Before:
D. M. Morton, Panel Chair
C. M. Brewer, Commissioner
A. K. Fung, QC, Commissioner
E. B. Lockhart, Commissioner
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Executive Summary

This Draft Report lays out the Panel’s Findings and Proposed Recommendations regarding the regulation of Indigenous utilities. It is intended to serve as a catalyst for further discussion during the upcoming workshop and comment period. Following that, the Panel will publish its final report with its findings and recommendations on April 30, 2020.

This Report reflects what the Panel heard and read during the past 8 months of process that included 11 Community Input Sessions and 8 Letters of Comment along with evidence and submissions from 21 Interveners. Based on what we have heard and read, we offer the following Proposed Recommendations:

<table>
<thead>
<tr>
<th>Regulation of Monopolies</th>
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<tbody>
<tr>
<td>1. That all ratepayers of Indigenous utilities receive the same protection as do ratepayers of non-Indigenous utilities.</td>
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<table>
<thead>
<tr>
<th>Regulation of Mandatory Reliability Standards</th>
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<tbody>
<tr>
<td>2. That the BCUC retain jurisdiction with respect to approval, compliance and enforcement of Mandatory Reliability Standards applicable to all transmission infrastructure in the province, regardless of who owns or operates the infrastructure.</td>
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</table>

<table>
<thead>
<tr>
<th>Reserve Lands</th>
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<tr>
<td>3. That a First Nation be given the opportunity to self regulate when it provides utility service on its reserve land, in much the same way municipalities and regional districts do. Subject to recommendations 4 to 6 below, this can be accomplished by enabling a First Nation or Band Council to &quot;opt out&quot; of BCUC regulation by notifying the BCUC of its intention.</td>
</tr>
<tr>
<td>4. That the First Nation should demonstrate that it has an appropriate complaint and dispute handling process in place to protect all ratepayers. In the event it cannot do so the BCUC would retain jurisdiction to handle all complaints.</td>
</tr>
<tr>
<td>5. That the BCUC complaint and dispute handling processes be available to any ratepayer who wishes to appeal a decision arising out of the First Nation utility’s complaint process.</td>
</tr>
<tr>
<td>6. Safety and reliability (other than MRS) will be the subject of the workshop and comment period. If the Final Report recommends that the BCUC retains jurisdiction over safety and reliability, First Nations would not be able to opt out of those applicable portions of the UCA governing these issues.</td>
</tr>
</tbody>
</table>

In proposing these recommendations, we have not made any comment on the issue of the “obligation to serve.” The municipal exclusion does not require a municipality to provide service to every customer and we do not consider it necessary to explicitly impose this obligation on a First Nation-owned utility. Public utilities are generally expected to have a clear and transparent policy for apportioning costs of extending the system to serve new customers between its existing customers and those new customers (extension policy). We note that any potential customer who is dissatisfied with the application of the extension policy provided by the First Nation utility would have recourse to a robust complaint process.
Those First Nations that choose not to opt out, would continue to be regulated by the BCUC subject to the terms of the UCA. The Panel is aware of the regulatory burden on small utilities and is considering approaches to mitigate that burden.

Any First Nation that seeks to acquire any assets from BC Hydro or any other incumbent public utility will continue be subject to BCUC regulation with respect to the approval of that transaction. In reviewing the transaction, the BCUC would consider among other matters the rate impact on the incumbent utility’s ratepayers.

<table>
<thead>
<tr>
<th>Modern Treaty Lands – Nisga’a</th>
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<tbody>
<tr>
<td>7. That the Nisga’a Nation be given the opportunity to self regulate, as do municipalities and regional districts, when it provides utility service on its own lands.</td>
</tr>
<tr>
<td>8. Notwithstanding the Nisga’a’s authority over their own lands, we recommend that the BCUC retain jurisdiction over Mandatory Reliability Standards, because of the interconnected nature of the North American bulk electric system.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other Modern Treaty Lands</th>
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<tr>
<td>9. Provided that a modern Treaty contains terms that are substantially similar to those set out in the Nisga’a Treaty, we would recommend, on the basis of parity, that a modern Treaty Nation be given the opportunity to self-regulate when it provides utility service on its own lands, in the same manner as we have proposed for the Nisga’a,</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Lands Subject to Historical Treaties</th>
</tr>
</thead>
<tbody>
<tr>
<td>10. We are inclined to recommend that First Nations that are parties to Historical Treaties be covered by the recommendations outlined in respect of Reserve Land. However, we welcome comments on this recommendation during the workshop and comment period.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Westbank First Nation</th>
</tr>
</thead>
<tbody>
<tr>
<td>11. Provided that the Advisory Council Law applies to resolution of utility complaints, we are inclined to recommend that the Westbank First Nation be given the opportunity to self-regulate when it provides utility service on its own lands, as we have proposed for the Nisga’a. To provide greater clarity, we invite the Westbank First Nation to give us further input as to how this law applies to utility complaint resolution during the workshop and comment period.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sechelt Indian Band and Sechelt Indian Government District</th>
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</thead>
<tbody>
<tr>
<td>12. It appears uncertain that either the Sechelt Indian Band or the Sechelt Indian Government District qualifies for the current municipal exception under the UCA. Nonetheless, we would recommend that those entities be given the opportunity to self-regulate when they provide utility service on their own lands, as we have proposed for the Nisga’a, provided that the Advisory Council has the power to resolve utility complaints. To assist us in making this recommendation, we invite the Sechelt Indian Band and the Sechelt Indian Government District to give us further insight into their processes during the workshop and comment period.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Ceasing to be an Indigenous Utility</th>
</tr>
</thead>
<tbody>
<tr>
<td>13. If a utility ceases to meet the definition of an Indigenous utility it becomes subject to regulation under the UCA.</td>
</tr>
</tbody>
</table>
14. The definition of Indigenous utility should be further explored during the workshops. We have outlined above recommendations for the regulation of utility services provided by First Nations. The workshop topics further explore different ways that service is provided, thereby defining an Indigenous utility. We also recommend that consideration be given, during the workshop period, to any further context in which the definition of Indigenous utility is required.

Our proposed recommendations are intended to provide a starting point for further discussion. We welcome feedback and comment during the workshops and the subsequent written comment period.
1.0 Introduction

1.1 Role of the British Columbia Utilities Commission

The British Columbia Utilities Commission (BCUC) is the regulator for British Columbia’s electric, auto-insurance, natural gas, and thermal energy “public utilities.” Regulation is generally needed when customers have limited or no choice in utility providers (such as natural gas or electricity). The BCUC is an independent agency of the government of the Province of British Columbia and its role is to ensure that British Columbians receive safe, reliable energy services at fair price, while allowing utilities the opportunity to earn a fair return on its investments. The legislation governing the BCUC is the Utilities Commission Act (UCA or “the Act”) which sets out the roles and responsibilities for the BCUC and the framework that regulated energy utilities must follow. For example, regulated utilities must follow a number of requirements, such as: receiving approval for the construction of new projects, providing information to the BCUC when requested, not discriminating between customers, and receiving approval for rates charged to customers.

In the UCA, a “public utility” is defined as a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for 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. An entity that meets the definition of a “public utility” is subject to regulation under the UCA.

There are a number of exclusions from the definition of a public utility, including municipalities or regional districts that provide services within their own boundaries, and a person that provides services to employees or tenants. The table below provides some examples of the types of entities that are and are not regulated by the BCUC.

<table>
<thead>
<tr>
<th>Regulated by the BCUC</th>
<th>Not Regulated by the BCUC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Generates energy and distributes to customers</td>
<td>Generates energy and sells to utilities like BC Hydro¹</td>
</tr>
<tr>
<td>Distributes energy bought from another entity to customers</td>
<td>Distributes energy to customers for no compensation</td>
</tr>
<tr>
<td>Owns transmission or distribution infrastructure wholly in BC</td>
<td>Owns transmission infrastructure that crosses the BC border</td>
</tr>
<tr>
<td>Sells geothermal resources with surface water temperature below 80°C</td>
<td>Distributes energy to tenants or employees</td>
</tr>
<tr>
<td>Utilities owned by municipalities/ regional districts providing service within their boundaries</td>
<td>Self-generation, e.g. solar panels on a roof</td>
</tr>
</tbody>
</table>

¹ By exemption. The BCUC does need to authorize the purchase of energy by the utility.
Note – generation, transmission or distribution could refer to electricity, gas or thermal energy infrastructure. For more information on Energy Regulation in BC please refer to the factsheet available on the BCUC website.  

<table>
<thead>
<tr>
<th>Regulated by the BCUC</th>
<th>Not Regulated by the BCUC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sale of geothermal resources with surface water temperature above 80°C</td>
<td></td>
</tr>
<tr>
<td>Other utilities like water and sewage</td>
<td></td>
</tr>
</tbody>
</table>

1.2 Genesis of Inquiry

The origin of this Indigenous Utility Inquiry was of interest to several participants at the Community Input Sessions who asked why the Inquiry is being held now.

The BCUC holds inquiries, whether on its own initiative or on request from the Provincial Government, on matters that may have broad impact on persons or groups in BC. Inquiries are open and transparent processes where the public can participate and give their views to the BCUC. On March 11, 2019 the Lieutenant Governor in Council directed the BCUC to conduct an Inquiry respecting the Regulation of Indigenous Utilities (Inquiry). Some recent examples of inquiries the BCUC undertakes include inquiries into the Regulation of Electrical Vehicle Charging Services, and Gasoline and Diesel Prices Inquiry.

This Inquiry was instigated after the decision on the 2016 application from Beecher Bay First Nation (Beecher Bay) seeking an exemption from Part 3 of the UCA. They argued that they were exempt either because the First Nation had the legal authority to regulate the utility under the First Nations Land Management Act (FNLMA), or alternatively, because as a company that is 51% owned by Beecher Bay First Nation, it fell within the exception for municipalities and regional districts set out in the UCA. In its decision, which is discussed further in Section 3 of this report, BCUC found that Beecher Bay did not meet the definition of a municipality and was therefore not eligible for the exemption nor was it excluded by the FNLMA provide. The decision raised questions as to whether First Nation utilities ought to be regulated differently under the UCA, and if special provisions may be needed.

1.3 Scope of the Inquiry

On March 11, 2019, the Lieutenant Governor in Council (LGIC) directed the BCUC to advise on the regulation, if any, of Indigenous utilities. Order in Council (OIC) No. 108/2019 (OIC 108), established the Inquiry and outlined the terms of reference for the Inquiry. The terms of reference set out several key questions the BCUC needs to consider and advise the LGIC on:

1. the commission must advise on the appropriate nature and scope, if any, of the regulation of Indigenous utilities;

---

2. without limiting paragraph (a), the commission 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 [Utilities Commission] Act or under another mechanism, or be unregulated?

   iii. If it is appropriate to regulate Indigenous utilities under the Act, 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 Act 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?

OIC 108 states for the purposes of this inquiry an “Indigenous Nation” means any of the following:

   a) a Band within the meaning of the Indian Act (Canada);
   b) the Westbank First Nation;
   c) the Sechelt Indian Band and the Sechelt Indian Government District established under the Sechelt Indian Band Self-Government Act (Canada);
   d) a Treaty First Nation;
   e) the Nisga’a Nation and Nisga’a Villages;
   f) another Indigenous community within British Columbia, if the legal entity representing the community is a party to a treaty and land claims agreement within the meaning of sections 25 and 35 of the Constitution Act, 1982 that is the subject of Provincial settlement legislation;

The OIC defines the term “Indigenous utility” as a public utility that is owned or operated, in full or in part, by an Indigenous Nation. OIC 108 with the full terms of reference is attached to this Report as Appendix B. The BCUC prepared two fact sheets about the Inquiry and the background to regulation and energy utilities, which can be found on the BCUC website.⁷

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1.3.1 Timing of the Inquiry

Pursuant to OIC 108 and by BCUC Order G-62-19 issued March 19, 2019, the BCUC established this Inquiry. The terms of reference for the Inquiry state that:

- an interim report describing the BCUC’s progress to date and the BCUC’s preliminary findings must be submitted to the LGIC no later than December 31, 2019; and
- a final report describing the results of consultations undertaken by the BCUC and the BCUC’s findings and recommendations must be submitted to the LGIC no later than April 30, 2020.

On October 31, 2019, OIC 108 was amended by OIC 559 which granted the BCUC an extension for the final report to April 30, 2020. A copy of that OIC is attached as Appendix C to this Report.

Following the establishment of the inquiry the BCUC invited submissions from Indigenous groups, government, utility owners and operators, and the public. The BCUC committed to issuing this draft Report for review by November 1, 2019. The BCUC will also be engaging the public on the draft Report through a series of workshops during November and December 2019. The engagement process is discussed in the next Section.

After the BCUC’s final report, the Provincial Government will consider the BCUC’s recommendations and may use them to inform future changes to legislation or policy.

1.4 Methodology

The BCUC approach to this Inquiry is to ensure an open and welcoming environment for those with an interest on this topic to provide their views. Throughout June and July, 2019, the BCUC held a series of community input sessions (Community Input Sessions) throughout British Columbia to hear comments on the issues raised in the Inquiry.

<table>
<thead>
<tr>
<th>Location of the Community Input Session</th>
<th>Date of Community input Session</th>
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<tbody>
<tr>
<td>Cranbrook</td>
<td>June 3, 2019</td>
</tr>
<tr>
<td>Kelowna</td>
<td>June 5, 2019</td>
</tr>
<tr>
<td>Kamloops</td>
<td>June 6, 2019</td>
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<tr>
<td>Williams Lake</td>
<td>June 7, 2019</td>
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<tr>
<td>Prince Rupert</td>
<td>June 10, 2019</td>
</tr>
<tr>
<td>Vancouver</td>
<td>June 12, 2019</td>
</tr>
<tr>
<td>Fort St John</td>
<td>June 25, 2019</td>
</tr>
<tr>
<td>Prince George</td>
<td>June 27, 2019</td>
</tr>
<tr>
<td>Campbell River</td>
<td>July 3, 2019</td>
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<tr>
<td>Victoria</td>
<td>July 4, 2019</td>
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8 OIC No.108, section 3.
9 OIC 559.
Community Input Sessions are an opportunity for the public to speak directly to the Inquiry Panel. They also provide an opportunity for the Panel to effectively gather public input for consideration on the matters that are within the scope of the Inquiry, and ask questions of speakers. The sessions were live streamed at bcuc.com and transcripts of the sessions are posted on the BCUC website.\textsuperscript{10}

The table below lists the parties who registered as interveners in the Inquiry.

<table>
<thead>
<tr>
<th>Registered Interveners</th>
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<tbody>
<tr>
<td>Adams Lake Indian Band (Adams Lake)</td>
</tr>
<tr>
<td>Beecher Bay (Sc’ianew) First Nation (Beecher Bay)</td>
</tr>
<tr>
<td>British Columbia Hydro and Power Authority (BC Hydro)</td>
</tr>
<tr>
<td>Canadian Geothermal Energy Association (CanGEA)</td>
</tr>
<tr>
<td>Commercial Energy Consumers Association of British Columbia (CEC)</td>
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<tr>
<td>Coastal First Nations-Great Bear Initiative Society (CFN-GBI)</td>
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<tr>
<td>Don Flintoff (Flintoff)</td>
</tr>
<tr>
<td>Enerpro Systems Corp (Enerpro)</td>
</tr>
<tr>
<td>First Nation Major Projects Coalition (FNMPC)</td>
</tr>
<tr>
<td>First Nations Energy and Mining Council (FNEMC)</td>
</tr>
<tr>
<td>First Nations Leadership Council (FNLC)</td>
</tr>
<tr>
<td>Foothills First Nation</td>
</tr>
<tr>
<td>FortisBC Energy and Fortis BC Inc. (FortisBC)</td>
</tr>
<tr>
<td>Heilstuk Tribal Council</td>
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<tr>
<td>Kitselas Geothermal Inc. (KGI)</td>
</tr>
<tr>
<td>Leq’á:mel First Nation</td>
</tr>
<tr>
<td>Nisga’a Lisims Government (Nisga’a Nation)</td>
</tr>
<tr>
<td>Nuu-chah-nulth Tribal Council, Cowichan Tribes, Gitanyow First Nation, Homalcow First Nation, B.C. First Nations Clean Energy Working Group (Collective First Nations)</td>
</tr>
<tr>
<td>Osoyoos Indian Band (OIB)</td>
</tr>
<tr>
<td>Tzeachten First Nation</td>
</tr>
<tr>
<td>Westbank First Nation Government (Westbank First Nation)</td>
</tr>
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Interveners had the opportunity to file written evidence, submit and respond to information requests, and submit final arguments. The deadline for written evidence submissions was July 15, 2019 and the BCUC received

\textsuperscript{10} https://www.bcuc.com/ApplicationView.aspx?ApplicationId=669
19 submissions from a range of Indigenous representatives, special interest groups and existing utilities. Information Requests on these written submissions from both the BCUC and interveners were conducted in early August, 2019. In addition to the registered interveners, 17 interested parties registered, and the BCUC received eight letters of comment.

On September 18, 2019, David Morton, the Chair and CEO of the BCUC and of the Inquiry Panel, spoke at the BC Assembly of First Nations 16th Annual General Assembly in Vancouver to discuss the progress of the Inquiry. This was followed by a special Community Input Session later that evening.

On September 27, 2019, the parties had the opportunity to provide oral final argument to the Panel at a session hosted in Vancouver. Participants were also given an opportunity to submit final written arguments. In advance of the October 4, 2019 deadline, the BCUC provided some guidance on content and invited submissions on several questions (which are outlined in full in Section 4.5).

The BCUC received final arguments from ten interveners, including a joint submission from Beecher Bay (S’cianew) First Nation and Adams Lake First Nation.

The BCUC thanks those who contributed to this Inquiry and acknowledges those who travelled to attend the Community Input Sessions. We appreciate the time and thoughtful input from interveners, which is reflected in the quality of the submissions received. The Panel has considered all comments and submissions in making the findings and recommendations as set out in this Report.

The following participants spoke at one or more Community Input Sessions:

<table>
<thead>
<tr>
<th>Name</th>
<th>Affiliated with</th>
</tr>
</thead>
<tbody>
<tr>
<td>F. Alexis</td>
<td>Okanagan Indian Band</td>
</tr>
<tr>
<td>K. Andrews</td>
<td>Métis Citizen</td>
</tr>
<tr>
<td>J. Balabanowicz</td>
<td>Innergex Renewable Energy</td>
</tr>
<tr>
<td>Chief D. Blaney</td>
<td>Homalco First Nations</td>
</tr>
<tr>
<td>E. Bolton</td>
<td>Tsimshian Nation, traditional territory of Kitselas</td>
</tr>
<tr>
<td>Chief A. Campbell</td>
<td>Hereditary Chief Lax Kw’alaams (Kisiox tribe, Eagle Crest and nine tribes of Lax Kw’alaams)</td>
</tr>
<tr>
<td>J. Cawley</td>
<td>Resolution Electric</td>
</tr>
<tr>
<td>Chief L. Chasity Shanoss (Daniels)</td>
<td>Gitwangak Indian Band (Gitxsan)</td>
</tr>
<tr>
<td>Chief R. Chipps</td>
<td>Beecher Bay Scia’new</td>
</tr>
</tbody>
</table>

11 Exhibit A-38
12 Final written arguments were submitted by: CFN-GBI, Flintoff, Fortis BC, BC Hydro, Beecher Bay First Nation and Adams Lake, CEC, Nisga’a Nation, and Collective First Nations, Leq’á:mel First Nation and KGI.
13 Note that the BCUC has not attributed genders throughout this Report out of respect for individuals. We use a person’s last name when referencing their submissions in this Report.
14 Note – the presentations made in Community Input Sessions by individuals do not necessarily reflect the views of a community or organization.
<table>
<thead>
<tr>
<th>Name</th>
<th>Organization/Community</th>
</tr>
</thead>
<tbody>
<tr>
<td>R. Corman</td>
<td>Kwikwetlem First Nation</td>
</tr>
<tr>
<td>C. Derrickson</td>
<td>Westbank First Nation (Treaty 8 Nation)</td>
</tr>
<tr>
<td>T. Dokkie</td>
<td>West Moberly First Nations</td>
</tr>
<tr>
<td>T. Donkers</td>
<td>Wei Wai Kum First Nation</td>
</tr>
<tr>
<td>L. Duke</td>
<td>Kelly Lake Community</td>
</tr>
<tr>
<td>N. Edwards</td>
<td>First Nation Major Projects Coalition</td>
</tr>
<tr>
<td>M. Eunson</td>
<td>Mikisew Cree First Nation, Ktunaxa First Nation</td>
</tr>
<tr>
<td>R. Foden</td>
<td>Silver Star Property Owners Association</td>
</tr>
<tr>
<td>R. Gemeinhardt</td>
<td>Kitsumkalum First Nation</td>
</tr>
<tr>
<td>J. Gottfriedson</td>
<td>Tk’emlúps te Secwepemc (Kamloops Indian Band)</td>
</tr>
<tr>
<td>M. Griffin (Niik’ap)</td>
<td>Nisga’a Nation</td>
</tr>
<tr>
<td>Z. Harmer</td>
<td>Canadian Geothermal Energy Association</td>
</tr>
<tr>
<td>J. Hooper</td>
<td>Secwepemc</td>
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<td>T. Hoy</td>
<td>Clean Energy Consulting</td>
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<td>C. Knight</td>
<td>Kitselas Geothermal Inc.</td>
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<td>Manuel</td>
<td>Tk’emlups Indian Band</td>
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<td>K. Matthew</td>
<td>Simpcw Resources Limited</td>
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<td>C. McCurry</td>
<td>?aq’am First Nation</td>
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<td>A. McDames</td>
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<td>Chief H. McLeod</td>
<td>Upper Nicola, Okanagan Nation</td>
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<td>Chief P. Michell</td>
<td>Kanaka Bar Indian Band</td>
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<td>T. Moraes</td>
<td>Skidegate Band Council and TIl Yahda Energy Ltd</td>
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<tr>
<td>C. Morven (Daaxhee)</td>
<td>Nisga’a Village of Gitwinkshilkw</td>
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<td>L. Morven</td>
<td>Nisga’a Village of Gitwinkshilkw</td>
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<tr>
<td>Chief Na’Moks (J. Risdale)</td>
<td>Tsayu, Wet’suwet’en Nation</td>
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<td>K. Obrigewitsch</td>
<td>Spirit Bay Development</td>
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<td>M. Podlasly</td>
<td>First Nation Major Projects Coalition</td>
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<td>V. Robinson</td>
<td>Nuxalk Nation</td>
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<td>S. Roka</td>
<td>Enerpro Systems</td>
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<td>P. Sanchez</td>
<td>Ktunaxa Nation</td>
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<td>R. Sauder</td>
<td>Beecher Bay First Nation</td>
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<td>M. Skidmore</td>
<td>Metlakatla First Nation</td>
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<td>M. Starlund</td>
<td>Community of Gitanyow</td>
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<td>T. Thompson</td>
<td>Kitselas Geothermal Inc.</td>
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<td>C. Tolmie</td>
<td>Gitanmaax Band Council</td>
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</table>
The next stage of the Inquiry is to prepare an interim report on the BCUC’s progress and preliminary findings by December 31st, 2019. A draft of this Report has been made available for comment to Indigenous communities and other interested parties on November 1, 2019. The BCUC will be holding a series of six workshops in Prince George, Kelowna, Vancouver, Nanaimo, Victoria and Smithers throughout November and December 2019, as listed below. This will provide an opportunity for participants to reflect on the issues raised so far and provide feedback on the Report to assist the BCUC in further refining the options and recommendations for the final report. These workshops will be open to the public.15

<table>
<thead>
<tr>
<th>Location</th>
<th>Date (2019)</th>
<th>Time</th>
<th>Venue</th>
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<tr>
<td>Prince George</td>
<td>Monday, November 18</td>
<td>10am – 3pm</td>
<td>Coast Inn of the North</td>
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<tr>
<td>Kelowna</td>
<td>Thursday, November 21</td>
<td>10am – 3pm</td>
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<td>2130 Harvey Ave</td>
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<td>Room: Okanagan Room</td>
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<tr>
<td>Vancouver</td>
<td>Wednesday, November 27</td>
<td>10am – 3pm</td>
<td>Allwest Reporting</td>
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<td>12th Floor - 1125 Howe St.</td>
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<tr>
<td>Nanaimo</td>
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<td>Victoria</td>
<td>Friday, November 29</td>
<td>10am – 3pm</td>
<td>Comfort Inn and Suites</td>
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<td>3020 Blanshard St.</td>
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<td>Room: Topaz Room</td>
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<td>Smithers</td>
<td>Monday, December 9</td>
<td>10am – 3pm</td>
<td>Prestige Hudson Bay Lodge</td>
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<td>Room: Summit Ball Room</td>
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</table>

15 Exhibit A-41.
16 Workshop end times are estimates and subject to change depending on participation.
Finally, the BCUC will be inviting written comments from participants on this draft Report until March 1, 2020. Participants will then have the opportunity to respond to the comments of other participants by March 31, 2020.

1.5 Structure of this Report

The remainder of the Report is structured into the following Sections:

a) Section 2.0 provides an overview of First Nations in British Columbia and the status of First Nations’ lands.

b) Section 3.0 examines the history of the BCUC, and its involvement with Indigenous Peoples including decisions with significance to First Nations.

c) Section 4.0 summarises the evidence and submissions received as part of this Inquiry, including the key issues raised by participants to address the Terms of Reference.

d) Section 5.0 sets out the Panel’s discussion of the key issues arising in the Inquiry, and its recommendations.

e) Section 6.0 highlights next steps regarding the development of a regulatory framework.

f) Section 7.0 provides guidance and questions to be addressed for the workshops and comment period that will follow this workshop.

1.5.1 Terminology

In this Report the term “Indigenous Nation” should generally be interpreted to have the same meaning as the definition in OIC 108. The Report may also refer to “First Nation,” “Nation”, “Band” or “Aboriginal persons” where this reflects the language used by a participant in the Inquiry, to respect the actual terms used. Such terms may be used interchangeably depending on the context.

When we refer to “participants” in the Inquiry, this may collectively refer to interveners, presenters at Community Input Sessions, and/or parties providing letters of comment.

We recognize that there are other Indigenous Nations and peoples who have not participated in this Inquiry who may hold different views and perspectives from those who have participated in this Inquiry. However, this Report can only reflect what we have heard or seen from participants in this Inquiry. Therefore, when we refer to the views of “many” or “most” participants, this should be taken to reflect the consensus or majority view of participants on matters which are before us in this Inquiry.

There is also a glossary of some acronyms and technical terms used in this Report in Appendix A.
2.0 Overview of First Nations in B.C.

2.1 Description of First Nations in B.C.

British Columbia is home to 196 First Nations (Indigenous Nations).\textsuperscript{17,18} Dispersed throughout various regions in the province, each has its own unique history and a distinct relationship with the provincial and federal governments.

The First Nation Leadership Council (FNLC) states:

As the original stewards and owners of the land now known as British Columbia, First Nations have unique cultures and ways of life, including systems of economy, governance and law. We have never ceded, surrendered or agreed to abandon our land, our culture, or our jurisdiction and governance systems.\textsuperscript{19}

Not only are Indigenous Nations throughout B.C. culturally diverse, there is great variety in the populations, economic opportunities, and access to goods and services of Indigenous Nations throughout the province. They include various forms of government, as is perhaps best reflected in those presentations that reference the traditional governance systems that exist in parallel to elected councils. The complexity of traditional and non-traditional government is illustrated in the submission of Chief Campbell who introduces himself to the Panel in this way:

I stand and I speak for the tribe, number one. Our tribe, Kispiox tribe, Eagle Crest...Secondly, I will speak on behalf of the nine tribes Lax Kw'alaams. I am not involved in the politics area.\textsuperscript{20}

The distinction between band councils and traditional government systems was further illuminated in the presentation of Crystal Tolmie who explains:

I am... [in Vancouver]... attending the BCAFN annual general assembly on behalf of my Gitanmaax Band Council, but I always find myself in a really unique scenario where I feel like I wear many hats on a continues [sic] basis, because aside from being the Deputy Chief for my Gitanmaax Band Council, I am a Hereditary Chief in my Kitsclucla area and I have a land base, and I've also worked in the corporate world.\textsuperscript{21}

Aside from the traditional government systems and the handful of Indigenous Nations that have negotiated self-government arrangements either by way of modern treaty or self-government-specific legislation, the majority of Indigenous Nations in B.C., including those in Treaty 8 territory, administer their internal affairs through band councils elected pursuant to the *Indian Act* or put in place by custom in accordance with that Act.

\textsuperscript{17} British Columbia WelcomeBC, B.C. First Nations & Indigenous People, retrieved from https://www.welcomebc.ca/Choose-B-C/Explore-British-Columbia/B-C-First-Nations-Indigenous-People. This coincides with the number of bands recognized under the *Indian Act*, which may differ from those recognized by the British Columbia Assembly of First Nations (BCAFN). The BCAFN acknowledges 203 First Nations in BC.


\textsuperscript{19} Exhibit C-16-2, First Nations Leadership Council (FNLC), p.3.

\textsuperscript{20} Transcript Vol. 5, Chief Campbell, pp. 222–223

\textsuperscript{21} Transcript Vol. 11, Tolmie, p. 551.
Unlike the early pre-confederation Peace and Friendship Treaties or the numbered treaties that do not detail governance, First Nations that have negotiated modern Treaty and Self-government arrangements, such as the Nisga’a, have authority to enact laws over a broad range of matters. These treaties or arrangements are negotiated to minimize the potential for conflicts between First Nation, federal and provincial laws. The Treaty sets out how the First Nations’ governance interacts with other governments within the Canadian Constitution and specifies that the Charter of Rights and Freedoms, which will apply to First Nations’ governments, as they do to all other governments in Canada. Other First Nations have assumed control over specific matters under what could be termed sectoral self-government arrangements that address such things as taxation, land, education, or services. These may involve the enactment of subject-matter specific laws by the federal and/or provincial government or agreements with either or both the federal and provincial governments.

In addition to band councils, most BC Indigenous Nations are affiliated with tribal councils, Treaty groupings and other non-governmental organizations, sometimes based on cultural ties or alternatively joined by common values or similar aspirations. Most also have some degree of involvement in broader organizations such as the BC Assembly of First Nations, the First Nations Summit, or the Union of BC Indian Chiefs, which come together as the First Nations Leadership Council (FNLC). Several such affiliations have made submissions to this Inquiry, including the FNLC, the Collective First Nations, the First Nations Major Project Coalition (FNMPC) and the Coastal First Nations – Great Bear Initiative.

2.2 Status of First Nations Lands

Reserves

As is the case throughout Canada, Indigenous Nations in BC that are recognized as bands were specifically allocated reserves under the Indian Act. The legal title to reserve lands is vested in Her Majesty the Queen in the Right of Canada, which set the lands apart for the use and benefit of a band. reserves are almost always situated within the traditional territories of the Indigenous Nation, and although they vary in size throughout the province, most are significantly smaller than the territories historically used and occupied by the Indigenous Nation. Some bands have numerous reserves scattered throughout their territories, while others may have only one.

However, as will be discussed in more detail later, laws of general application in the province apply on reserve land.

A specific category of reserve land and an example of what can be termed “sectoral self-government” is reserve land that is governed by a First Nation under the First Nations Land Management Act (FNLMA). The following summarizes how the FNLMA came into being:

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22 Nisga’a Final Agreement Act, SBC 1999, c. 11.
24 First Nation Fiscal Management Act, S.C 2005, c.9.
29 Indian Act, RSC s.88
In 1991, a group of First Nation Chiefs approached the Government of Canada with a proposal to opt out of 32 provisions in the *Indian Act* on land and resources. As a result of this proposal, the Framework Agreement on First Nation Land Management was negotiated by 14 First Nations and Canada in 1996, and later ratified in 1999 by the First Nations Land Management Act. The Framework Agreement led to the establishment of the Lands Advisory Board and Resource Center to assist the 14 First Nations in implementing their own land management Regime. Under the First Nations Land Management (FNLM) Regime, land administration is transferred to First Nations once their land codes come into effect. This includes the authority to enact laws with respect to land, the environment, and resources...30

Under the FNLM, First Nations that meet specific criteria can, through a formal process, be added to the Schedule of the Act which identifies those that have assumed responsibility for management of their reserve land. First Nations that have signed the Framework Agreement draft and ratify a land code which must address specific matters listed in the FNLM, including identifying the reserve lands to which the Code applies, general rules and procedures for dealing with that land, and laws relating to the land, as well as amendment and dispute resolution processes. While these lands are not subject to the provisions of the *Indian Act* for most purposes, they remain reserves within the federal section 91(24) jurisdiction.

The Panel heard from a number of First Nations that are subject to the FNLM and have adopted land codes. As will be addressed in more detail later in the report, some consider this sufficient to enable First Nations to govern Indigenous utilities31.

*Treaty Lands*

Unlike much of the rest of Canada, which is for the most part covered by First Nation/Crown treaties, very few First Nations in British Columbia have entered into treaties. Aside from those in Treaty 8 and a limited number of pre-Confederation treaties,32 only the Nisga’a and a handful of BC First Nations, namely Maa-nulth First Nations [Huu-ay-aht, Ka:yu:’k’t’ih/Che:k’tles7et’h], Toquaht, Uchucklesaht, Ucluelet], Tla’amin Nation and Tsawwassen First Nation have modern treaties. Although 58 First Nations are at some stage of Treaty negotiations, most lands in BC remain subject to Aboriginal Title claims. Of those Indigenous Nations in a modern Treaty relationship, the Nisga’a has the largest land base, which encompasses 200,000 hectares (20,000 square kilometres) of land, while the treaties with the Maa-nulth, Tla’amin and Tsawwassen First Nations cover comparatively much smaller land bases. Other First Nations in the latter stages of the negotiation process have identified specific lands for their use that will be protected by Treaty, and over which they will have specific negotiated authority. In a number of instances, these include common use areas, which are shared with other First Nations.

Pursuant to section 35 of the *Constitution Act, 1982*33, treaties, including modern treaties, are constitutionally protected. Niik’ap (Mansell Griffin), describes the Nisga’a Treaty as follows:

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30 https://www.aadnc-aandc.gc.ca/eng/1327090675492/1327090738973
32 British Columbia Treaty Commission, Aboriginal Rights, retrieved from: http://www.bctreaty.ca/aboriginal-rights: “When BC joined Confederation in 1871, only 14 treaties on Vancouver Island had been signed, and aboriginal title to the rest of the province was left unresolved.”
Our treaty is a complex and detailed, comprehensive agreement addressing all aspects of our continuing relationship between the Nisga’a Nation, Canada and BC. It sets out the power of Nisga’a Lisims government to make laws in relation to matters vital to the Nisga’a Nation, including lands and resources. Importantly, our treaty sets out specific areas where Nisga’a laws prevail over any inconsistent or conflicting federal and provincial law.\textsuperscript{34}

Accordingly, lands that are subject to modern Treaty are governed according to modern Treaty provisions, which will likely establish rules of paramountcy.

\textit{Traditional Territories and Use of Aboriginal Title Land by Utilities}

Prior to the colonization of British Columbia, Indigenous Nations had full use and occupation of the land and its resources, each with control of distinct territories. Because so few treaties have been concluded, much of the province remains subject to Aboriginal Title. Referencing the academic scholar Kent McNeil, the FNLC likens Aboriginal Title to “an interest in land that resembles provincial more than municipal jurisdiction.”\textsuperscript{35}

The concepts of Aboriginal Title and Rights are well established in modern Canadian jurisprudence, primarily focussing on the rights of Indigenous Nations to consultation and accommodation regarding new developments on their territories. As is evident in the submissions before this Inquiry, BC First Nations have been persistent in asserting rights within their territories. Speaking on behalf of Simpcw Resources Ltd, Keith Matthew references an agreement between the Interior Salish People and Sir Wilfred Laurier “to share in all the resources equally and hold each other up to be great and good.”\textsuperscript{36} Matthews goes on to explain that subsequent governments did not honour this agreement.

Mark Starlund, speaking on behalf of Gitanyow, asserts that “the grid in British Columbia in particular [i]s, for the most part, built on the First Nations of British Columbia’s traditional territories, and for the most part, has just been expropriated ....”\textsuperscript{37} The legacy of damage to Indigenous Nations territories is described repeatedly in presentations by representatives of Indigenous Nations. Chief Na’Moks (John Ridsdale) references the powerlines that are going through Wet’suwet’en Territory and the devastation of the dam for Rio Tinto Alcan. Marion Eunson, who works for the Ktunaxa Nation Council notes that although close to 53% of the hydroelectric energy for the province is produced from Ktunaxa Nation Territory, the Ktunaxa did not get much in return.\textsuperscript{38} In the words of the FNMP:

In the past, governments and companies enjoyed near complete domination of key aspects of project development on Indigenous lands. They held privileged access to land, capital, natural resources, and information needed to develop projects. In short, project proponents and their partners enjoyed freedom to dictate how projects would be developed in Indigenous homelands. Indigenous people and their interests were minimized, or in many cases, ignored by companies and governments.\textsuperscript{39}

\textsuperscript{34} Transcript Vol.10, pp 485.
\textsuperscript{35} Exhibit C16-2, p. 14.
\textsuperscript{36} Transcript Vol. 3, p.75.
\textsuperscript{37} Transcript Vol. 5, p.182.
\textsuperscript{38} Transcript Vol. 1, p. 20.
\textsuperscript{39} Exhibit C3-3, First Nation Major Projects Coalition, p.7.
This sentiment is reflected in the submission of most Indigenous Nation representatives, including the Collective First Nations, who point out that a good portion of BC Hydro’s large hydroelectric projects and the core of Fortis Gas (which was, at the time, owned by BC Hydro) were until the early 1980’s, not regulated, so, in the words of David Austin, the combined utility had the advantage of being able to build its business in an unregulated environment.\textsuperscript{40}

In relation to the distribution of electricity throughout British Columbia, First Nations fall within the general definition of customers in the Terms and Conditions of Service for public utilities. While most BC First Nations have access to electricity services from the power grid, some remote communities are not integrated into the public utilities’ hydroelectricity systems. In such cases, the public utility provides services to these First Nations by way of dedicated diesel generators.\textsuperscript{41}

Although grateful for access to electricity, First Nation presenters express concern about the conflicts in use of traditional lands without corresponding benefits,\textsuperscript{42} and non-integrated communities expressed serious reservations about their dependence on fossil fuels for electricity.

3.0 Overview of the BCUC, the UCA and the BCUC’s Involvement with Indigenous Peoples

3.1 History of the BCUC

The Public Utilities Commission was first established in 1938 by the \textit{Public Utilities Act}\textsuperscript{43} (PUA) to regulate public utilities in the province including gas and electricity utilities. The PUA was eventually repealed and replaced in 1973 by the \textit{Energy Act},\textsuperscript{44} which established the Energy Commission, in part, to regulate energy utilities within the Province. By 1980, the legislature repealed the \textit{Energy Act} and passed the \textit{Utilities Commission Act}\textsuperscript{45}, thereby creating the BCUC. Today, the BCUC has approximately 60 staff and 10 commissioners, with skillsets primarily in accounting, finance, engineering, economics and law. While they come from diverse backgrounds, until recently, there was no way of knowing whether this included employees or commissioners who identify as Indigenous or are First Nation members.

The BCUC does not have specific processes or procedures for evaluating applications from Indigenous utilities. They are evaluated under the same criteria as all other applications from public utilities. In 2010, as a result of the \textit{Carrier Sekani and Kwikwetlem First Nation} Court of Appeal decisions,\textsuperscript{46} the BCUC developed First Nations Filing Guidelines for Crown Utilities after a 60-day comment period where regulated utilities, the public, and two First Nations provided comments.\textsuperscript{47}

\textsuperscript{40} Transcript Vol. 12, p.591.
\textsuperscript{41} Transcript Vol. 9, p. 410-411.
\textsuperscript{42} Transcript Vol. 11, p 537.
\textsuperscript{43} \textit{Public Utilities Act}, S.B.C. 1938, c.47.
\textsuperscript{44} \textit{Public Utilities Act S.B.C.} 1973, c.29.
\textsuperscript{45} \textit{Public Utilities Act S.B.C.} 1980, c. 60 revised by R.S.B.C. 1996, c. 473.
3.2 Overview of the UCA and the Clean Energy Act

Entities that provide energy services and products for compensation in British Columbia are defined as public utilities, and therefore subject to regulation by the BCUC in accordance with the provisions of the UCA.

Notably missing from the UCA is the notion of a monopoly utility – likely because at the time the UCA was enacted, a monopoly was the default for gas and electric utilities. However, over the past 20 years, the landscape has changed substantially, and some utilities now operate in markets with a significant amount of competition. Examples include the provision of thermal energy services for in-building heat and hot water, and electric vehicle charging infrastructure.

Triggered in large part by the increasing proliferation of thermal energy services, in 2012 the BCUC conducted an Inquiry that resulted in the Report on the Inquiry into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives (AES Inquiry Report). As noted in that report, in general, a provider of services which meets the definition of a public utility in the UCA, and where natural monopoly characteristics are present and consumers require protection, should be subject to regulation.\(^ {48}\) The objective of the BCUC is the “protection of the public interest by regulating public utilities to ensure that they provide safe and reliable service at reasonable prices” to “customers, who are often captive.”\(^ {49}\) The Report also states that if monopolistic elements are not present, economic regulation is not required.

Since its first enactment in 1980, the UCA has been amended a number of times; however, there is no evidence that there was any First Nations consultation regarding the enactment of the UCA or its amendments. In 2010, BC enacted the Clean Energy Act (CEA)\(^ {50}\). The CEA, among other things, lays out the Province’s 15 energy objectives that the BCUC is required to consider when assessing energy supply contracts,\(^ {51}\) long-term resource management plans,\(^ {52}\) expenditure schedules,\(^ {53}\) and infrastructure projects.\(^ {54}\) One of these objectives is “to foster the development of first nation and rural communities through the use and development of clean or renewable resources.”\(^ {55}\) When considering these energy objectives, the BCUC must balance the cost of contracts and projects against the requirement that rates be just and reasonable. The CEA also establishes a First Nations Clean Energy Business Fund. The fund provides capacity and equity funding as well as revenue sharing opportunities between the BC Government and eligible First Nations.\(^ {56}\)

That said, the BCUC is bound by Court Decisions interpreting utility regulation in BC, and more broadly in Canada. In particular, there have been a number of decisions concerning consultation for infrastructure projects, and these are discussed in Section 3.3.

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\(^ {49}\) SSL-Sustainable Services Ltd. Status as a Public Utility under the UCA, Final Order G-104-18 dated June 5, 2018, p.9.

\(^ {50}\) Clean Energy Act, S.B.C. 2010, c. 22.

\(^ {51}\) Utilities Commission Act (UCA), RSBC 1996, c.473, s.71.

\(^ {52}\) UCA, RSBC 1996, c.473, s.44.1(8)(a).

\(^ {53}\) UCA, RSBC 1996, c.473, s.44.2(5) and (5.1).

\(^ {54}\) UCA, RSBC 1996, c.473, s.46(3.1) and (3.3).

\(^ {55}\) Clean Energy Act, s.(2)(l).

Given the focus of the UCA on rates that are just, reasonable and not unduly discriminatory or preferential, and the public interest determinations that have been made, the BCUC is focused primarily on economic regulation. The BCUC also ensures that service is safe and reliable.

The economic aspect of regulation ensures that the “regulatory compact” is maintained. The premise of the regulatory compact is that ratepayers pay no more than is required to provide them with service and that utilities have an opportunity to earn a return on invested capital that has been established by the BCUC.

### 3.3 Previous Decisions regarding the Adequacy of Consultation

Although the legislature has not expressly provided the authority to engage in consultation with Indigenous parties, the BCUC does have the jurisdiction to consider whether a duty to consult exists and the adequacy of any consultation that has taken place. When the BCUC reviews an application – for an energy supply contract or a Certificate of Public Convenience and Necessity (CPCN) – it considers the adequacy of the applicant’s consultation efforts to the date of the decision.

#### 3.3.1 ILM Transmission Line – BCUC must address consultation and accommodation during CPCN Applications

The British Columbia Transmission Corporation (“BCTC”) filed an application in 2007 with the BCUC for a CPCN, for a 247 kilometre long, 500-kilovolt power line that stretches from Merritt to Coquitlam (the ILM Project). The panel concluded that it should not consider the adequacy of consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the project, stating that consultation and accommodation would be more appropriately addressed upon BCTC’s application for an Environmental Assessment Certificate (EAC) when the project was sufficiently defined so as to make accommodation discussions meaningful.

The BCUC denied an application for reconsideration of the Order by the Nlaka’pamux Nation Tribal Council, Okanagan Nation Alliance and Upper Nicola Indian Band (NNTC/ONA/Upper Nicola).

The Kwikwetlem First Nation and the NNTC/ONA/Upper Nicola appealed the Scoping Decision to the BC Court of Appeal\(^{57}\) arguing that the BCUC had a role in assessing the adequacy of the Crown’s consultation efforts before granting a CPCN for a project that could adversely affect Aboriginal Rights and Title. The BC Court of Appeal allowed the appeal, finding that the BCUC has an obligation to inquire into the adequacy of consultation before granting a CPCN, noting that even if the environmental assessment certificate process under the *Environmental Assessment Act*\(^{58}\), could be adapted to consider consultation at the CPCN application stage, the proponent would, at that point, be at a great advantage. The court stated at para. 70:

> ...If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTC’s practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. **The question the Commission must decide**

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58 *The Environmental Assessment Act*, SBC 2002, c. 43.
is whether the consultation efforts up to the point of its decision were adequate. [Emphasis added]

### 3.3.2 Rio Tinto – BCUC can determine adequacy of consultation in making decisions under the UCA

Under the UCA, the BCUC can declare an Electricity Purchase Agreement unenforceable if it is not in the public interest.\(^5^9\) The 2007 Energy Purchase Agreement entered into by Alcan and BC Hydro (the “2007 EPA”) commits Alcan to supplying and BC Hydro to purchasing excess electricity generated by the Kenney Dam project in the Nechako River in northwestern British Columbia until 2034. In November 2007, the Carrier Sekani Tribal Council (CSTC) sought an order declaring the 2007 EPA unenforceable on the grounds that it should be subject to consultation and accommodation. The BCUC found that the 2007 EPA would not adversely affect the interests of the CSTC because it would not have any physical impact on existing water levels in the Nechako River and would not change the current water management of the fishery. Further, the BCUC found that more than an underlying infringement was required to trigger the duty to consult in the circumstances and, as a result, it did not need to reconsider its decision to exclude a review of the adequacy of Crown consultation from the scoping order.

The decision was appealed to the BC Court of Appeal where it was overturned\(^6^0\). In October 2010, the Supreme Court of Canada (SCC) overturned the BC Court of Appeal’s decision and confirmed the decision of the BCUC, finding that the BCUC correctly accepted that it had the jurisdiction to consider the adequacy of consultation with Indigenous groups, and finding the duty to consult is confined to the adverse impacts flowing from the current government conduct or decision, not to larger adverse impacts of the project of which it is a part.

In addition to reaffirming the legal test articulated in *Haida v Taku*,\(^6^1\) the decision also commented on the role of tribunals in consultation, stating that the duty of a tribunal to consider consultation depends upon the mandate conferred upon it by the legislature that creates the tribunal. Legislatures may choose to delegate the duty to consult to a tribunal or may choose to confine a tribunal’s power to determine whether adequate consultation has taken place.\(^6^2\)

The SCC held that the BCUC was correct to conclude that it had the power to consider the adequacy of Crown consultation with affected Aboriginal peoples but that the UCA did not empower the BCUC to engage in consultations in order to discharge the Crown’s constitutional obligation to consult with Aboriginal groups.\(^6^3\)

### 3.3.3 Dawson Creek/Chetwynd Area Transmission Project – CPCN not issued until sufficient consultation and accommodation

In 2011, BC Hydro applied for a CPCN to construct the Dawson Creek/Chetwynd Area Transmission (DCAT) Project. The Application proposed that the Project was required as soon as possible to resolve constraints in the existing 138 kV transmission system, to serve significant load growth in the Groundbirch and Dawson Creek areas, and to restore reliable service to the region. The Project included three main components: construction of

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\(^{5^9}\) UCA, RSBC 1996, c.473, s.71.

\(^{6^0}\) *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67.


\(^{6^3}\) Ibid. para. 72 and 74.
The new Sundance Lakes Substation, construction of a 60 km double circuit 230 kV transmission line from Sundance Lakes to Bear Mountain Terminal (BMT) Substation and continuing a further 12 km to the Dawson Creek Substation on a new or expanded right-of-way, and the expansion of BMT. The Project was estimated to cost $222 million and had an expected in-service date of April 30, 2014.

The Project was on land within Treaty 8 territory and the duty to consult was triggered. West Moberly First Nation (WMFN), participated as an Intervener in the BCUC process. The review of the adequacy of First Nations’ consultation was conducted in an oral hearing and the BCUC Panel also participated in a flyover of the proposed DCAT route to gain further perspective.

Ultimately, the Panel found consultation with WMFN on the DCAT Project was inadequate because BC Hydro had not obtained sufficient knowledge of the potential impacts of the Project on WMFN’s Treaty rights nor consulted the WMFN on those impacts. The Panel based its determination on the following:

- BC Hydro acknowledged that, at the time, it did not know enough about the seasonal round (which is the practice of the WMFN’s Treaty rights of hunting, fishing, and trapping) and how the DCAT Project may impact it;
- The issue of moose and moose habitat and the mitigation of potential impacts on them, had not been adequately assessed; and
- BC Hydro did not consider the new adverse impacts of the Project with an adequate cumulative impact perspective.

Subsequent to the date of the decision, BC Hydro conducted further consultation and necessary accommodation that the BCUC deemed sufficient to enable them to approve the Project.

### 3.3.4 Bennett Dam RipRap Project- Adequate Consultation

On November 13, 2015, BC Hydro proposed the W.A.C. Bennett Dam Riprap Upgrade Project to address inadequate long-term erosion protection of the W.A.C. Bennett Dam (the Dam) located on the Peace River approximately eighteen kilometres west of the town of Hudson’s Hope (Project). BC Hydro applied under section 44.2 of the UCA seeking acceptance of its expenditure schedule for the Project. Acceptance of an expenditure schedule by the BCUC must, in part, be found to be in the public interest. The Project involved:

- replacing portions of the failed rock armour layer, also known as riprap, on the upstream face of the Dam;
- development and operation of the Sand Flat quarry to source the required volume of riprap;
- transportation by truck of the riprap from the Sand Flat quarry to the Dam; and
- temporary stockpiling of riprap near the Dam.

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64 British Columbia Hydro and Power Authority, Certificate of Public Convenience and Necessity for the Dawson Creek/Chetwynd Area Transmission Project Final Order G-144-12 and Decision, dated October 10, 2012.

65 Ibid., p. 169.


67 British Columbia Hydro and Power Authority, WAC Bennett Dam Riprap Upgrade Project, Final Order G-78-16 and Reasons for Decision dated May 27, 2016.
The Project involved quarrying rock from the Sand Flat Quarry (SFQ) and trucking it to the riprap stockpile site approximately 40 kilometres away. BC Hydro estimated the quarried material would require 50 round trips per day from June to October for two to three years. In addition to the trucks carrying quarried material, there are estimated to be about 25 water truck round trips per day using the same routes to mitigate dust.

The BCUC assessed the potential adverse impacts of the Project on the Treaty 8 rights to be low, based on a number of factors. First, while there will be a significant amount of truck traffic and quarrying activity for the Project, the trucking and quarrying will be temporary (2–3 years) and seasonal. During the time work is occurring it may cause temporary disruption to the exercise of Treaty rights. As well, while the SFQ will be quarried and thus the rock features changed permanently, the site must be reclaimed back to a state suitable for wildlife at the conclusion of the Project. First Nations will be able to exercise their Treaty rights on the SFQ after it has been reclaimed. Thus, the potential adverse impact to Treaty rights of the quarrying is temporary.

The BCUC found that BC Hydro had implemented extensive mitigation measures through the EMP and EPPs. Thus, the temporary and seasonal potential impacts that may occur will be lessened through the mitigation strategies planned.

Regarding the scope of BC Hydro’s duty to consult, the BCUC considered the framework set out in *Haida v. Mikisew* that consultation in a Treaty case is determined by the context, including an assessment of the severity of potential impacts on Treaty rights. Based on this framework and the panel finding that the level of potential impact from the Project on Treaty 8 rights was deemed low, the Panel found that the scope of the duty to consult First Nations on the Project was at the lower end of the *Haida* spectrum. The BCUC found BC Hydro’s consultation to be adequate.

Ultimately, the Panel found that the consultation had been adequate up to the point of the BCUC decision. Although BC Hydro did not implement all of the mitigation strategies put forward in the report of the First Nations Independent Technical Review, it did consider and implement those that worked within the balance of all interests, and provided acceptable reasons as to why the others would not be implemented.

### 3.4 Spirit Bay Utilities Application - First Nations Utilities Not Included in Municipal Exception

On June 1, 2016, Spirit Bay Utilities sought to exempt, pursuant to section 88(3), their ocean thermal energy, gaseous propane and electricity generation and distribution systems from the application of Part 3 of the UCA, Regulation of Public Utilities. The exemption request excluded section 42 of the UCA, duty to obey orders, in relation to safety orders of the BCUC.

As an alternative request to the section 88(3) exemption, Spirit Bay Utilities requested the BCUC to direct, pursuant to section 72 of the UCA, that Beecher Bay First Nation is a municipality or regional district for the purposes of the UCA. This would exempt it from the provisions of the UCA solely applicable to public utilities.

Spirit Bay Utilities explained that a partnership was created called Spirit Bay Developments Limited Partnership (“LP”) that is 51% owned by the Beecher Bay First Nation and 49% owned by a family-controlled entity to facilitate the development. Pursuant to the Land Code the Beecher Bay First Nation created zoning laws, registry

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68 Order G-78-16 and Reasons for Decision
laws, property taxation laws, and amended its Land Code to allow for 99 year leases. The LP is actively managed by two general partners – the TSD General Partner Inc. and the Beecher Bay GP Ltd. The Limited Partnership had invested almost $7,000,000 over the previous two years to create the first subdivision plans, service the first 54 lots, gain CMHC approval of the leases and FCT Title insurance for the lots.

Spirit Bay Utilities stated it would be initially majority owned by the Beecher Bay First Nation and ultimately wholly owned. It would oversee the acquisition of the utility assets from the LP and the ongoing operation/maintenance and administration of the utility.

The Beecher Bay First Nation is located on Southern Vancouver Island approximately 45 minutes from Victoria. There are 242 members of which 80 live on the reserve which is roughly 1,000 acres. It is in the process of developing a residential community (“Spirit Bay Community”) on part of this reserve by making available land for development under long term leases. These lands will not be surrendered as that term is defined under the Indian Act. They will remain under the control and governance of the Beecher Bay First Nation in accordance with the comprehensive Land Code.

In terms of the provision of Utility Services, Spirit Bay argued that the Land Code does two things:

1. gives the Beecher Bay First Nation the powers of a government; and
2. provides the Beecher Bay First Nation with jurisdiction over the provision of Utility Services including providing them. The Beecher Bay First Nation has established the Spirit Bay utility to provide the Utility Services to the Spirit Bay Community. Without these services its development would not proceed.

Spirit Bay Utilities argued that under this code, the Beecher Bay First Nation through its Council (“Council”) has very broad power to make laws as set out in sub-section 6.1:

Council may, in accordance with this Land Code, make Laws respecting:

(a) development, conservation, protection, management, use and possession of First Nation Land;
(b) interests and licences in relation to First Nation Land;
(c) any matter necessary to give effect to this Land Code; and
(d) any matter necessary or ancillary to a Law respecting First Nation Land.

The utility further pointed out that in sub-section 6.2 there are numerous examples of its broad law-making jurisdiction and these examples are not exclusive. Some of the examples provided were:

For greater certainty, Council may make Law in relation to First Nation Land including but not limited to:

(b) regulation, control authorization and prohibition of the occupation and development of land;
(c) creation, regulation and prohibition of interests and licences;
(e) provision of local services and the imposition of user charges;
(f) provision of services for the resolution, outside the courts, of disputes;
(p) construction, maintenance and management of roads, water courses, water diversions, storm drains, bridges, ditches and other local and public works;

Further, Spirit Bay Utilities stated that Section 38 of the Land Code provides for an optional mechanism for resolving disputes in relation to First Nation land that is in addition to all other civil remedies. The Beecher Bay First Nation has at least comparable law-making authority to that of a municipality or regional district and will be exercising this authority with respect to the Spirit Bay Utilities by enacting the Beecher Bay Spirit Bay Utilities Law.  

The BCUC found that if Spirit Bay Utilities provided energy to the Spirit Bay community for compensation, it would be a public utility within the UCA. It further found that section 88 of the Indian Act continued to apply to Beecher Bay, despite the Land Code enacted pursuant to the First Nations Land Management Act (FNLMA). The UCA, which is a provincial law of general application, had not been displaced by the FNLMA or the Land Code, and as such, it applied to the proposed utility. On the basis that the First Nation fell outside the definition of municipality as defined by the Interpretation Act, which refers to municipal corporations or regional districts defined in the Local Government Act. Neither the Spirit Bay Utilities corporation nor the partnership fell within this definition, and therefore the municipal exclusion did not apply.

In its decision, the BCUC also denied the utility’s alternative request for an exemption, finding that it did not meet the test set out in the Canal Plant Agreement Exemption which allows an exemption when, “with the advance approval of the LGIC, when such exemption serves the objects and purposes of the [UCA] and it is in the public interest to do so”. Further, since the proposed utility was a monopoly and there was no alternative regulatory body, an exemption as set out in the AES Inquiry Report was not warranted. The BCUC also stated:

In this Application, the onus is on the applicant to demonstrate that these monopolistic elements have been mitigated, and in this case they have failed to do so. In addition, the exemption scheme proposed by Beecher First Nation, which is the majority owner of Spirit Bay Utilities, has the effect of making the regulator the owner of the utility. For these reasons, the Panel finds that there is a potential for abuse of monopoly power and therefore exemption from regulation does not serve the objects and purposes of the UCA and is not in the public interest.

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With regard to Spirit Bay Utilities’ argument that complaints are subject to voluntary arbitration and ultimately to the courts, the Panel notes that generally speaking regulated utilities are expected to manage their own complaint processes. In addition, complainants have access to the Commission’s complaint resolution process. Ultimately, complainants have recourse to the courts in the event that they feel their complaint has not been dealt with fairly by the utility and the Commission. For Spirit Bay Utilities to state that a dispute resolution process is in place and that civil remedies are available through the courts does not distinguish Spirit Bay Utilities from

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69 Spirit Bay Utilities Ltd., Application for an Exemption Pursuant to Section 88(3) of the UCA or Declaration Pursuant to Section 72(Spirit Bay Utilities Exemption Application), pp. 1–3.

70 ibid., pp. 1–3.
any other regulated utility in the province, except that it underlines that there is no independent regulator to whom complainants can turn.\footnote{Spirit Bay Utilities Ltd., Application for Exemption pursuant to section 88(3) of the UCA, Final Order G-175-16 and Reasons for Decision, p. 9.}

3.5 Approval of Energy Supply Agreements involving First Nations IPPs

BC Hydro acquires a portion of its energy needs from Independent Power Producers (IPPs). IPPs develop and operate projects such as wind, hydro and biomass. IPPs include power production companies, municipalities, First Nations and customers. In 2019, BC Hydro acquired approximately 14,000 GWh from IPPs for the integrated system in 2019, which represents approximately 25\% percent of the 57,777 GWh of energy required to meet energy demands.\footnote{BC Hydro 2020–21 Revenue Requirement Application, Exhibit B-1 p. 4-29.} The figure below shows the breakdown by fuel type.

**Figure 1: BC Hydro Acquired IPP Generation Output by Resource Type\footnote{BC Hydro, Independent Projects History & Maps, retrieved from: https://www.bchydro.com/work-with-us/selling-clean-energy/meeting-energy-needs/how-power-is-acquired.html.}**

![Figure 1: BC Hydro Acquired IPP Generation Output by Resource Type](image)

While there is limited empirical evidence of the nature and extent of First Nations involvement in IPP projects, it is well understood that there are a significant number of such projects and the evidence received in this Inquiry is that they contribute significantly to economic development of Indigenous communities. Seeking to assess the extent to which First Nations in BC are actively participating in the renewable energy sector, the BC First Nations Clean Energy Working Group (FNCEWG) recently partnered with researchers at the University of Victoria’s School of Environmental Studies to conduct a province-wide survey.\footnote{Cook, D., Fitzgerald, E., Sayers, J., and Shaw, K., Survey Report: First Nations and Renewable Energy Development in British Columbia (Survey Report) (April 2017), prepared for BC First Nations Clean Energy Working Group, retrieved from: https://www.uvic.ca/research/assets/docs/rpkm/shaw-karena-first_nations_renewable_energy_bc.pdf.} The research team invited 203 First Nations and several Tribal Councils and received responses from 102 First Nations and three Tribal Councils.\footnote{ibid., p. 8}
The survey results indicate that 98% of respondents are already involved or wish to be involved in the sector, with 79% of the respondents connected to the provincial energy grid. The survey demonstrated a wide variety of projects developed, differing in size, technology and application.

Of the 105 respondents, 30 indicated that they have at least one project in operation. The survey team calculated 78 renewable energy projects in total, with the majority of existing projects being run-of-river hydroelectric (hydro), with solar photovoltaic (PV), geothermal, wind, and solar thermal making up the rest. Of the operational projects reported in the survey, at least 50 are connected to the North American electricity grid and for grid-connected communities, the opportunity to sell power to BC Hydro is key to the commercial viability of a project.

In addition to the operational projects, many First Nations are involved in developing new energy projects. 32 respondents indicated that they are currently planning or building 48 new projects, with 15 projects already under construction.

The respondents also identified barriers to entry and expansion in renewable energy development, with difficulty in securing energy supply agreements from BC Hydro, financing, and community readiness identified as the most significant barriers.

BC Hydro acquires power from IPPs through various processes, namely, competitive call processes, standard or open offers, and bilateral arrangements. The following acquisition processes have been used to acquire energy from IPPs:

- The Clean Power call, issued on June 11, 2008, to acquire up to 5 000 gigawatt hours per year of electricity from clean or renewable resources; and
- The Standing Offer Program (SOP) launched in 2008 for small, permit-ready projects sized between 100 kW and 15 MW.

BC Hydro also acquires power from:

- The Micro-SOP for First Nations and Communities for projects over 100 kW up to and including 1 MW; and
- The Net Metering Tariff for customers with projects sized at 100 kW or less.

The majority of the energy procured from IPPs comes through projects contracted through the Clean Power call and the SOP. These IPP projects have long-term (typically 20 to 40 years) energy purchase agreements (EPAs) with BC Hydro.

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76 Figure 3.2 on p.9 of the Survey Report shows the generational capacity for the projects reported in the survey.
77 Survey Report, p. 9.
78 Survey Report, p. 10.
79 Figure 3.5 on p.12 of the Survey Report shows the technology of the projects in development.
83 Government of British Columbia, Ministry of Energy, Mines and Petroleum Resources (MEMPR), Comprehensive Review of BC Hydro:
The SOP was established to encourage the development of small clean or renewable electricity projects by streamlining the process for selling electricity to BC Hydro at a known price. The program provides an attractive opportunity for many First Nations looking to develop power projects, as discussed above. As BC Hydro has not conducted competitive calls for power since 2011, the SOP has become the primary energy procurement offering available to any organization seeking to secure a long-term Electricity Purchase Agreement (EPA) with BC Hydro.

The SOP has become a vehicle for small IPPs, communities, First Nations and others who may lack the capacity to participate in larger, competitive procurement processes. However, in March 2018, BC Hydro announced that it would not issue any new EPAs pending the completion of the government’s Comprehensive Review of BC Hydro, with the exception of five specific projects that are part of Impact Benefit Agreements for First Nations with BC Hydro and/or mature projects that have significant First Nations involvement. As of the release of the Comprehensive Review of BC Hydro: Phase 1 Report dated February 14, 2019, the SOP has been suspended indefinitely because of a surplus of electricity. The decision to indefinitely suspend the SOP does not impact existing executed electricity purchase agreements.

Generally, persons generating and selling energy in the Province, including IPPs, are captured within the definition of a public utility in section 1 of the UCA. As a public utility, such IPPs would normally be regulated under Part 3 of the UCA requiring BCUC approvals for construction of facilities and the setting of rates to sell energy. However, until 2000, IPP projects selling energy to BC Hydro received various exemptions from Government relieving them from the requirements of Part 3, Regulation of Public Utilities.

Even if exempted from regulation under Part 3 of the UCA, energy supply contracts with BC Hydro are regulated under section 71 of the UCA. This section requires that a person who enters into an energy supply contract, such as an EPA with BC Hydro, to file a copy of the contract with the BCUC under rules and within the time it specifies. The BCUC may determine that an energy supply contract is not in the public interest, and may by order, declare the contract unenforceable. In many instances, Government also exempted IPPs from this section of the UCA.

However, amending Ministerial Order M-22-9801-A1 dated March 30, 2000 exempts persons that sell a power service to BC Hydro or the British Columbia Power Exchange Corporation (Powerex) from all provisions of Part 3, Regulation of Public Utilities.

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86 ibid., p. 27.
89 An “energy supply contract” is defined under section 71 of the UCA to mean “a contract under which energy is sold by a seller to a public utility or another buyer, and includes an amendment of that contract, but does not include a contract in respect of which a schedule is approved under section 61 of this Act.”
as well as section 71 of the UCA, and exempts BC Hydro and Powerex from Part 3 and section 71 of the UCA for such purchases for all contracts entered into on or before September 30, 2001.\textsuperscript{90} These exemptions eliminated BCUC oversight of IPPs for a significant number of IPP projects.\textsuperscript{91}

For energy supply contracts that BC Hydro has entered into with IPPs after September 30, 2001, there has been a number of other government regulations including Ministerial Orders, Orders in Council, Special Directions that either exempt or restrict the BCUC’s review of those energy supply contracts.\textsuperscript{92} Also, sections 7(1)(g),(h) and (2) of the CEA exempt the Clean Power call request for proposals and the SOP. As a result of these exemptions, there was no requirement for approval of a CPCN to develop the generation infrastructure. However, there was a requirement for approval of an energy supply contract under section 71 of the UCA, although this too, was in some cases exempt or the BCUC was directed by the provincial government to approve the contracts.\textsuperscript{93}

Where BCUC has retained the jurisdiction to review energy supply agreements between IPPs and BC Hydro under section 71 of the UCA, the BCUC must take into account energy objectives set out in the CEA such as self-sufficiency of Provincial electricity needs, and more recently, Special Direction 10 to the BCUC which limits the BCUC’s ability to not approve energy supply agreements related to biomass.

A number of IPP EPA renewals that directly affect First Nations are before the BCUC as of the date of this Report. Further, a number of additional EPAs will expire over the next few years, while the electrical energy system is expected to remain in surplus.

### 3.6 Other Proceedings

In addition to the above examples, there have been a number of proceedings with significant First Nation involvement.

**Prophet River First Nation natural gas pipeline sale**

In 2018, as part of its approval of the FEI-Fort Nelson Revenue Requirements Application, the BCUC approved the sale from the Prophet River First Nation to FEI of the natural gas distribution pipeline located on the Prophet River First Nation Reserve. The pipeline only serves the residents and businesses on the reserve. The sale was instigated at the request of the First Nation, which up to that point had paid the entire gas account as the sole account holder for the entire reserve. The First Nation advised that it did not have sufficient resources and capacity to operate and maintain the pipeline indefinitely but wanted to incent individual homeowners and businesses to be financially responsible through having separate meters installed. The BCUC approved the transaction as being in the public interest based on the First Nation’s agreement to backstop the individual bill payments so that other FEI ratepayers would not be adversely affected by the purchase.\textsuperscript{94}

\textsuperscript{91} Zapped Report, pp.48-53.
\textsuperscript{92} Examples include: Section 7 of the Clean Energy Act, B.C. Reg. 254/2010, B.C. Reg. 182/2014, B.C. Reg. 204/2016, Order in Council 158.
\textsuperscript{93} When the Clean Energy Act (CEA) came into effect, section 7(h) of the CEA exempted the SOP from section 71 of the UCA.
BC Hydro Waneta Dam transaction

In 2009, BC Hydro purchased from Teck Metals Ltd., a one-third interest in the Waneta Dam. BC Hydro filed an expenditure schedule with the BCUC pursuant to section 44.2(1) of the UCA seeking an order accepting that the expenditures associated with the Waneta transaction were in the public interest. A number of First Nations intervened in the application before the BCUC seeking, in large measure, that the Waneta transaction required BC Hydro to fulfill the Crown’s constitutional obligation to consult and accommodate, inclusive of past infringements and grievances. Ultimately, the BCUC determined, in part, that BC Hydro undertook a level of consultation and accommodation which adequately upheld the honour of the Crown in the circumstances. The Sinixt Nation supported by the Okanagan Nation Alliance and the Ktunaxa National Council applied to the BCUC to reconsider its decision, which it did but denied the application for reconsideration. Subsequent to the reconsideration decision, the SCC delivered its decision in Rio Tinto, which held, in part, that the duty to consult is confined to the adverse impacts flowing from the current government conduct or decision and not to larger adverse impacts of the project of which it is a part.95

Site C Inquiry

In 2017 the BCUC was asked by the Provincial Government to conduct an Inquiry into whether the Site C dam project was on budget, the costs of suspending or terminating the project, and the cost of an alternative energy portfolio. The Inquiry involved the participation of many First Nations interveners and presenters at Community Input Sessions held throughout British Columbia.

4.0 What the Panel Heard: Research, Evidence and Submissions

In this Inquiry, the BCUC has received evidence and submissions from a range of Indigenous groups and individuals, existing utilities, independent experts, and other entities. This Section summarizes the issues and themes that have been raised by participants.

4.1 Summary of Expert Reports Research

The BCUC commissioned two independent expert reports to add to the evidentiary record. These reports do not focus on the situation in BC. Rather, they are intended to provide a broader picture to set the context of the key questions to be addressed in this Inquiry.

4.1.1 Report on Regulation

Scott Hempling96 prepared a report which provides a high-level examination of utility regulation. The report covers what regulation is and when it is used, an overview of public utility regulation in the context of electricity, gas and district energy, and how utility regulators do their jobs.

95 Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 at para. 53.
96 Scott Hempling is a United States attorney, author, law professor and expert witness.
Regulation is described in the report as:

the set of actions a government-created body takes to permit, limit, and guide the behaviour of private individuals and businesses. With these permissions, limits, and guidance, regulation aims to promote the public interest by preventing negative outcomes and producing positive ones.

In one sentence: *We use regulation to align private behavior with the public interest, in situations where private behavior, unregulated would conflict with the public interest.* More technically, economists view regulation as a tool to reduce economic loss in markets with imperfections – imperfections like economies of scale, high entry barriers, unique products, and insufficient information. Absent regulation, these imperfections can lead to destructive competition, unanticipated scarcity, insufficient innovation, and overconsumption of goods that affect others negatively...97

Hempling goes on to explain how regulation must consider different components in order to serve the public interest, such as long-term versus short-term needs, affordable rates versus efficient price signals, and environmental values versus global competitiveness. While the term ‘public interest’ has no fixed meaning, Hempling describes it as elevating the shared, long-term interests and needs of the entire community over the narrow, short-term interests of specific individuals and companies.98

In explaining the characteristics and the rationale for the regulation of public utilities, Hempling describes how utility regulatory commissions, such as the BCUC, were created to regulate electricity and gas companies, because often the sellers were monopolies. As monopolies face no pressure from competitors, Hempling identifies that without this competitive pressure a monopoly can become inefficient by charging excessive prices while providing a low-quality service and monopolies will discriminate their prices to increase profit e.g. charging higher prices to customers with few alternatives. Hempling states:

To address these two concerns—inefficiency and discrimination—most public utility statutes have two requirements: 1. The utility’s rates must be "just and reasonable" and 2. The utility must not grant any customer an "undue preference or advantage."99

However, while there are benefits to regulation there are also potential costs as the nature of regulation can limit actions that can be taken, or order actions that may not be considered desirable. Those affected by such orders tend to view them as “costs” even if those orders create larger benefits (e.g. environmental regulation).

Regarding markets traditionally dominated by monopolies, more recent developments have disrupted these traditional markets and regulation can now play a role in encouraging competition in these markets.100 The report also covers how utility regulators do their jobs. This includes a discussion on the types of regulated actions,101 the actors who could be regulated,102 the main subject areas regulators address,103 e.g. sale of gas and

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97 Exhibit A-8, Report by Scott Hempling on Utility Regulation, pp.1-2.
98 ibid., p. 3.
99 ibid., p. 5.
100 ibid., p. 8.
101 ibid., p. 9.
102 ibid., p. 10.
103 ibid., p. 10.
electric service, the legal powers of the regulator including rate-setting powers, regulatory procedures, the independence and professionalism required by regulators, and the role of public records and public meetings.

4.1.2 Canadian Regulatory Jurisdiction Scan

The BCUC retained Daria Babaie, Ryezan Inc., an independent consultant to provide a jurisdictional review regarding the regulation of Indigenous utilities in provinces and territories in Canada (with the exception of BC). The review addresses the characteristics of Indigenous utilities with respect to the nature of utility ownership and operations, the types of services provided, the types of customers served, and the geographic service area of the utility. The report also covers whether Indigenous utilities are subject to regulation and/or statutory exceptions or exemptions, and whether any province or territory has reviewed the need to regulate or establish the scope of regulation for Indigenous utilities.

The report identified Indigenous utilities operating throughout Canada, namely in Alberta, Northwest Territories, Nunavut, and Ontario. Some examples of the different types of Indigenous utilities identified include: Electricity Transmission companies such as Five Nations Energy Inc. in Ontario and PiikaniLink Limited Partnership in Alberta, Crown Corporations such as the Qulliq Energy Corporation in Nunavut, and joint partnership utilities such as Northland Utilities Ltd. in the Northwest Territories. The report identifies different ownership structures and regulatory models under which Indigenous utilities operate. These regulatory models are often developed based on the unique circumstance for each Indigenous utility such as: Indigenous ownership in part or in whole, the geographical area served and services provided.

The report found no evidence of any overarching reviews of the application of existing utility regulation legislation with regards to Indigenous utilities. While the report identified multiple Indigenous utilities operating throughout Canada under different ownership structures and regulatory models, including examples of exemptions or exceptions to existing regulation, there was no evidence of different regulatory treatment or specific exemptions in the legislation that would apply to all types of Indigenous utilities operating in a province or territory.

The report also identifies some Indigenous utilities in Alberta and Ontario that are not regulated by a board or commission and are subject to statutory exceptions or exemptions. For example, in Alberta three Indigenous communities wholly own their rural electricity distribution systems, which are called Rural Electrification Associations (REAs). REAs are not-for-profit cooperatives that own their electricity distribution system and distribute electricity to their members in rural Alberta. The Alberta Utilities Commission does not regulate the rates or hear customer complaints for REAs. Rather, the Board of Directors of the respective REAs sets the rates for REAs. REAs or the Rural Utilities Branch of the Alberta government deal with customer complaints. An example from Ontario is Cat Lake Power Utility Ltd. (Cat Lake Power, of the Cat Lake First Nation), which was

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105 ibid., p. 16.
106 ibid., p. 17.
107 Exhibit A-13, Jurisdictional Review of the Regulation of Indigenous Utilities in Canada, p. i.
108 ibid., p. vi.
109 ibid., p. ii
110 ibid., p. 9
granted an exemption from the Ontario Energy Board (OEB). However, it was required to hold a transmission license issued by the OEB in order for it to own and operate transmission facilities in Ontario, which is rate-regulated by the OEB. In 2006, due to various reasons, Cat Lake Power relinquished its transmission license to the OEB and the OEB ordered Cat Lake Power to transfer its assets to Hydro One which currently holds an interim distribution license to operate the former transmission assets, now deemed by the OEB to be distribution assets.111

The report also discusses a case in Newfoundland, where the Mushuau Innu First Nation (the “Innu”) owns electrical infrastructure in Natuashish, including the diesel generation plant and the power lines, to supply electrical service to the community. The electrical service is not regulated as a utility by the Newfoundland and Labrador Board of Commissioners of Public Utilities (NLBC), although whether the electrical service provided by the Innu meets the definition of a public utility is a determination that would properly be made by the Board. In 2016, the NLBC asked the Court of Appeal of Newfoundland and Labrador whether it had jurisdiction for orders relating to the provision of electrical services provided by the Innu. The Court found that the Board’s jurisdiction depended on whether the electrical service provided by the Innu to the community satisfied the definition of the public utility. The Court also addressed possible constitutional impediments to the Board’s jurisdiction in Natuashish, a reserve under the Indian Act, stating “the general rule is that provincial laws apply to Indians and land reserved for the Indians. As such the Province has authority generally over the development and provision of electrical power in the Province and that jurisdiction extends to Natuashish.”112

Based upon Babaie’s jurisdictional scan, it appears that the BCUC’s Indigenous Utility Inquiry is the first review undertaken in Canada of the need to regulate or establish the scope of regulation for Indigenous utilities more broadly, rather than assessing the issue on a case by case basis.

4.2 Overarching Policy Issues Influencing the Regulation of Indigenous Utilities

The Panel acknowledges that there are two critical policy issues that have been raised by participants in this Inquiry which affect any potential framework for regulation of Indigenous utilities: the jurisdiction of Indigenous Nations to enact laws on their lands, and reconciliation. While both issues are beyond the BCUC’s jurisdiction as an economic regulator and not specifically addressed in the OIC, the Panel considers that these issues are fundamental in setting the context for consideration of the items in the OIC terms of reference, and the later discussion around the Panel’s recommendations.

4.2.1 Jurisdiction of Indigenous Nations

Many participants submit that Indigenous Nations have jurisdiction to make their own laws on their lands including with respect to utility services. This draws into question the jurisdiction of the BCUC and the applicability of the UCA on Indigenous lands. It has also been highlighted that there is a need to account for the special circumstances of First Nations with a modern Treaty, as noted by Nisga’a Nation, and with Self-Government Agreements as noted by the Westbank First Nation.

The BCUC sets out below the various perspectives upon Indigenous jurisdiction, and how this relates to utilities.

111 Ibid., p. 44
The Nisga’a Nation asserts that the Nisga’a Treaty recognizes its power to enact laws regulating utilities on Nisga’a Lands, but that Nisga’a Nation has not exercised that power yet. In future, the Nisga’a Nation may draw down legislation for generation, transmission, storage, distribution and sale of energy within Nisga’a Lands. The Nisga’a Treaty sets out which laws prevail in instances of conflict with provincial legislation. Therefore, Nisga’a Nation submits that the threshold assumption that the BCUC has the authority to regulate a Nisga’a utility on Nisga’a Lands is flawed.113

Westbank First Nation submits that pursuant to its Self-Government Agreement, given the force of law by the Westbank First Nation Self-Government Act, Westbank First Nation has autonomy and control over its internal affairs. All persons residing or conducting business on reserve are subject to Westbank First Nation laws, enacted pursuant to its Constitution. Westbank First Nation would look to supersede the regulation of the BCUC.114

Many participants have highlighted the inherent jurisdiction of Indigenous Nations to make laws on their lands.115 For example, Adams Lake asserts that for self-government to have substantive meaning, utilities located on reserves should fall within the purview of Indigenous governments to regulate.116

Some argue that enacting a Land Code pursuant to the First Nations Land Management Act (FNLM) provides or should provide the authority to make laws regarding the provision and oversight of utilities.117 For example, Beecher Bay enacted a Land Code in 2003, and submits that under section 38 of the FNLM, a number of sections of the Indian Act respecting land and related matters then ceased to apply to Beecher Bay. It therefore argues that the Land Code provides the authority to make laws regarding provision and oversight of utilities.118 Leq’á:mel First Nation enacted its Land Code in 2010, and submits the Land Code provides greater potential for economic development due to the transparency and enforceability of regulations and laws, and that autonomy related to land is a step closer to self-government and self determination.119 The Collective First Nations provide a detailed examination of the FNLM and related legislation in their final argument, which they submit supersedes the UCA where a First Nation has passed a Land Code.120 They submit that aside from questions of paramountcy, there should be no strict requirement that First Nations pass a Land Code before Indigenous utilities be exempt from the UCA.121 They also submit that although it is probable that First Nations that enact Land Codes are exempt from the UCA, rather than making a finding on this issue, the BCUC should recommend that the Provincial Government place heavy emphasis on such legislation when it considers an explicit Provincial legislative re-ordering of oversight of Indigenous utilities. It is a compelling precedent for the reordering of decision-making authority to First Nations. The objective should be reconciliation with First Nations and not a

113 Exhibit C21-3, Nisga’a Nation Evidence, pp. 2, 6–9.
114 Exhibit C1-2, Westbank First Nation Evidence, p. 1; Exhibit C12-3, Westbank First Nation Response to CanGEA IR 1.1.
115 For example, Transcript Vol. 3, Hooper, p. 116; Transcript Vol. 6, Moraes, p. 292, 295–296; Exhibit C9-2, Beecher Bay First Nation Evidence, pp. 5–6; Exhibit C16-2, FNLC Evidence, p. 5.
116 Exhibit C14-2, Adams Lake Evidence, p. 6.
117 Exhibit C1-2, Tzeachten First Nation Evidence, p. 1; Exhibit C9-2, Beecher Bay First Nation Evidence, p. 6; Exhibit C14-2, Adams Lake Evidence, p. 3; Exhibit C14-3, Adams Lake Response to BCUC Information Request (IR) 2.1.
119 Leq’á:mel First Nation Final Argument, pp. 4–6.
120 Transcript Vol. 12, Austin and Sayers, pp. 605–631.
protracted constitutional legal battle over Indigenous utility regulation. This would serve as an example of Federal and Provincial co-operation on constitutional jurisdiction.\textsuperscript{122}

Adams Lake submits that section 81(1) of the \textit{Indian Act},\textsuperscript{123} which references “local works,” provides authority for First Nations to make decisions respecting their land. Adams Lake says that to interpret the wording of the statute in its grammatical and ordinary sense, “local works” must include Indigenous utilities. It further notes that the SCC said in \textit{Manitoba Metis Federation Inc. v. Canada (Attorney General)}\textsuperscript{124} that the honour of the Crown is a core concept that finds its application in concrete practices. The Court stated that this means that the Crown must act in a way that accomplishes the purpose of statutory grants to Indigenous peoples (at para. 73 [4]). Adams Lake argues that it would be contrary to this principle not to interpret the \textit{Indian Act} to provide First Nations with jurisdiction over Indigenous utilities.\textsuperscript{125}

Leq’á:mel First Nation submits that it is focused on building a sustainable economy for its community through its right of self-determination and self-government as protected under section 35 of the \textit{Constitution Act, 1982}. Leq’á:mel First Nation also notes the Province of BC’s “Draft Principles that Guide the Province of British Columbia’s Relationship with Indigenous peoples,”\textsuperscript{126} which “affirms the inherent right of self-government as an existing Aboriginal right within section 35.”\textsuperscript{127}

While Land Codes only apply on reserve lands, some participants note that an Indigenous Nation’s jurisdiction regarding Indigenous utilities should extend to traditional territories.\textsuperscript{128} For instance, FNLC submits that Indigenous jurisdiction and authority flow from Indigenous legal orders that pre-date Canadian law. Adams Lake and Beecher Bay note that where an Indigenous utility operates on-reserve or Treaty settlement land, its jurisdiction should also extend to services beyond its lands to promote fairness and consistency in a region.\textsuperscript{129}

FortisBC provides legal analysis, which in its submission demonstrates that the UCA is applicable on reserve lands. FortisBC notes that Section 91(24) of the \textit{Constitution Act, 1867} reflects the concern that the broad application of provincial laws could undermine Aboriginal and Treaty rights, and the Crown’s fiduciary obligation to Indigenous peoples. However, it submits the courts have indicated reserve lands are not enclaves immune from provincial jurisdiction. FortisBC notes that Section 88 of the \textit{Indian Act} provides a mechanism through which provincial laws of general application may apply. FortisBC submits that the regulation of activities on reserve lands (as opposed to the use of land), such as through the UCA, only incidentally interferes with section

\textsuperscript{122} Collective First Nations Final Argument, p. 7.
\textsuperscript{123} Section 81(1) states: “The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely… (f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works....”
\textsuperscript{125} Exhibit C14-2, Adams Lake Evidence, p. 7.
\textsuperscript{127} Leq’á:mel First Nation Final Argument, p. 4.
\textsuperscript{128} Exhibit C13-2, Collective First Nations Evidence, p. 12; Exhibit C16-2, FNLC Evidence, pp. 5, 7.
\textsuperscript{129} Exhibit C14-2, Adams Lake Evidence, p. 6 7; Exhibit C9-2, Beecher Bay First Nation Evidence, p. 6.
FortisBC recognizes that the applicability of the UCA on lands covered by modern treaties or self-government agreements is best assessed on a case-by-case basis. In response to FortisBC, Beecher Bay says that it would be more appropriate to consider the matter of the applicability of the UCA in the context of specific facts and a complete record so that parties could submit clear and principled legal analysis supported by evidence. In addition, while this legal issue requires careful and comprehensive consideration, it alone will not determine the matters being addressed in the Inquiry. Collective First Nations submit the analysis neglects to account for the overarching doctrines of interjurisdictional immunity and federal paramountcy. Adams Lake says that FortisBC’s analysis lacks the degree of analysis required to make conclusions with respect to the division of powers.

A number of participants note the unresolved issues regarding territory and Aboriginal Rights and Title in BC, and some participants say that the questions in this Inquiry cannot be answered while there are ongoing jurisdictional questions. For instance, FNMPG notes that for US tribal utilities, defined and mutually agreed areas of land jurisdiction were a key factor for success. Pembina Institute submits that where questions of First Nations jurisdiction and Rights and Title are of the essence, they should be considered outside of the BCUC’s mandate and addressed by Indigenous and Crown governments. Some participants refer to the complexity of multiple layers of jurisdiction that Indigenous Nations have to deal with, due to both provincial and federal laws or regulations applying to Indigenous Nations in different situations and indicate that it is important to have the input of government, including the Federal Government with respect to jurisdiction on reserve. CEC recommends that the BCUC seek direction and clarification from provincial and federal governments on jurisdictional issues. The Panel notes that the Federal Government has been invited to participate in the Inquiry, but has not provided a submission.

### 4.2.2 Reconciliation

Many participants explain that the issues explored in this Inquiry must be viewed with the perspective of the need to advance reconciliation with Indigenous peoples. Several highlight the direct links between the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the development of an Indigenous utility sector. Some express that reconciliation can only be achieved if the rights to self-determination and self-governance of Indigenous Nations are recognized, while others note the positive opportunities for reconciliation from encouraging Indigenous participation in the energy sector.

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130 Exhibit C4-2, FortisBC Evidence, pp. 8–9.
131 Exhibit C4-3, FortisBC Response to BCUC IR 3.1.
133 Exhibit C13-9, Collective First Nations Response to BCUC IR 5.1.
134 Exhibit C14-3, Adams Lake Response to BCUC IR 5.1.
135 Transcript Vol. 5, Starlund, p. 179; Transcript Vol. 5, McDames, p. 210–211; Exhibit D-3-1, Pembina Institute, p. 2.
136 Exhibit C16-2, FNLC Evidence, p. 12; Exhibit C3-3, FNMPG Evidence, pp. 10–12.
137 Exhibit D-3-1, Pembina Institute, p. 3.
140 CEC Final Argument, p. 8.
A number of participants refer to the UNDRIP in framing the discussion around Indigenous utilities. Some note that BC is currently drafting legislation to align provincial laws with UNDRIP, which will elevate UNDRIP’s legal status and require changes to legislation across all sectors including energy. A number of participants cite specific Articles of UNDRIP that should be considered relevant to this Inquiry:

- Article 3 Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

- Article 4 Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

- Article 5 Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

- Article 18 Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions.

- Article 19 States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

- Article 20 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. 2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

- Article 23 Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

- Article 26 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have

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142 Exhibit C16-2, FNLC Evidence, p. 9; Exhibit C13-2, Collective First Nations Evidence, p. 2; Beecher Bay/ Adams Lake Final Argument, p. 3; Transcript Vol. 12, Sayers, pp. 570–571; KGI Final Argument, p. 12.

143 Transcript Vol. 3, Matthew, pp. 72–74; Exhibit C16-2, FNLC Evidence, pp. 9–10; Exhibit C13-2, Collective First Nations Evidence, p. 2; Exhibit C3-3, FNMPC Evidence, p. 12; Beecher Bay/ Adams Lake Final Argument, pp. 4–5.
the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupations. 3. State shall give legal recognition and protection to those lands, territories and resources. Such recognition shall be conducted with due respect the customs, traditions and land tenure systems of the Indigenous peoples concerned.

- Article 32 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

The Collective First Nations submit that BCUC must go beyond its traditional role as a utility regulator and advance reconciliation, and consider that sections 5(1) and 5(2) of the UCA mean the BCUC is not constrained in its recommendations. While FNMPC notes that implementing UNDRIP is beyond BCUC’s current mandate, FNMPC says it would be helpful for the BCUC to remind the BC Government that BCUC’s work is directly impacted by UNDRIP. Beecher Bay and Adams Lake provide specific examples of how the BCUC’s recommendations could be consistent with UNDRIP, for example, pursuing development of utilities to support community development, making decisions about utilities and their regulation, collaboratively working with First Nations, and considering the obligation to recognize and respect traditional lands with respect to the traditions of Indigenous peoples. They also highlight that the terms of reference have little consideration of principles of reconciliation and Indigenous rights, and the BCUC must consider where Indigenous utilities fit within the greater context of reconciliation. Reconciliation may also link with access to the transmission system as discussed in Section 4.4.1.

Several participants note that establishing utilities and making decisions around the regulation of utility services are important aspects of self-determination and self-governance that could also promote economic development and capacity building, and thus work towards meaningful reconciliation. Adams Lake states that regulating Indigenous utilities under the UCA would be inconsistent with reconciliation and UNDRIP, and Beecher Bay submits that as sources of law that apply to Indigenous governments remain subordinate to other sources of law, there can be no meaningful reconciliation. Sayers of Collective First Nations says that not having the ability to be a utility or control a utility is contrary to self-determination. Matthew notes that the BCUC was established without the participation of Indigenous peoples, and that Aboriginal Title and Rights should not be compromised by regulating without consent. Collective First Nations say the right of self-determination includes the right of First Nations to freely pursue their own social, economic, and cultural

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145 UCA section 5(1) states: “On the request of the Lieutenant Governor in Council, it is the duty of the commission to advise the Lieutenant Governor in Council on any matter, whether or not it is a matter in respect of which the commission otherwise has jurisdiction.”
146 UCA section 5(2) states: “If, under subsection (1), the Lieutenant Governor in Council refers a matter to the commission, the Lieutenant Governor in Council may specify terms of reference requiring and empowering the commission to inquire into the matter.”
147 Collective First Nations, Final Argument, p. 2.
148 Exhibit C3-3, FNMPC Evidence, p. 12.
149 Beecher Bay/ Adams Lake Final Argument, pp. 4–5.
150 Beecher Bay/ Adams Lake Final Argument, p. 3.
151 Exhibit C16-2, FNLC Evidence, p. 8; Exhibit C14-2, Adams Lake Evidence, p. 1, 2; Exhibit C9-2, Beecher Bay First Nation Evidence, p. 1, 10; Beecher Bay/Adams Lake Final Argument, p. 5; Leq’á:mel First Nation Final Argument, p. 11.
152 Transcript Vol. 12, Sayers, p. 571.
153 Transcript Vol. 3, Matthew, pp. 74, 81, 83.
development, which should not be prevented by policies of the Provincial Government in the context of development of energy projects or utilities. They also note self-regulation of Indigenous utilities is an opportunity to right the wrongs of the past, such as the continuation of Site C and subsequent closure of the SOP, both of which have impacted First Nations (see Section 4.4.2).154

It has also been noted that First Nations have not had equal opportunities to participate in the energy sector, and that removing barriers to facilitate participation must also be a factor in reconciliation.155 Matthew submits that utilities are a potential means to address the most pressing issues in communities.156 KGI submits that for reconciliation to be meaningful, Indigenous utilities cannot be subject to normal market forces that may otherwise push them out of the market. Regarding this issue, Collective First Nations cite the following findings of the Truth and Reconciliation Commission (TRC):

> Canada denied the right to participate fully in Canadian political, economic and social life to those Aboriginal people who refused to abandon their Aboriginal identity.

... 

> In terms of the economy, that means participating in it on their own terms. They want to be part of the decision-making process. They want their communities to benefit if large-scale economic projects come into their territories. They want to establish and develop their own businesses in ways that are compatible with their identity, cultural values and world views as Indigenous peoples.157

Beecher Bay and Adams Lake build further upon this, highlighting that the impacts of colonialism must be at the forefront of the BCUC’s recommendations,158 noting the passage below from the TRC Report:

> In the face of growing conflicts over lands, resources, and economic development, the scope of reconciliation must extend beyond residential schools to encompass all aspects of Aboriginal and non-Aboriginal relations and connections to the land.159

A further aspect of reconciliation that should be considered, as noted for example by Hooper, is that there has been no compensation for the energy infrastructure that has been built on the traditional territory of Indigenous Nations.160

CanGEA notes the Federal Standing Committee on Natural Resources study titled “International Best Practices for Indigenous Engagement in Major Energy Projects: Building Partnerships on the Path to Reconciliation.” The study makes five recommendations as to how Canadian governments can best work with Indigenous peoples

154 Collective First Nations Final Argument, p. 5.
155 Exhibit C13-2, Collective First Nations Evidence, p. 3, 12; Exhibit C6-3, KGI Evidence, p. 5, 8, 12; Transcript Vol. 4, T. Thompson, pp. 141–142.
156 Exhibit C13-2, Collective First Nations Evidence, p. 3, 12; Exhibit C6-3, KGI Evidence, p. 5, 8, 12; Transcript Vol. 4, T. Thompson, pp. 141–142.
158 Beecher Bay/ Adams Lake Final Argument, p. 4.
and communities in energy projects in an effort to promote long-term socioeconomic benefits to the communities. One recommendation is to create sustainable opportunities for Indigenous peoples by supporting the development of community-owned and operated utilities through public-private partnerships and regional co-operatives. CanGEA submits the recommendations provide a clear message that Indigenous participation in energy projects represents a significant opportunity for reconciliation as well as an opportunity for socio-economic benefits for communities.\textsuperscript{161}

### 4.3 Summary of Issues Addressing Questions in the Terms of Reference

The following subsections provide a summary of the key issues raised by presenters at Community Input Sessions, interveners and letters of comments, arranged to align with the items in the terms of reference of OIC 108. At the beginning of each subsection, a high-level overview of the issue is provided in bold, followed by summaries of what participants said. The BCUC acknowledges the contributions of all participants and has attempted to capture as many perspectives as is feasible within the confines of this Report.

The Panel’s analysis and recommendations related to these issues can be found in Section 5.

#### 4.3.1 Characteristics of an Indigenous Utility

Section 3(1)(b)(i) of OIC 108 asks the BCUC to provide a response to the following question:

> 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.

A summary of the views of participants addressing each of the subheadings in the OIC question is provided below, along with a discussion of additional “defining characteristics” not specifically contemplated by OIC 108.

Indigenous utilities in BC are in their infancy. As noted in Section 3.5, to date Indigenous participation in the utility sector in BC has largely been focused on the development of IPP projects. Therefore, to answer the question in OIC 108, the Panel could not solely rely on case examples of existing or planned Indigenous utilities. Rather, the Panel has sought the views of participants in this Inquiry to establish how and why prospective Indigenous utilities may evolve in the future.

#### 4.3.1.1 The Nature of the Ownership and Operation of Indigenous Utilities

OIC 108 defines an “Indigenous utility” as: a public utility that is owned or operated, in full or in part, by an Indigenous Nation. This forms the starting point for examining the characteristics of ownership and operation of Indigenous utilities. Many participants suggest that any definition of an Indigenous utility should involve majority control by an Indigenous Nation, and otherwise be flexible in terms of ownership structure. However, some different perspectives also emerge around this issue.

\textsuperscript{161} Exhibit C7-2, CanGEA Evidence, pp. 40–41.
**Majority Ownership and/or Control**

Most participants who address this question view that any definition of an Indigenous utility should be based upon some notion of majority control of the utility by Indigenous Nation(s). This could be a “brightline test” whereby the ownership share by the Nation(s) would be greater than 50% (i.e. a minimum share of 51% or 50.1%), with any remaining stake held by a partner(s). Some specific examples include Spirit Bay Utilities, which is 51% owned by the Beecher Bay First Nation and 49% owned by a family-controlled entity; and Kitselas Geothermal Inc. which is owned by the Kitselas Development Corporation, a partnership 51% owned by the Kitselas First Nation, and 49% by Borealis GeoPower.

However, some participants caution against creating a threshold test for percentage of ownership, both because this could be understood as an infringement upon Indigenous self-determination and because Indigenous Nations will vary significantly in terms of capacity constraints and will seek different corporate models according to their distinct needs. Thompson acknowledges there may be instances where ownership stakes are lower but meaningful control and/or participation by Indigenous groups exists, qualifying them as an Indigenous utility.

Collective First Nations point out that there are a variety of ways to define “control”, for example the power to direct the management, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise. FNLC submits that an Indigenous utility should include majority-control by the Indigenous Nation(s), while Leq’á:mel First Nation notes that in a Limited Partnership structure, limited partners fall into a passive role.

A number of reasons are expressed in support for majority ownership or control. Adams Lake and Beecher Bay submit that a controlling interest in the utility allows it to operate in the best interests of the community and according to Indigenous laws, traditions, and principles. Collective First Nations support majority ownership or control by an Indigenous Nation(s), noting the benefits from these utilities should accrue as much as possible to Indigenous Nations and not others. L. Morven points out that “true partnership with Indigenous Nations requires a substantial role in decision making versus token involvement on certain projects”. It was suggested that the voice of Indigenous Peoples could be diminished by minority ownership or could be subject to abuse by non-Indigenous investors seeking to use a minority Indigenous partners to qualify for the exemption. FortisBC and CFN-GBI note that if the Indigenous Nation does not exercise control, then the votes of its customers can have no practical effect, leading to potential abuse of monopoly power. In BC Hydro’s view some substantial degree of ownership, interest or operation by Indigenous Nations of Indigenous utilities should be a

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162 Transcript Vol. 10, E. Bolten, p. 489; Transcript Vol. 6, Moraes p. 292; Transcript Vol. 3, Matthew p. 82; Exhibit C16-2, FNLC Evidence, p. 6; Exhibit C21-3, Nisga’a Nation Evidence, p. 15; Exhibit E-6, Tsay Keh Dene, p. 1.
163 Exhibit C9-1, Beecher Bay First Nation Evidence, p. 15; Exhibit E-6, Tsay Keh Dene, p. 1.
164 Transcript Vol. 10, L. Morven, p. 512.
165 Exhibit C6-2, KGI Evidence, p. 8.
167 Exhibit C16-2, FNLC Evidence, p. 6.
168 Leq’á:mel First Nation Final Argument, p. 8.
169 Exhibit C14-3, Adams Lake Response to BCUC IR 6.1; Exhibit C9-3, Beecher Bay Response to BCUC IR 2.1.
171 Transcript Vol. 10, L. Morven, p. 512.
172 Exhibit C6-3, KGI Evidence p. 8; Exhibit C4-2, FortisBC Evidence, p. 19–20.
173 Exhibit C4-2, FortisBC Evidence, p. 10; Coastal First Nations Final Argument, p. 8.
precondition to receiving an exemption from the UCA, that the meaning of "substantial" could usefully be considered further, but this may not be the sole consideration in determining an appropriate regulatory model.\(^{174}\)

However, FNLC submits that initially, some First Nations may have a minority share with a plan to transition over time, and should not be excluded from identifying as an Indigenous utility, as long as the rights and jurisdiction of the Proper Title Holders are respected.\(^{175}\) Collective First Nations note that where a Nation is unable to achieve the majority control standard then the utility would be free to apply for an exemption from regulation under the UCA, or if the problem is persistent and re-occurring the matter could be revisited by consultation between Indigenous Nations and senior Governments.\(^{176}\) FortisBC submits that Indigenous Nations with a non-controlling interest should be subject to regulation as there will be customers who would not have a say in the governance of the Indigenous Nation. Further, regulation would avoid gaming by investor owned utilities wishing to avoid regulation by granting a non-controlling interest to an Indigenous Nation without obtaining BCUC approval.\(^{177}\)

Some participants caution against any definition that required higher percentages of ownership by Indigenous Nation(s) or 100% ownership. Obrigewitsch notes that First Nations may face challenges in attracting traditional financing, and consequently have to seek private equity investment through a partner,\(^{178}\) and Donkers highlights that a high percentage could exclude some Nations that do not have a large cashflow.\(^{179}\) Adams Lake and Beecher Bay add that 100% Indigenous ownership would create an unfair barrier to economic development, while hampering cooperation and partnership between Indigenous and non-Indigenous people.\(^{180}\) However, there may be a longer term desire to move towards 100% Indigenous ownership of a utility. For example, Moraes from Skidegate Band Council explains that the Band partnership, Tlél Haida Energy Limited, is working toward 100% ownership of its hydro and solar projects.\(^{181}\)

CFN-GBI proposes a different test to majority ownership/ control: that an Indigenous utility should be determined on the basis of a “material benefits test”, whereby a utility enterprise creates a material economic or social benefit to either an Indigenous Nation/Band or its members. CFN-GBI submits that defined ownership levels can easily be circumvented, and cases where majority ownership structures deliver negligible benefits to Indigenous interests are a frequent outcome.\(^{182}\)

**Flexibility to Determine Utility Structure**

Generally, participants did not consider that, except for the notion of a controlling interest, there should be constraints upon the structure of an Indigenous utility. A theme expressed by many is that the ownership structure of an Indigenous utility should allow a degree of flexibility to reflect the unique needs and

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174 BC Hydro Final Argument, p. 5.
175 Exhibit C16-2, FNLC Evidence, p. 6.
176 Exhibit C13-9, CFN Response to BCUC IR No. 1 p. 2
177 Exhibit C4-2, FortisBC Evidence, p. 16.
179 Transcript Vol 9, Donkers, p. 405.
180 Exhibit C14-2, Adams Lake First Nation Evidence, p. 6; Exhibit C9-2, Beecher Bay Evidence, p. 5.
181 Transcript Vol. 6, Moraes, p. 292.
182 Exhibit C20-2, Coastal First Nations Evidence, pp. 11–12.
preferences of Indigenous Nations. For instance, FNLC views that choices around ownership are important aspects of self-determination, and Beecher Bay submits that limiting Indigenous utilities to one arrangement would be inconsistent with reconciliation.183

Some participants view that direct ownership should not be a requirement, such as through corporations that are owned wholly or by a majority by Indigenous Nation(s).184 Some examples of entities owned by Indigenous Nations with interest in pursuing energy projects include Simpcw Development Corporation, ?aq'am Development Corp. and Gitanyow Economic Development Corp.185 There may also be instances where multiple Indigenous Nations wish to have ownership shares in a utility.186 For example, Starlund favours a cooperative structure for Indigenous utilities which may involve multiple Nations, due to the inability of small individual projects to secure financing.187

Collective First Nations submit that Indigenous operatorship is not necessary to be an Indigenous utility, as not all Indigenous Nations have that expertise and may decide to develop it over time or contract that out.188 The Nisga’a Nation also notes that a Nisga’a utility could be wholly or partly operated by the Nisga’a Nation or contracted out.189

Many participants are in favour of an exclusion from the definition of “public utility” under the UCA similar to that which exists for municipalities and regional districts. The municipal exemption currently requires a utility to be owned 100% by the municipality itself.190 While Flintoff believes any exception should be applied in a manner that preserves a level playing field,191 other participants note that the requirement for 100% ownership should not apply to Indigenous utilities in the same manner as municipal utilities, for example because First Nations have not had equal opportunities to pursue economic initiatives and do not have the same access to capital as other utilities.192

4.3.1.2 The Types of Services Provided by Indigenous Utilities

There are many aspects of an energy utility’s service, including generation or production of energy, transmitting and distributing energy to customers, and the administration of metering and billing. Participants highlight that there may be a place for Indigenous utilities to provide any of these aspects of utility services.

183 Exhibit C20-2, CFN-GBI Evidence, p. 12; Exhibit C9-2, Beecher Bay Evidence, p. 5; Exhibit C16-2, FNLC Evidence, p. 6; Exhibit C14-2, Adams Lake First Nation Evidence, p. 6.
184 Exhibit C14-3, Adams Lake Response to BCUC IR 6.1; Exhibit C21-3, Nisga’a Nation Evidence, p. 15; Exhibit C9-3, Beecher Bay Response to BCUC IR 3.1 – 3.4; Exhibit C13-2, Collective First Nations Evidence p. 8; Exhibit C6-5, KGI Response to BCUC IR 2.1.
186 Exhibit C16-2, FNLC Evidence, p. 6; Exhibit C13-2, Collective First Nations evidence, p. 8.
189 Exhibit C21-3, Nisga’a Nation Evidence, p. 15.
190 Separately, the BCUC is conducting an Inquiry into the Regulation of Municipal Energy Utilities, which will consider whether other ownership structures should also be permitted under the exclusion.
191 Exhibit C5-2, Flintoff Evidence, p. 20.
192 Exhibit C13-8, Collective First Nations Response to Flintoff IR 2.1, 2.2.1; Exhibit C21, Nisga’a Nation Evidence, p. 15.
A number of participants express the general position that there should not be any limitation on the services that an Indigenous utility might provide, with some noting no such restrictions exist currently. For example, Collective First Nations submit that circumstances will vary between Indigenous utilities and flexibility is needed to pursue whatever opportunity is available to them. Leq’á:mel First Nation notes there is no certainty as to what the service characteristics of future utilities will be. BC Hydro submits there is little evidence in the Inquiry relating to an appropriate type of regulation based on type of service. Some participants did, however, provide specific ideas about the type of utility they may wish to establish in future.

For some participants, there is a desire to provide generation services which would then be sold to a utility such as BC Hydro, or to access existing transmission infrastructure to sell to other customers. Roka of EnerPro also notes the interest of Bands to combine small scale generation with local distribution to sell power to their communities. Generally, participants with an interest in generation express a preference for clean energy, with a range of technologies under consideration, including solar, geothermal, run-of-river hydro, biomass (heat and power), pumped storage, wind and ocean heat exchange.

Several Indigenous Nations express interest in purchasing electricity from BC Hydro in bulk to resell to their community, and administering the billing of utility services. Roka explains that a number of Bands have approached EnerPro, an energy metering and monitoring company, regarding the potential for such services. Roka notes that this would provide own source revenues, while giving the Band to set special rates for Elders, or to attract industrial customers. One component of the Spirit Bay Utilities plan is to purchase electricity from BC Hydro at bulk rates, which Spirit Bay Utilities would then distribute to the homes and businesses at the Spirit Bay Development at a reasonable retail rate. Leq’á:mel First Nation also expresses that it is exploring the prospect of purchasing electricity from BC Hydro at its property boundary, and reselling to existing mobile trailer tenants. Leq’á:mel notes further that it paid for the initial distribution components to serve these trailers. Chief Webber of the Nuxalk Nation submits that First Nations should be able to set their own hydro rates because the two-tier system causes a lot of social problems in remote communities.

Some remote communities in BC are served by non-integrated distribution systems, or “micro-grids,” which are owned and operated by BC Hydro. Chief Webber states that Nuxalk First Nation is close to installing a run-of-river project and once this is operational, it would be interested in buying Hydro’s micro-distribution system and

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193 Exhibit C5-2, Flintoff Evidence, p. 21; CEC Final Argument, p. 7; Exhibit C20-2, CFN-GBI Evidence, p. 12-13; Exhibit C21, Nisga’a Nation Evidence, p. 16.
195 Leq’á:mel First Nation Final Argument, p. 9.
196 BC Hydro Final Argument, p. 5.
197 Transcript Vol. 6, pp. 303–304.
198 E.g. Transcript Vol. 6, Chief Michell, p. 246; Exhibit C6-3, KGI Evidence, p. 3; Transcript Vol. 9, Chief Webber, p. 410; Exhibit E-6, Tsay Keh Dene, p. 4; Exhibit C9-1, Beecher Bay First Nation Evidence, p. 3.
200 Transcript Vol. 6, Roka, pp. 300 – 301.
201 Exhibit C9-2, Beecher Bay First Nation Evidence, p. 3
202 Leq’á:mel First Nation Final Argument, pp. 6, 7, 9.
203 Under BC Hydro’s Residential Conservation Rate, customers pay a lower rate for the first 1,350 kWh in a two-month period, and a higher rate for consumption above 1,350 kWh.
204 Transcript, Vol. 9, Chief Webber, p. 411.
running their own utility.205 Tsay Keh Dene notes that its prospective biomass project will eliminate the need to use diesel power to meet their electricity needs.206

Some participants address the issue of whether Indigenous utility services might duplicate or be additional to existing utility services. This issue is addressed in Section 4.3.2.

4.3.1.3 The Persons to Whom Services are Provided by Indigenous Utilities

There is general agreement that the customer base of an Indigenous utility is everyone - Indigenous, non-Indigenous, business or individual, residential, commercial and industrial - residing or conducting business in the service area of the utility.207

Autonomy

Some participants view that the self-determining authority and jurisdiction of Indigenous Nations mean that an Indigenous utility can determine its customer base and set rates, including non-members of the Nation residing on lands falling under the Indigenous Nation’s jurisdiction.208 Morven notes that otherwise, there would be a patchwork of electricity provision in the province.209 Adams Lake and Beecher Bay submit that any laws enacted, for instance related to an Indigenous utility, would likely apply to First Nation members and non-members.210

In addition, a number of Indigenous Nations highlight that they are already providing other public or administrative services to non-members residing on their lands. For example, Tzeachten First Nation states that it has the same responsibility to provide services, programs and administrative duties to all citizens living on Tzeachten First Nation land as it does for its own members.211

Several Indigenous Nations acknowledge the importance of bylaws and policies that set out how an Indigenous utility would respond to disputes with customers, including members, non-members and businesses, which are set out further in Section 4.3.4.3. For example, Beecher Bay submits that such dispute resolution may be essential to attract businesses and residents to engage with an Indigenous utility, noting further that much like corporate persons who do not participate in local government elections, non-members will look for ways to ensure their interests are considered.212

FortisBC submits that an Indigenous utility should only be exempt from regulation by the BCUC if it is serving Indigenous peoples who have a say in the governance of the Indigenous Nation, because all customers would have adequate recourse.213

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205 Transcript, Vol. 9, Chief Webber, p. 416.
206 Exhibit E-6, Tsay Keh Dene Letter of Comment, p. 5.
207 Exhibit C5-2, Flintoff Evidence, p. 21; CEC Final Argument, p. 7.
208 Transcript, Vol. 10, Morven, p. 513; Exhibit C21-3, Nisga’a Nation Evidence, p. 16; Exhibit C14-3, Adams Lake Response to BCUC IR 3.2.1; Exhibit C16-2, FNLC Evidence, p. 17.
210 Exhibit C14-3, Adams Lake Response to BCUC IR 3.2.1; Exhibit C9-3, Beecher Bay Response to BCUC IR 3.1–3.4.
211 Exhibit C12-2, Westbank First Nation Evidence, p. 2; Exhibit C1-2, Tzeachten First Nation Evidence, p. 2; Exhibit C14-2, Adams Lake Evidence, p. 3.
212 Exhibit C9-3, Beecher Bay Response to BCUC IR 3.1 – 3.4.
213 Exhibit C4-2, FortisBC Evidence, pp. 11 – 13.
Economic Opportunity

First Nations also recognize the economic opportunity in providing utility services to the general public, rather than certain segments. Indeed, one of the biggest drivers for creating an Indigenous utility would be to create economic development; as stated by Donkers: “the ability to sell to residential, commercial and industrial customers would be really important and necessary.” (See also Section 4.3.1.5). The Collective First Nations provide the following examples:

Many First Nations are building housing developments on reserve lands and sell or lease land to non-members on a market basis with a 99-year lease or other arrangements. Providing Utility Services to non-members can be an important economic opportunity.

Businesses owned by members and non-members are also established on reserves through leases to land and business licenses, and also need utility services. This could include industrial park developments by the Osoyoos Nation, the Kamloops Nation and others.

4.3.1.4 The Geographic Areas Served by Indigenous Utilities

There is general consensus from participants that the geographic area of an Indigenous utility should include, at a minimum, the reserve/Treaty lands of the Indigenous Nation that owns the utility. Restricting the geographic area served by an Indigenous utility to the narrow definition of Treaty or reserve lands, however, has challenges, not least of which is that it is an ‘economic non-starter’, as noted by Starlund. FNLC submits that limiting the scope of Indigenous utilities to reserve lands would necessarily limit their economic viability, discouraging the development of renewable resource economies. Another challenge is that some Indigenous Nations in British Columbia have numerous small reserves scattered throughout their traditional territories. An Indigenous utility that is restricted to serving only reserve land may not be feasible for these First Nations. The Leq’a:mel First Nation submits that the geographic area served by an Indigenous utility on fragmented Treaty lands should, at a minimum, include land adjacent to the Treaty parcels. BC Hydro expresses concerns about Indigenous utilities serving lands beyond reserves if such service is not subject to the UCA and submits that an appropriate answer to this concern is that Indigenous utilities with exemptions from the UCA should provide service within well-defined geographic areas. In addition, the BCUC should continue to have jurisdiction for the provision of service outside such well-defined geographic areas.

214 Transcript, Vol. 3, Matthew, p. 82.
216 Exhibit C13-2, Collective First Nation Evidence, p. 12; Collective First Nations’ footnote: Examples include Ravenswood on Tseil-Waututh First Nation lands in North Vancouver, Musqueam Nation, Kamloops Indian Band and the Tsawout Nation. There could also be opportunities to provide Utility Services to non-members in remote communities.
217 Ibid. p. 10.
219 Exhibit C9-2, Beecher Bay Evidence, p. 6; Flintoff Final Argument, p. 7; Exhibit C21, Nisga’a Nation Evidence, p. 18; BC Hydro Final Argument p. 12.
221 Exhibit C16-4, FNLC Response to BCUC IR to FNMPIC 6.2.
222 Leq’a:mel Final Argument p. 10; Exhibit C12-2, Westbank First Nation Evidence, p. 2.
223 Leq’a:mel Final Argument pp. 10 – 11. Although Flintoff proposes that special consideration should be given to the wheeling of energy between the District Lands that are scattered: Exhibit C5-2, Flintoff Evidence, p. 21
224 BC Hydro Final Argument, p. 8.
Instead of reserve lands, some participants submit the geographic area served by Indigenous utilities should include the traditional territory of the First Nation that owns the utility\textsuperscript{225} or the land adjacent to each parcel in the case of multiple non-contiguous reserves.\textsuperscript{226} A territorial approach means that the Indigenous utilities would determine their customer base, which reasonably would extend to non-Indigenous people and non-band members residing within the service area of an Indigenous utility.\textsuperscript{227} Some Indigenous Nations consider that an Indigenous utility should have the right to offer its services to persons who seek the benefit of the services, even when they are located off reserve.\textsuperscript{228} In addition to this being a right of self-government\textsuperscript{229}, some Indigenous Nations also consider this to be necessary to promote fairness and consistency among ratepayers in a region.\textsuperscript{230} Section 4.2.1 provides further discussion related to participants’ positions on Indigenous jurisdiction over lands.

Inevitably, traditional territories between Indigenous Nations will overlap, and CFN-GBI considers that territorial disputes should be resolved between the Indigenous Nations, by the courts,\textsuperscript{231} or perhaps even by government direction as noted by CEC.\textsuperscript{232} Adams Lake submits that a First Nation’s authority to regulate the utility within its own boundaries is analogous to a municipality.\textsuperscript{233} Coastal First Nations address the challenge created by trying to extend the geographic limit of the municipal exemption of the UCA to Indigenous Nations:

> In the case of municipalities and regional districts, the UCA relies on a geographic limit - namely, municipal and regional governments are exempted from public utility status for service delivered "within [their] own boundaries". This, effectively, ensures the political accountability that, from a public policy perspective, serves to replace regulation as the constraint on monopoly behavior.

> In the case of Indigenous Nations, however, the overlap between an economically rational utility service area and political accountability may be less clear. Put simply, beyond reserves, the area that an Indigenous utility may wish to serve may include both members of the Indigenous Nation, and non-members.

> This requires an imperfect choice: regulate the utility and violate the principles that justify the exemption of municipal and regional governments, or don’t regulate, and risk monopoly power being exercised over some of the utility's customers.\textsuperscript{234}

\textsuperscript{225} Collective First Nation Final Argument, p. 5.
\textsuperscript{226} Leq’a:mel Final Argument, p. 2.
\textsuperscript{227} Exhibit C16-2, FNLC Evidence, p. 14.
\textsuperscript{228} Exhibit C14-3, Adams Lake Response to BCUC IR 2.2.1; Exhibit C9-2, Beecher Bay Evidence p. 6.
\textsuperscript{229} Transcript, Vol. 10, Morven p. 513.
\textsuperscript{230} Exhibit C14-2, Adams Lake First Nation Evidence, p. 7; Exhibit C9-2 Beecher Bay Evidence p. 6.
\textsuperscript{231} Exhibit C13-9, CFN Response to BCUC IR p. 3.
\textsuperscript{232} CEC Final Argument, p. 8.
\textsuperscript{233} Exhibit C14-2, Adams Lake First Nation Evidence, p. 7-8.
\textsuperscript{234} Exhibit C20-2 Coastal First Nations Evidence p. 6.
4.3.1.5 The Drivers of Indigenous Utilities

Although not specifically contemplated by the OIC, the BCUC has heard a range of perspectives from participants around the unique drivers, objectives or aspirations that an Indigenous Nation may have for wishing to establish a public utility. The Panel notes that many such factors differ from the typical drivers of a “non-Indigenous” utility, and therefore are relevant to the discussion of “defining characteristics.” Participants highlight that Indigenous utilities provide an opportunity to provide self-sufficiency for communities. This includes facilitating economic development in Indigenous communities, providing revenue streams, attracting industry, creating employment, and funds to commit to community priorities. Indigenous utilities may also provide a pathway to improved energy services where communities are currently underserved. In addition, they allow Indigenous Nations to contribute to reducing the impact upon the environment and climate change.

To provide context, the Collective First Nations note that in a survey of 102 BC First Nations, 98% were involved in the clean energy industry or wanted to be.\footnote{Exhibit C13-2, Collective First Nations Evidence, p. 1.}

**Participation in the Economy**

Many participants comment that participation in the energy sector, such as through an Indigenous utility, provides an opportunity for achieving economic development goals within communities and self-sufficiency.\footnote{Exhibit C14-2, Adams Lake Evidence, p. 1; Transcript Vol. 1, McCurry, p. 3, 5; Transcript Vol. 3, Matthew, p. 77; Transcript Vol. 5, Starlund, p. 184; Transcript Vol. 9, Chief Blaney, 399 – 400; Transcript Vol. 9, Robinson, p. 418; Transcript Vol. 10, Obrigewitsch, p. 433.} Corman submits that economic opportunities for First Nations are largely a function of geography, and that for non-urban First Nations, who are the vast majority, one of the few opportunities is from the production of energy.\footnote{Transcript Vol. 6, Corman, p. 310.} Tzeachten First Nation notes it takes taxation, own source revenue (OSR) and servicing for any level of government to be sustainable and successful,\footnote{Exhibit C1-2, Tzeachten First Nation Evidence, p. 2.} while Beecher Bay submits that OSR could be used for community initiatives such as offsetting housing costs, reducing poverty and improving energy security.\footnote{Exhibit C9-2, Beecher Bay First Nation Evidence, p. 5.} Revenue generation may extend beyond utility revenues, for instance in attracting businesses or new housing developments which may in turn generate other revenue streams such as taxation, as well as local development and employment.\footnote{Exhibit C9-2, Beecher Bay First Nation Evidence, pp. 3 – 5; Exhibit C13-2, Collective First Nations Evidence, p. 10; Transcript Vol. 6, Corman, pp. 311 – 314; Transcript Vol. 9, Donkers, pp. 405 – 406; Transcript Vol. 10, Chief Chipps, p. 432; Transcript Vol. 10, Podlasly, p. 457; Exhibit E-6, Tsay Keh Dene, p. 6.} On employment, FNMPC notes that in the US, jobs created in tribal utilities include electricity procurement, operations and maintenance of the electricity system, and customer service roles.\footnote{Exhibit C3-3, FNMPC Evidence, p. 9.} CanGEA provides case examples in New Zealand which demonstrate other socio-economic benefits realized from Indigenous geothermal projects.\footnote{Exhibit C7-2, CanGEA Evidence, pp. 30–36.}

Revenues generated by utilities may be used by a First Nation to address community objectives. For example, FNMPC notes that in the US, revenues generated by utilities are paid back to tribal governing authorities and dedicated to community priorities. Beecher Bay’s intent for the Spirit Bay Utilities is that additional revenue

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\footnote{235 Exhibit C13-2, Collective First Nations Evidence, p. 1.}
\footnote{236 Exhibit C14-2, Adams Lake Evidence, p. 1; Transcript Vol. 1, McCurry, p. 3, 5; Transcript Vol. 3, Matthew, p. 77; Transcript Vol. 5, Starlund, p. 184; Transcript Vol. 9, Chief Blaney, 399 – 400; Transcript Vol. 9, Robinson, p. 418; Transcript Vol. 10, Obrigewitsch, p. 433.}
\footnote{237 Transcript Vol. 6, Corman, p. 310.}
\footnote{238 Exhibit C1-2, Tzeachten First Nation Evidence, p. 2.}
\footnote{239 Exhibit C9-2, Beecher Bay First Nation Evidence, p. 5.}
\footnote{240 Exhibit C9-2, Beecher Bay First Nation Evidence, pp. 3 – 5; Exhibit C13-2, Collective First Nations Evidence, p. 10; Transcript Vol. 6, Corman, pp. 311 – 314; Transcript Vol. 9, Donkers, pp. 405 – 406; Transcript Vol. 10, Chief Chipps, p. 432; Transcript Vol. 10, Podlasly, p. 457; Exhibit E-6, Tsay Keh Dene, p. 6.}
\footnote{241 Exhibit C3-3, FNMPC Evidence, p. 9.}
\footnote{242 Exhibit C7-2, CanGEA Evidence, pp. 30–36.
could help alleviate poverty and improve housing security for community members. Adams Lake notes that any additional revenue that may flow back to the community as a result of operating a local utility system would be significant. Chief McLeod discusses how a project can give people in the community dreams and a sense of ownership that will uplift the community.

We heard numerous accounts of the ongoing hardships that persist in many Indigenous communities, including the lasting impact of residential schools, unemployment, poverty, difficulties paying energy bills, marginalization and other social issues. Participant submissions suggest that Indigenous utilities may provide an opportunity to address some of these issues.

**Improving Energy Security**

Indigenous utilities are also highlighted as a pathway to self-sufficiency from the perspective of improving the quality of the energy service in an environmentally conscious manner. This may include areas that are remote and underserved by existing utilities, which is the case for many Indigenous Nations in BC. For instance, some remote communities wish to reduce dependency on high cost and unreliable diesel generation. Chief Webber notes that the high costs of diesel mean that members have to choose between electricity, warmth and food. CFN-GBI is motivated to shift from diesel by a commitment to protect human health, improve air quality and reduce its contribution to climate change. Tsay Keh Dene notes that due to high electricity costs in remote communities, they must rely on subsidies from government and the utility to maintain supply, and the costs are prohibitive for commercial or industrial enterprises. Matthew highlights that his community currently relies on wood heat and electricity with high electricity bills, and that an Indigenous utility could address needs in the community and surrounding areas. Cawley notes Indigenous utilities could include islanded systems independent from BC Hydro or FortisBC. Chief Michell states that if transmission or distribution lines go down, which is an increasing risk with climate change, “I want the light bulbs at Kanaka Bar to stay on,” and that there is a need for independent power production in various regions.

**Environmental Concerns**

Some participants discuss another factor in Indigenous energy projects, namely, a desire to reduce contribution to climate change and preserving the environment for future generations. For example, speaking about the impact of a solar project in his community, Chief McLeod states “We’ll have a small little piece... and showing the world that we can do something different.” Sayers highlights that the clean energy industry is “[S]mall

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243 Exhibit C3-3, FNMP Evidence, p. 9; Exhibit C9-2, Beecher Bay First Nation Evidence, pp. 4–5.
244 Exhibit C14-3, Adams Lake Response to BCUC IR 7.1.
245 Transcript Vol. 11, Chief McLeod, p. 540–541.
247 Transcript Vol. 6, Moraes, p. 292; Transcript Vol. 9, Chief Webber, pp. 410 – 415; Exhibit C20-2, CFN-GBI Evidence, p. 3; Transcript Vol. 10, Podlasky, p. 457.
248 Exhibit E-6, Tsay Keh Dene Letter of Comment, p. 4.
249 Transcript Vol. 3, Matthew, pp. 88 – 95.
250 Transcript Vol. 2, Cawley, p. 36, 39.
251 Transcript Vol. 6, Chief Michell, pp. 256 – 257, 259.
impact on the environment, and that’s the kind of development most First Nations want to do, a sustainable
development.” Balabanowicz notes a climate lens could be applied to considering utility performance and rate
setting.

Hoy observes that the current situation in BC means utility ratepayers have little to no choice, and that while
there are benefits of the energy grid, a one-size-fits-all solution is not relevant in communities that may want to
improve resiliency, generate a source of economy, and/or work towards self-determination.

Wider Benefits of Indigenous Utilities

KGI notes that in addition to benefits to communities, Indigenous utilities can provide wider benefits to the
province, for example by contributing to overall energy security in BC by providing distributed generation and
alternatives to reliance on single transmission corridors, and having a role in solving regional energy challenges
such as the expansion of the LNG industry in North West BC. In addition, Tsay Keh Dene submits that energy
systems can be implemented within the community which embody the environmental stewardship and
understanding which are intrinsic to Indigenous culture and values, while also creating economic conditions to
enable First Nation communities to begin moving away from reliance on government subsistence funding and
toward self-sufficiency.

4.3.1.6 Other Issues Related to Characteristics

The Nisg̱a’a Nation suggests that the BCUC add the following to the list of “defining characteristics,” as a
threshold consideration: the jurisdiction under which the Indigenous entity operates. This would allow the BCUC
to consider the Nisg̱a’a Nation’s jurisdiction on Nisg̱a’a Lands in determining whether the BCUC has, as a starting
point, jurisdiction to regulate a Nisg̱a’a utility.

4.3.2 Regulation of Indigenous Utilities

Section 3(1)(b)(ii) of OIC 108 asks: Should Indigenous utilities be regulated under the Utilities Commission Act
or under another mechanism, or be unregulated?

Participants in this Inquiry express a range of views on this overarching question, with some advocating that
Indigenous utilities should be self-regulating, others suggesting there needs to be at least some degree of
external regulation, and various parties falling somewhere in-between. The Section below outlines the
benefits and costs of regulation under the UCA expressed by participants, with subsequent subsections
examining different regulatory options brought forward in this Inquiry.

The BCUC notes that Hempling addresses the benefits and costs of utility regulation in a general sense. Participants’ views on this issue are summarized below.

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253 Transcript Vol. 12, Sayers, p. 574.
254 Transcript Vol.6, Balabanowicz, p.307.
255 Transcript Vol. 8, Hoy, p. 382 – 383.
256 Exhibit C6-3, KGI Evidence, p. 5; KGI Final Argument, p. 205.
257 Exhibit E-6, Tsay Keh Dene Letter of Comment, p. 6.
258 Exhibit C21-2, Nisg̱a’a Nation Evidence, p. 9.
259 Exhibit A-8.
Benefits of Regulation

As already noted, the BCUC has stated in previous inquiries that regulation is needed where there are monopoly characteristics and/or public interest concerns, and some participants focus on these issues. BC Hydro submits that regulatory oversight is appropriate for all utilities where there are monopolies (sole service providers in an area), and/or where public interest concerns may be present. BC Hydro considers that public interest concerns include: higher costs for remaining customers of existing utilities; maintaining reliability standards where a utility connects to the BC Hydro system; providing for rates, terms and conditions that reflect the nature of the service purchased by Public Utilities; and the Province’s energy objectives (including ratepayer benefits of BC Hydro heritage assets, and competitive rates). FortisBC submits that the economic and policy rationale for utility regulation – that customers of a monopoly cannot switch supplier if there are excessive rates or poor service – exists regardless of who owns the utility. Waberski submits that if a utility is a monopoly and ratepayers are funding more than direct operating costs, it should be regulated in order to protect the ratepayer, regardless of who owns the utility. Waberski states that with no oversight there is no mechanism for accountability except the courts. Bolton considers that in a monopolistic market, Indigenous utilities should be regulated, but in an open market the market should decide. Knight adds that regulation could ensure safety and public confidence.

CEC is guided by the provisions of the UCA, which state a public utility must provide service that is in all respects adequate, safe, efficient, just and reasonable, and 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. CEC submits these principles are necessary to protect all energy consumers, and should apply regardless of whether a utility is Indigenous or not. CEC says the UCA can be an effective means of protecting the public interest in the absence of competition.

BC Hydro submits that having one set of rules and regulations for all public utilities reduces costs to customers by preventing conflicting decisions from different regulatory bodies, and reduces complexity and uncertainty. BC Hydro submits this promotes efficient development of utility infrastructure which reduces risks of “stranded assets” (where infrastructure becomes unused or underutilized). At present, the BCUC would adjudicate in a situation where a new public utility wants to provide service where an existing utility operates. FortisBC adds on this point that it is generally not in the public interest to have duplicative utility infrastructure as consumers would bear the cost of inefficient service delivery. CEC states that stranded asset risk must be considered in the regulation of Indigenous utilities in existing service areas, and that the UCA is an appropriate way to manage such issues. BC Hydro also notes that if an Indigenous utility operates beyond reserve or Treaty Settlement

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261 BC’s energy objectives are outlined in section 2 of the Clean Energy Act, retrieved from: http://www.bclaws.ca/civix/document/id/consol24/consol24/00_10022_01
262 Exhibit C2-2 BC Hydro Evidence, pp. 2 – 3.
263 FortisBC Final Argument, p. 1
264 Transcript Vol. 10, Waberski, p. 481
266 Transcript Vol. 10, Knight, p. 504.
267 CEC Final Argument, pp. 2, 7.
268 Exhibit C2-2 BC Hydro Evidence, pp. 8 – 9, 12. See also: Exhibit C2-3, BC Hydro Response to BCUC IR 2.1, 2.2
269 FortisBC Final Argument, p. 28
270 CEC Final Argument, p. 7 – 8.
lands, such utilities may be able to “choose” their customers, leaving more costly customers to utilities regulated under the UCA which have an obligation to serve.271

With respect to the inconsistency of two different regulators, BC Hydro provides the example of Nelson Hydro, which is a municipal utility that provides service within and beyond its boundaries, and has an ongoing application with the BCUC requesting a rate increase which proposes a different treatment for its rural customers than for its customers located within the municipality.272 BC Hydro also highlights the positive example of consistent regulation with regards to the BCUC’s recognition of the hybrid nature of BC Hydro and FortisBC, where FortisBC is both a customer of BC Hydro and its own public utility.273 FortisBC also believes that energy consumers in BC are best served by BCUC regulating all public utilities, noting the BCUC’s considerable expertise, and the advantages of having consistent application of decisions based on established regulatory principles and policy.274

Some participants address the need to regulate safety and reliability. Chief Michell states that whether by the UCA or some other means, there needs to be some regulation of safety and reliability, which should be fair, consistent, transparent and honest, though the setting of rates should not be determined by the BCUC.275 With respect to reliability, BC Hydro notes that the Mandatory Reliability Standards (MRS) Program is in place to ensure a minimum measure of reliability and security regarding the North American interconnected electric grid. The BCUC has jurisdiction in BC with respect to MRS regulation, and BC Hydro says that having a common regulator ensures the application of a consistent framework that considers the public interest, prevents lowered quality of service, and fairness of MRS compliance monitoring.276 KGI submits that regulatory oversight would ensure third party review of equipment and operational standards that offer potential investors in Indigenous utilities confidence regarding the long-term viability of any assets.277

FortisBC observes that utilities can also impact the broader public, whether by way of environmental or socio-economic impacts, and that there is value in having one regulator to recognize these broader impacts.278 Furthermore, FortisBC notes that projects are approved when they are in the public interest, and that rates are approved where they are just, reasonable and not unduly discriminatory or preferential. Therefore, FortisBC says that regulation by the BCUC is only an impediment to an Indigenous utility or any other utility taking steps that are contrary to the public interest or treating customers unfairly. In this regard, FortisBC considers regulation under the UCA is compatible with ambitions of an Indigenous utility such as using profits to assist members of the Nation, since utilities are entitled to earn a “fair return.”279

Cawley observes that the current process of regulation is very methodical and broad ranging, and it reaches out and gives people the opportunity to comment, participate and intervene.280

271 BC Hydro Final Argument, p. 8.
272 Exhibit C2-3, BC Hydro Response to BCUC IR 1.1
273 Exhibit C2-3, BC Hydro Response to BCUC IR 1.1.1
274 Exhibit C4-2, FortisBC Evidence, pp. 18 – 19.
276 Exhibit C2-3, BC Hydro Response to BCUC IR 1.1.1
277 KGI Final Argument, p. 19
278 FortisBC Final Argument, p. 8
279 FortisBC Final Argument, p. 23.
Flintoff submits that Indigenous utilities being regulated by the BCUC would clarify their status and that Indigenous Nations could advance projects under a known regulatory framework.\textsuperscript{281}

*Costs of Regulation Under the UCA*

Some participants suggest that to facilitate reconciliation, Indigenous utilities should not be regulated under the UCA. In Section 4.2.1, the BCUC summarizes the positions of those participants that submit they have inherent jurisdiction respecting Indigenous utilities. KGI notes in this regard that regulation will change over time in recognition and accommodation of existing and future Treaty settlements that will fragment control.\textsuperscript{282} It has been highlighted that regulation under the UCA would be contrary to self-determination and self-government by precluding Indigenous Nations from having the ability to set their own laws and oversee their own utilities. Additional perspectives are outlined below.

Several participants submit that the UCA does not account for the unique needs and objectives of Indigenous utilities.\textsuperscript{283} Morven submits that rate applications are primarily reviewed under the UCA on their economic merits, with little accounting for the urgent need for renewable resources and shifting from the adverse impacts of reliance on diesel. Furthermore, some participants suggest that the social and environmental factors that First Nations place weight upon must also be factored into any regulation.\textsuperscript{284} Morven also notes that protecting ratepayers is not the sole guiding factor in regulation, and there should be a focus on the participation of communities and individuals in the governance of Indigenous utilities, and that governance structures of the Nisga’a allow this to a greater extent than the UCA.\textsuperscript{285} The Collective First Nations submit the UCA is designed for the regulation of existing large scale monopolies or near monopolies such as BC Hydro and Fortis and not “green shoot” Indigenous utilities that have yet to establish themselves in an environment dominated by these institutions.\textsuperscript{286} Starlund notes that the BCUC’s mandate to look at all of BC is too broad to help First Nations’ specific issues.\textsuperscript{287} Tsay Keh Dene similarly views the UCA as an outdated piece of legislation which does not reflect the values and reasoning which are the primary drivers behind establishing an Indigenous utility. Further, attempting to control utilities does little to provide the resources, tools, and freedom of autonomy to re-establish the relationship of Indigenous communities with their traditional territory.\textsuperscript{288}

Some participants note that the rate-setting process for Indigenous utilities may operate differently than traditional utilities and account for different objectives, for example funding community development.\textsuperscript{289} By way of example, FNLC submits that Indigenous utilities may need to initially charge higher rates to reflect small size and high start-up costs that are not faced by existing utilities, and that regulatory approvals tend to restrict rate increases.\textsuperscript{290} Roka submits that regarding the resale and distribution of power purchased from a utility such as

\begin{footnotes}
\item[281] Exhibit C5-2, Flintoff Evidence, p. 4
\item[282] KGI Final Argument, p. 20
\item[283] Transcript Vol. 8, Hoy, p. 381
\item[284] Transcript Vol. 10, Morven, p. 517. See also: Exhibit C16-2, FNLC Evidence, p. 10. Exhibit D-3-1, Pembina Institute, p. 4
\item[285] Transcript Vol. 10, Morven, pp. 517, 519
\item[287] Transcript Vol. 5, Starlund, p. 184.
\item[288] Exhibit E-6, Tsay Keh Dene, p. 2 – 3.
\item[290] Exhibit C16-2, FNLC Evidence, p. 10.
\end{footnotes}
BC Hydro, regulation creates a hindrance such as rate controls, and that Bands may wish to charge less in order to attract industry to their lands.291

Beecher Bay submits that the BCUC’s decision not to exempt Spirit Bay Utilities from the UCA had significant consequences, and believes that that the UCA does not recognize or respond to the unique needs and nature of Indigenous utilities. Beecher Bay believes that it is this gap in the UCA that limits Spirit Bay Utilities from realizing its objectives with respect to providing electricity services to Spirit Bay customers.292 Beecher Bay also notes the development of an Indigenous utility sector would allow Beecher Bay Council and other Indigenous governments to do what is best for their communities and to respond to emergent technologies in an effective and flexible manner.293

Leq’á:mel First Nation submits that Indigenous utilities carry considerably more financial risk than existing utilities such as FortisBC and BC Hydro, and that regulation of utility operations on reserve lands could increase this risk to investors.294

Participants also highlight that the BCUC itself is not set up to meet Indigenous needs. Chief McLeod notes that in the development of a project with an Energy Purchase Agreement, the need for BCUC approval creates another roadblock and delay to finishing the project. Further, although regulation isn’t wrong in itself, it needs to be conducted in a way that allows time for proper discussion, understanding and openness.295 Chief Tolmie also observes that while regulation is beneficial to protect stakeholders, it is important to have experts in Indigenous issues such as land rights and the hereditary system that are not covered by usual regulations.296

Some also express that the cost and duration of the regulatory process can pose a barrier to prospective Indigenous utilities, such as the need for lengthy rate applications.297 Obrigewitsch states that the process to seek an exemption from the UCA for Spirit Bay Utilities was daunting, and took more than 18 months and almost a quarter million dollars in legal fees, which is very onerous and uneconomical for a small utility.298 Collective First Nations submit that compliance with the UCA requires extensive expertise and resources.299

Tsay Keh Dene is aiming to implement a biomass plant that would generate heat and thermal energy, and notes that the current model of entering into an Energy Purchase Agreement with BC Hydro disincentivizes a holistic approach to energy management and energy stewardship, whereas if Tsay Keh Dene were solely responsible it could manage the interaction of electric and thermal energy demands within the community and amongst the commercial ratepayers.300

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291 Transcript Vol. 6, Roka, p. 301.
293 Exhibit C9-2, Beecher Bay First Nation Evidence, p. 10.
294 Leq’á:mel First Nation Final Argument, p. 10.
300 Exhibit E-6, Tsay Keh Dene, p. 5.
Some participants do not consider that there is a material risk of stranded assets for existing utilities if Indigenous utilities were not subject to the UCA. CFN-GBI submits that its members’ interests are to engage in the provision of clean energy to industrial facilities planned in their territories, rather than replace BC Hydro services.\textsuperscript{301} The Collective First Nations observe that it is unlikely that Indigenous utilities would compete with or displace existing utility services, due to the cost of building maintaining infrastructure,\textsuperscript{302} except in instances where existing infrastructure is at capacity.\textsuperscript{303} They further note that there is no guarantee that Indigenous utilities will flourish absent regulation under the UCA, but this opportunity must be available to them.\textsuperscript{304}

The Nisga’a Nation does not believe that BCUC regulation is required to manage potential issues related to compelling solutions between an existing utility such as BC Hydro and a Nisga’a utility regulated by the Nisga’a Nation, including safety or Mandatory Reliability Standards. The Nisga’a Nation notes that BC Hydro, with the BCUC’s approval, can establish the terms and conditions to interconnect with customers, and it is unnecessary and inappropriate to try to compel a solution on a Nisga’a utility.\textsuperscript{305}

4.3.3 Regulation of Indigenous Utilities Under the UCA

Section 3(1)(b)(iii) of OIC 108 asks: If it is appropriate to regulate Indigenous utilities under the \textit{Utilities Commission Act}, 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?

Some participants recognize that there may be benefit or a place for some degree of regulation by the BCUC under the UCA. However, most recognize that if the BCUC were to regulate for any length of time that the current framework or process would need to be amended to meet the needs of Indigenous utilities. Comments address the Sections of the UCA that may apply, the degree of regulatory burden, and the overall mandate of the BCUC conferred by the UCA.

Lighter Regulation

Some participants mention the high administrative costs of regulation. KGI submits that it has no problems with the UCA \textit{per se}, but suggests that BCUC has a need to provide low cost regulation because small Indigenous utilities cannot engage in the same way as large utilities.\textsuperscript{306} BC Hydro submits that the BCUC should consider how to reduce the regulatory burden for small utilities, for example with standardized reporting templates, exemptions from parts of the UCA to ease regulatory burden, and streamlined application processes, including reduced evidence requirements.\textsuperscript{307} FortisBC notes that the BCUC’s Thermal Energy System Guidelines provide an example of scaled regulation including more light-handed forms of regulation.\textsuperscript{308} FortisBC believes that in determining the appropriate nature of regulation the considerations for small Indigenous utilities should be

\begin{itemize}
  \item \textsuperscript{301} CFN-GBI Final Argument, p. 10.
  \item \textsuperscript{302} Exhibit C13-2, Collective First Nations Evidence, pp. 9 – 10. See also: Transcript Vol 12, Thompson, p. 658.
  \item \textsuperscript{303} Exhibit C13-9, Collective First Nations Response to BCUC IR 3.1.
  \item \textsuperscript{304} Exhibit C13-2, Collective First Nations Evidence, p. 13.
  \item \textsuperscript{305} Nisga’a Final Argument, p. 17.
  \item \textsuperscript{306} Exhibit C6-3, KGI Evidence, p. 24. See also: Transcript Vol. 10, Waberski, pp. 480 – 481.
  \item \textsuperscript{307} Exhibit C2-2 BC Hydro Evidence, p. 3. Exhibit C2-3, BC Hydro Response to BCUC IR 3.2
  \item \textsuperscript{308} Exhibit C4-2, FortisBC Evidence, p. 18
\end{itemize}
subject to the same considerations as similarly situated non-“Indigenous utilities” as it could create an un-level playing field, and submits that any guidelines should be developed outside of this Inquiry.\(^{309}\)

Some participants suggest there may be a role for the BCUC to regulate Indigenous utilities by acting upon complaints only when other avenues have been exhausted.\(^{310}\) For example, CFN-GBI submits that for Indigenous utilities that are otherwise exempt from the UCA, the BCUC could hear complaints of non-Indigenous customers to ensure they have an avenue to act upon potential discriminatory prices or terms.\(^{311}\) CFN-GBI submits that retaining some jurisdiction on complaints would mitigate issues around “dual regulation” as observed with Nelson Hydro.\(^{312}\) KGI submits that well understood dispute resolution systems exist in First Nations, and that Technical Safety BC has a role in safety; therefore, there is no need for the BCUC to duplicate roles related to customer service and safety. KGI notes that if necessary, the BCUC could be the last step in dispute resolution.\(^{313}\)

**Accommodating the Needs of Indigenous Nations**

Some participants suggest changes to the general decision criteria that the BCUC uses, to recognize the needs of Indigenous Nations. FNLC’s preference is for an exemption for Indigenous utilities. However, it says that if the BCUC is to regulate Indigenous utilities for any length of time, it should be mandated to apply a broad range of criteria to make fair decisions that will contribute to substantive equality and economic reconciliation, in accordance with Aboriginal Title and Rights and UNDRIP. FNLC states that rate approval criteria must take into account the benefits of fostering community capacity and resilience. FNLC notes precedent for decision-making criteria in 2015, when the Ontario Ministry of Energy issued a directive to the regulator to consider the social benefits of a renewable energy project to Whitesand First Nation.\(^{314}\) KGI notes that the public interest will need to expand beyond that solely put forward by the Government of BC to include those interests of Indigenous Nations (and Indigenous utilities) as their treaties rights are recognized.\(^{315}\) CanGEA submits that if an Indigenous utility is regulated, the regulations should recognize socio-economic benefits as well as aspects of self-sufficiency. CanGEA notes that in the case of examples in New Zealand that inclusion of Māori values in NZ’s resource management laws has led to several successful geothermal utility Māori trust and government partnerships, which in turn has led to increased self-sufficiency, economic stimulus, jobs and other opportunities.\(^{316}\)

BC Hydro notes that if the Government wishes to advance or elevate the consideration by the BCUC of a particular provincial policy objective, it may do so by amending the UCA, CEA or issuing other forms of legislation such as an OIC.\(^{317}\)

Some participants identify issues with the BCUC’s approach to rate approvals. CFN-GBI submits that the normal “cost-of-service” form of ratemaking has implications for Indigenous utilities, for example where there are policy

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\(^{309}\) Exhibit C4-3, FortisBC Response to BCUC IR 5.1, 5.2, 6.1  
\(^{310}\) Exhibit C16-2, FNLC Evidence, p. 15.  
\(^{311}\) Exhibit C20-2, CFN-GBI Evidence, pp. 6 – 7.  
\(^{312}\) CFN-GBI Final Argument, p. 6.  
\(^{313}\) Exhibit C6-3, KGI Evidence, p. 9.  
\(^{314}\) Exhibit C16-2, FNLC Evidence, p. 11, 13.  
\(^{315}\) Exhibit C6-6, KGI Response to CEC IR 1.2.  
\(^{316}\) Exhibit C7-2, CanGEA Evidence, 28, 30-36, 39.  
\(^{317}\) Exhibit C2-3, BC Hydro Response to BCUC IR 5.3
initiatives such as favourable financing, taxation, or capital contributions. CFN-GBI notes that at present, such means of support would translate to a reduced rate of return, which would favour the utilities’ customers but would defeat the purpose of encouraging Indigenous economic development. Therefore, the form of BCUC regulation should avoid this outcome, noting that benefits of economic development may also be key to the business model or part of reconciliation or accommodation packages. CFN-GBI does not anticipate that its recommendation would require a change to the UCA, noting that section 59(4) specifies that whether or not rates are just and reasonable is a “question of fact” of which the BCUC is the “sole judge.”

Chief Michell provides the example of providing free energy to band members, and that there may not be a need to make a percentage on top of investment, therefore the BCUC should not say what the rates charged should be.

**Areas of Consistency with Other Utilities**

Chief Michell adds that there needs to be some regulation of safety and reliability for Indigenous utilities. Matthew also notes that while the BCUC was not set up with First Nation decision making, it is important to have standardization around safety and reliability.

BC Hydro submits it is supportive of a different regulatory framework for Indigenous utilities on reserve lands and current Treaty Settlement Lands, if the BCUC retains jurisdiction over Mandatory Reliability Standards and other safety and reliability provisions, and the power to compel solutions to disputes between utilities. BC Hydro also notes other considerations regarding new utilities within BC Hydro’s service area, such as ensuring BC Hydro’s ratepayers do not bear the cost of new assets or assets dispossessed by BC Hydro.

Flintoff submits that all parties should be treated equally under the UCA for a level playing field for all utilities including Indigenous utilities.

**4.3.4 Regulatory Options for Indigenous Utilities if Not Regulated by the BCUC**

Section 3(1)(b)(iv) of OIC 108 asks: If it is not appropriate to regulate Indigenous utilities under the *Utilities Commission Act* but is appropriate to regulate Indigenous utilities in some manner, how should Indigenous utilities be regulated?

The first subsection below discusses participants’ submissions regarding the mechanism by which Indigenous utilities could be relieved from regulation under the UCA. The following subsections provide a summary of positions regarding potential regulatory structures that could emerge in the absence of regulation under the UCA.

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318 Exhibit C20-2, CFN-GBI Evidence, pp. 9 – 10.
319 CFN-GBI Final Argument, p. 9.
320 Exhibit C20-4, CFN-GBI Response to BCUC IR 5.1
323 Transcript Vol. 3, Matthew, p. 84.
324 Exhibit C2-3, BC Hydro Response to BCUC IR 1.4
325 Exhibit C5-2, Flintoff Evidence, p. 20
4.3.4.1 Exception Similar to the Municipal Exception

Under the UCA, there are a number of exceptions from the definition of a “public utility” which relieve utilities from regulation under the UCA, one such exception being “a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries” (municipal exception). Many participants believe that there should be similar but distinct, treatment for Indigenous utilities.

It was noted that municipalities and regional districts are accountable to their citizens; if citizens are also customers of a municipal utility they have the opportunity to demand improvements to their service. Several participants reason that the municipal exception serves as a model that could or should be adopted in a similar manner for Indigenous utilities, as a mechanism for providing relief from regulation under the UCA. For example, Sauder states “we are capable of doing the same things that other communities do. And certainly municipalities run private utilities, and we are capable of doing the same thing.”

CFN-GBI submits that current exceptions from the definition of a “public utility” under the UCA reflect the legislature's choice that the BCUC is just one mechanism for over-seeing monopolies, and that the municipal exception establishes that it is reasonable to defer pricing and service decisions from one level of government (i.e. the Province) to another. Some go further and state that Indigenous Nations have greater rights to an exemption than a municipality. For instance, Adams Lake submits that whereas a municipality only has delegated authority, Indigenous governments have authority from sources such as inherent rights protected by s. 35 of the Constitution Act, 1982. Morven submits that if reasoning can be applied to autonomy of municipal government structures, “the rights of self-governing nations like the Nisga’a Nation must be upheld.”

Some participants highlight that with respect to the Income Tax Act, band councils have been found to constitute municipalities and granted the same exemptions as municipalities. However, it was also noted that any exemption from the UCA should clearly distinguish between First Nations and municipalities/regional districts, Nisga’a Nation submits that this should also include an express amendment for utility services provided by the Nisga’a Nation due to its powers and law making authority under the Nisga’a Treaty.

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327 Note that some participants use the term “exemption” to mean the same as the exclusion. In the language of the UCA, an exemption refers to an order which must be granted under section 88(3) of the UCA, whereas an exception means that a party is not defined as a “public utility” such as a municipality. Exemptions are discussed in the next subsection.
329 Transcript Vol. 10, Sauder, pp. 441–442
330 Exhibit C20-2, CFN-GBI Evidence, p. 5
332 Transcript Vol. 10, Morven, p. 515.
335 Exhibit C21-3, Nisga’a Nation Evidence, pp. 1, 16, 17.
FNLC submits that exempting Indigenous utilities from regulation on the same basis as municipalities would require careful discussion and support to ensure that Aboriginal Title and Rights are upheld, Indigenous governance and legal processes are respected, and at the same time ensure that viable dispute resolution and appeal procedures are available to ensure Indigenous ratepayers’ interests are protected.\footnote{Exhibit C16-2, FNLC evidence, p. 14.}

Some participants note that any such exception raises the question of what would constitute the “boundaries” within which an Indigenous utility provides services,\footnote{Exhibit C16-2, FNLC Evidence, p. 14. Exhibit C5-2, Flintoff Evidence, p. 10. Exhibit D-3-1, Pembina Institute, p. 3} and while some prefer an exception to apply to services on traditional territory, others recognize an exception may initially only apply to reserve or Treaty lands. FortisBC notes that like the boundaries of a municipality, the boundaries of reserve/Treaty lands are generally well-defined. On the other hand, Indigenous “traditional lands” remain less-clearly defined (i.e. uncertain) and are more-readily subject to overlapping claims, which would add unintended complexity. CFN-GBI notes that the overlap of political accountability and utility service area may be less clear for Indigenous utilities than municipalities.\footnote{Exhibit C4-6, FortisBC Response to Flintoff IR 3.1} CFN-GBI therefore recommends that Indigenous utilities should not be subject to the UCA if the majority of the customer base are members of the First Nation/Band.\footnote{Exhibit C20-2, CFN-GBI Evidence, pp. 6 – 8.}

Along a similar vein, co-operatives (whereby the customers themselves own shares in the utility) could also be self regulated, as such institutions lack the profit motive that produces undesirable monopolistic behaviors.\footnote{Exhibit C20-2, CFN-GBI Evidence, pp. 6 – 8.}

Providing certainty to Indigenous Nations through an exception is also raised. The Nisga’a Nation maintains that it has lawmaking authority to regulate a Nisga’a utility, but submits that an exception from the definition of “public utility” would assist in providing regulatory certainty on Nisga’a Lands, while respecting Nisga’a Nation’s jurisdiction to organize its own affairs. Further, reconciliation cannot be achieved if steps are not taken to give effect to government-to-government relationship.\footnote{Exhibit C21-4, Nisga’a Nation Response to BCUC IR 2.1. See also: Exhibit C13-2, Collective First Nations evidence, p. 12} CFN-GBI submits clarity around the regulation of co-operatives would assist with considerations of how to participate in energy markets going forward.\footnote{CFN-GBI Final Argument, p. 8.} Collective First Nations note that the alternative to an exception may be to go to the Supreme Court of Canada.\footnote{Transcript Vol. 12, Austin, p. 628.}

In addition to the municipal exception, the definition of “public utility” in the UCA excludes landlords that provide service to tenants with terms of five years or less.\footnote{There also exists a separate exemption for landlords that provide service to tenants with terms of more than five years} Roka notes that Bands could be considered similar to landlords for the purposes of buying power as a single customer and distributing power on their lands without regulation under the UCA.\footnote{Transcript Vol. 6, Roka, pp. 301 – 306.} Flintoff agrees and notes that the Vancouver Airport Authority is a similar example.\footnote{Exhibit C5-2, Flintoff Evidence, p. 25.}
4.3.4.2 Case-by-Case Exemptions from the UCA

Under section 88(3) of the UCA, with Ministerial approval the BCUC can exempt a specific public utility or a “class” of public utilities from some or all of the obligations under the UCA. An exemption under section 88(3) is an alternative means to an “exception” or exclusion for providing regulatory relief to Indigenous utilities. However, an exemption does not change the definition of a “public utility” and is granted in the discretion of the LGIC upon the recommendation of the BCUC in accordance with established criteria.

CFN-GBI notes that these exemption provisions offer the BCUC and the minister broad powers to tailor regulation on a case-by-case basis to address any unique needs of Indigenous utilities that may arise, while still balancing customer-protection interests. BC Hydro supports exemptions being considered on a case-by-case basis to reflect the unique context and presence of factors that support exemption. However, FNLC submits the exemption process is time-consuming, legally expensive and administratively burdensome to small Indigenous utilities, and does not always lead to success. FNLC further notes a piecemeal approach does not afford Indigenous governments with the special constitutional recognition they have under section 35 of the Constitution Act, 1982.

FortisBC provides a framework for regulation of Indigenous utilities that contemplates exemptions in certain circumstances. FortisBC submits that rather than developing a regulatory scheme tied to a definition of an “Indigenous utility,” this should be focused on the underlying policy rationale for public utility regulation, for example consumer protection. FortisBC says that a utility should receive a section 88(3) exemption from Part 3 of the UCA if an Indigenous Nation has a controlling interest, and only serves Indigenous peoples that have a say in the governance of the Nation. FortisBC says this is justified because monopoly characteristics are mitigated as every customer has a say in the governance of the utility owner, consistent with the exclusion of municipal utilities from the UCA. FortisBC submits that the Spirit Bay decision highlights the importance of all customers having suitable recourse if an exemption from the UCA is to be considered. Collective First Nations submit that it is not clear why an entitlement to vote results in municipal councils being: “... accountable to ratepayers for the performance, including rates, of the municipal utility,” because commercial and industrial ratepayers of municipal utilities don’t have a right to vote. FortisBC notes the municipal exemption is not a perfect fit for Indigenous utilities, and that the municipal exemption is overly broad from a consumer protection perspective. FortisBC says this “shortcoming” can be addressed in the context of Indigenous utilities based on its proposed framework.

FortisBC suggests that there should be further categories for section 88(3) exemptions, where an Indigenous utility operates on modern Treaty lands or self-government agreements contemplate the exclusion of BCUC.

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347 Exhibit C20-2, CFN-GBI Evidence, p. 16.
348 Exhibit C2-3, BC Hydro Response to BCUC IR 4.1
349 Exhibit C16-2, FNLC Evidence, p. 13.
350 Exhibit C4-2, FortisBC Evidence, pp. 7, 12, 13.
351 Exhibit C13-2, Collective First Nations Evidence, p. 15
352 Exhibit C4-3, Response to BCUC IR 2.1
353 FortisBC Final Argument, pp. 7 – 8.
jurisdiction, and where customers own the utility in a co-operative model.354 FortisBC says that any exemption should be granted on the condition that there is a duty to serve.355

The Collective First Nations submit that a faster route to change could be a Ministerial Order.356

The following subsections further explore submissions related to the options for Indigenous utility regulation in the event of an exception/exemption from the UCA.

4.3.4.3 Self-Regulation

Some participants have submitted that it should be up to the Indigenous Nation(s) that owns or operates the Indigenous utility to determine how the utility is run. Examples were provided regarding the means by which ratepayer concerns could be addressed or mitigated, and the capability of Indigenous Nations to administer utility services, including the parallels with other services that are already administered by Indigenous Nations. Some examples of how self-regulation of an Indigenous utility may work are described below from the perspectives of different Indigenous Nations and groups.

Adams Lake has assessed and applied property taxes since 1995, and that authority applies to interests held by non-Indigenous leaseholders. Adams Lake submits that its commitment to developing business partnerships with leaseholders reflects its core values regarding non-members of Adams Lake, and that this would inform dealings concerning rate structures and utility charges between the Nation and its leaseholders. Adams Lake adds that often, Indigenous and non-Indigenous communities have shared concerns, such as reliable energy security, and an Indigenous utility would provide a means to entice new business developments.357 Adams Lake states that “[r]egulatory fairness promotes business and economic development.” For off-reserve services offered, Adams Lake says a service agreement can have rates set out and detailed, including annual increases to fees, much like other servicing agreements. Servicing agreements can be extremely comprehensive and include alternative dispute resolution mechanisms.358

Beecher Bay states that applicable regulatory legislation, such as the 2003 Land Code enacted pursuant to the First Nations Land Management Act, includes processes and procedures to ensure fairness and transparency to ratepayers. Beecher Bay submits that there is no principled reason why Indigenous power utilities should be barred from self-regulation, which is to say regulation in accordance with applicable statues, Indigenous laws, and common law principles regarding service fees and user charges. Beecher Bay is already administering property taxes for non-member residents in the Spirit Bay Development, and is committed to maintaining positive relationships with non-members. Beecher Bay considers that its success as a community depends on fair and reasonable taxation rates and processes, which would also be true for utility services.359 Beecher Bay

355 FortisBC Final Argument, p. 20. The duty/obligation to serve is the obligation to (a) provide the services defined by its franchise agreements and its statute, (b) maintain quality levels defined by commission rule, and (c) comply with commission rules and orders. Exhibit A-8, Hempling Report on Regulation, p. 9
356 This would be issued pursuant to section 22 of the UCA to exempt Indigenous utilities from Part 3 and section 71 of the UCA. Collective First Nations, Final Argument p. 12
357 Exhibit C14-2, Adams Lake Evidence, pp. 3 – 4.
358 Exhibit C14-3, Adams Lake Response to BCUC IR 3.1 – 3.2. Response to CEC IR 1.1
359 Exhibit C9-2, Beecher Bay First Nation Evidence, pp. 7 – 8.
adds that decisions leading to disputes between Indigenous and non-Indigenous ratepayers would not be in the best interests of an Indigenous community.  

The Collective First Nations prefer to pass their own laws regarding Indigenous utilities on their territory, and note that such flexibility may mean that utilities do not follow the traditional cost-causation model. It was observed that BC Hydro’s residential customers do not pay a proportionate share of costs in their rates. Additionally, that if self-regulating, First Nations would be very conscious of their members and those that live on their lands, and that the common law would provide a mechanism to protect ratepayers. Sayers adds that doing things that are best for members and those that live on their lands is something that every government is committed to, stating “I can’t see anybody trying to gouge our members, especially in light of the high unemployment and... the social situations we find ourselves in.” Austin also notes that the FNLM requires that there be “identification or a forum for the resolution of disputes in relation to interest or rights in First Nation land.”

Leq’á:mel First Nation submits that there are safeguards in its governance standards that provide recourse to consumers who contest its laws, regulations and Land Code. Services provided to non-band members are provided on the same terms (without discrimination) as to band members and all customers/tenants have access to the same dispute resolution process, which is a required provision of a First Nation’s Land Code, and similar to recourse available under the UCA. Leq’á:mel First Nation notes that a tenant or customer would also have access to the courts, as would any customer of BC Hydro or FortisBC should a dispute not be remedied through the BCUC.

The Nisg̱a’a Nation outlines that under the Nisg̱a’a Treaty, Nisg̱a’a Lisims Government must ensure appropriate procedures for the appeal or review of administrative decisions of Nisg̱a’a Public Institutions, and that recourse is available to Nisg̱a’a citizens and non-Nisg̱a’a residents on Nisg̱a’a Lands. There are also provisions in the Nisg̱a’a Treaty that would ensure participation in ratemaking for a Nisg̱a’a utility.

FNLC says that First Nations have governmental authority and dispute resolution processes that could be put in place for a utility. FNLC submits that a self-regulating Indigenous utility would engage with stakeholders when setting rates, which would be submitted for approval by the Nation’s governance arm. This would enable Indigenous governments to develop or use their own internal governance models to provide recourse to ratepayers. Some Nations may need funding to develop dispute resolution structures. If an Indigenous Nation’s dispute mechanisms were exhausted, the BCUC could potentially retain a complaints-only function, or alternatively a First Nations body could be established.

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360 Exhibit C9-3, Beecher Bay Response to BCUC IRs 3.1 – 3.4.  
362 Transcript Vol. 12, Sayers, p. 572.  
363 Transcript Vol. 12, Austin, p. 609.  
364 Leq’á:mel First Nation Final Argument, p. 11.  
Tzeachten First Nation notes that it already administers and monitors sanitary and water services, which has created ability and capacity within Tzeachten’s government organization.\(^{367}\)

Westbank First Nation highlights that its lands are home to over 10,000 non-member residents on two Indigenous reserves, and that for more than ten years, it has maintained an accountable and transparent government to both Westbank First Nation Members and the greater non-Member population.\(^{368}\)

FN MPC observes that in the US, tribal utilities’ jurisdiction applies only within reservation boundaries, and that while they have the option of servicing off-reservation customers this would be subject to state utility regulators. However, FN MPC note that US reservations are generally significantly larger than B.C. First Nations reserves.\(^{369}\)

### 4.3.4.4 Indigenous Utilities Body

Some participants suggest the potential for an Indigenous-led regulatory body that would provide some degree of regulatory oversight, co-ordination and/or support to Indigenous utilities independent of the BCUC.

FN LC recommends the research and development of legislation creating an independent Indigenous Utilities Commission (IUC), led and directed by First Nations organizations, to provide expert guidance to Indigenous utilities in BC as well as acting as a quasi-judicial body with similar functions to the BCUC, and empowered by statute to operate independently from government. The IUC, however, would have a diversified mandate to consider the unique circumstances of Indigenous utilities and to support First Nations decision-making and dispute resolution structures according to their own legal orders. FN LC notes that more consultation is needed to understand to what extent these regulatory structures should be available on an opt-in basis, and to what extent they should be binding on Indigenous utilities. FN LC submits that a plan should be made to move funding put towards subsidizing fossil fuel dependency towards the IUC’s operations, and training and capacity building for First Nations. FN LC notes that an IUC would assist in transitioning First Nations towards full jurisdiction.

In support of the IUC model, the FN LC also provides examples of existing shared-governance public institutions that provide specialized infrastructural, administrative, and legal support to diverse First Nations, such as the First Nations Tax Commission, the First Nations Finance Authority, the First Nations Health Authority, and the development of Environmental Assessment processes by several First Nations that complement and enhance provincial environmental legislation.\(^{370}\)

FN MPC notes that in the US, utility-owning tribes have organized a number of tribal utility associations that provide technical, group procurement, political advocacy and access to legal-type services for tribal members. Such associations allow the sharing of operational experiences, skills, and best practices with one another. FN MPC encourages the formation of a BC Indigenous utility association that would act in a similar manner, and to begin a dialogue on how concurrent BC Crown and Indigenous jurisdictions might operate within the

\(^{367}\) Exhibit C1-2, Tzeachten First Nation Evidence, p. 1

\(^{368}\) Exhibit C12-3, Westbank First Nation

\(^{369}\) Exhibit C3-3, FN MPC Evidence, p. 8

\(^{370}\) Exhibit C16-2, FN LC Evidence, pp. 15 – 17.
province. With regards to how an IUC could operate in BC, Wilson suggests than an IUC would need to have a sub-regional approach to reflect the different issues faced by First Nations across the province.

Donkers notes that with existing First Nations bodies such as the First Nations Tax Commission and Lands Advisory Board, it is helpful to have some regulations in place to help First Nations make their own laws within these areas, while Sauder notes these bodies are useful resources and provide a place to address questions that arise.

Starlund suggests that First Nations may need to act co-operatively to form a viable utility, and that such a co-operative may also act as some form of regulatory body.

Adams Lake suggests, an administrative body that is constituted by the Indigenous community and driven by Indigenous laws, principles and knowledge would be best positioned to offer support to Indigenous utilities. Adams Lake notes that while BCUC has technical expertise, it does not have expertise in Indigenous legal systems, culture, rights and history.

4.3.4.5 BCUC Support to Indigenous Utilities

Some participants suggest potential regulatory solutions that could make use of resources or frameworks provided by the BCUC, but in a way that is tailored to Indigenous Nations and separate to regulation under the UCA.

Tsay Keh Dene believes that a new legislative instrument, an "Indigenous Utilities Act," would provide an appropriate framework for regulation of an Indigenous utility. The mandate BCUC could include providing a clear understanding of the goals, challenges, and rewards of supporting First Nations in reassuming control of their own energy infrastructure and maximizing the benefits and opportunities associated with energy self-sufficiency, while maintaining safety and reliability for energy users. Tsay Keh Dene submits the primary focus of regulation should be to ensure that First Nations communities have access to safe and reliability energy as a right.

The Nisg̱a’a Nation notes that in the development of its own laws around the regulation of a Nisg̱a’a utility, it could choose to incorporate by reference regimes like the UCA, or to contract with the BCUC to regulate a utility. Similarly, Leq’á:mel First Nation submits that certain provisions of the UCA could possibly be embodied in the Land Code or other appropriate documents.
Beecher Bay submits that where an Indigenous utility is operating on lands beyond its jurisdiction, one option would be co-management agreements whereby the BCUC and an Indigenous Nation incorporate Indigenous laws and processes into the regulation of utility services.379

Beecher Bay and Adams Lake do not view the BCUC as the appropriate regulator for Indigenous utilities, but believe that the BCUC could provide valuable resources to help build Indigenous expertise and capacity with respect to complaints and safety issues. By providing support without imposition, BCUC would be laying the groundwork for an authentic demonstration of reconciliation and working with Indigenous Nations on a government-to-government basis.380

Some participants also suggest that it might be possible to have an Indigenous arm of the BCUC that would be better equipped to provide expertise in Indigenous issues and facilitate better working relationships with Indigenous peoples.381

4.3.5 Ceasing to be an Indigenous Utility

The final question of OIC 108 - Section 3(1)(b)(iv) - asks: If an Indigenous utility is not regulated under the Utilities Commission 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?

Some participants address this question from the perspective of potential approvals that would be needed, on the presumption that “ceasing to be an Indigenous utility” would involve some form of sale of Indigenous interests. CFN-GBI states:

Rather, as with the Utilities Commission Act's operation today, ‘if a person is proposing to provide a service for which regulation is implicated, the person must seek the necessary regulatory approvals - among other things, a Certificate of Public Convenience and Necessity and the approval and filing of rate schedules. CFN expects that the same positive obligation on the utility could apply in cases where a utility lost any regulatory relief it may have to provide service as an Indigenous utility.382

BCUC could seek to require notification rather than authorization of an Indigenous utility sale, if BCUC has or is given jurisdiction to do so.383 Flintoff submits that the Indigenous utility may also have to apply to the federal government for approval of a sale.384 The Collective First Nations say that an application should not be required, but post-sale the utility should be subject to regulation under UCA.385

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379 Exhibit C9-3, Beecher Bay Response to BCUC IRs 3.1-3.4.
380 Beecher Bay/ Adams Lake Final Argument, p. 8
382 Exhibit C20-2, CFN-GBI Evidence, p. 18.
383 Exhibit C20-2, CFN-GBI Evidence, p. 18.
384 Exhibit C5-2, Flintoff Evidence, p. 25.
385 Exhibit C13-2, Collective First Nations Evidence, p. 22
Chief Michell notes that things that are built for the community are to be owned by the community for the next thousand years, and are not built for sale to the market.\textsuperscript{386} In other words, this question would never arise for his community.

### 4.4 Other Issues Related to Indigenous Participation in the Utility or Energy Sector

Through the course of the Inquiry, a number of broader issues related to Indigenous involvement in the energy sector were raised, such as access to the grid, energy policy decisions that have impacted potential Indigenous projects, and capacity constraints in Indigenous communities wishing to become more involved in the energy sector.

Although some of this discussion relates to independent power producers\textsuperscript{387} that may be owned by Indigenous Nation(s), which are not specifically within the terms of reference for the Inquiry, the Panel notes that it is important to examine the broader context of Indigenous participation in the energy sector as part of any conversation about the future regulation of Indigenous utilities.

#### 4.4.1 Access to transmission grid and other markets

A number of participants raise concerns that any constraints upon the lands such utilities can serve would limit the available market and potential viability of such utilities. Some participants voice concerns that current barriers to accessing markets beyond their lands via the bulk transmission system in BC (mostly operated by BC Hydro) also provide a barrier to the viability of Indigenous utilities.

As noted by BC Hydro, there is currently a ban on “retail access” in the province, which means that a utility other than BC Hydro cannot use the BC Hydro transmission and distribution infrastructure to sell power to customers that are in BC Hydro’s service area.\textsuperscript{388} However, BC Hydro highlights that a power producer in BC can still access BC Hydro’s transmission system for the purpose of selling power to a wholesale customer connected to the BC Hydro system, e.g. another public utility, or to an entity based within or outside BC that is not a retail customer of BC Hydro. BC Hydro provides a description of the requirements for connecting to the grid, including relevant studies to be completed, and other tariffs that need to be followed.\textsuperscript{389}

Some participants express the concern that Indigenous utilities may not be able to achieve sufficient scale if they are limited to only serving their community due to the potentially small customer base, and that they require access to other customers via the transmission grid.\textsuperscript{390} Starlund notes that First Nations do not comprise a large enough internal market to attract financing for a project individually, and that there is a need for a co-operative approach between First Nations to build scale, which in turn requires grid access.\textsuperscript{391}

\textsuperscript{386} Transcript Vol. 6, Chief Michell, p. 271.
\textsuperscript{387} An independent power producer (IPP) generates and sells energy to a utility or wholesale buyer, however an IPP is not generally regulated as a “utility”.
\textsuperscript{388} Exhibit C2-2 BC Hydro Evidence, pp. 13 – 14.
\textsuperscript{389} Exhibit C2-3, BC Hydro Response to BCUC IR 8.1
\textsuperscript{390} Transcript Vol. 6, Corman, p. 322. Transcript Vol. 10, Bolton, p. 492. Exhibit C13-2, Collective First Nations Evidence, p. 11
\textsuperscript{391} Transcript Vol. 5, Starlund, p. 181, 187.
Gemeinhardt adds that this co-operative approach may improve the negotiating position of First Nations.\(^{392}\) Some First Nations wish to market electricity with other products such as carbon credits or renewable energy certificates,\(^{393}\) and highlight the possibility for selling into markets outside of BC such as the USA.\(^{394}\) Austin submits that the cost of transmission poses a challenge with respect to building projects specifically for exporting energy.\(^{395}\)

KGI submits that Indigenous utilities are de facto Crown corporations as they operate to meet the objectives of Indigenous governments, and should therefore enjoy access to the market on par with a Crown corporation like BC Hydro. KGI suggests that oversight of market access should be managed by an agency independent of the incumbent energy supplier, which could be the BCUC or another agency. Furthermore, the access tariff should recognize the actual transmission costs and benefits such as end-of-line generation, which is not currently the case with BC Hydro’s Open Access Transmission Tariff.\(^{396}\) KGI also suggests that room be made for a small entry for Indigenous utilities into BC Hydro’s or FortisBC’s existing markets.\(^{397}\) KGI proposes that Indigenous utilities should be granted an exemption so that full or partial retail access is available where BC Hydro has not been able to provide reliable service.

CFN-GBI recognizes that utilities may technically seek wheeling services on BC Hydro’s system, but that such services are generally impractical for small customers due to cost and rate design, and the complexity of booking transmission on BC Hydro’s OASIS\(^{398}\) system. Thus, making it easier to use the transmission system is a reasonable objective in the context of reconciliation.\(^{399}\)

Some participants also highlight that the transmission grid in BC was largely built on First Nations’ traditional territory without consent, and that consequently First Nations should be able to access that grid.\(^{400}\) While noting it may be beyond the scope of the Inquiry, CFN-GBI submits that as a matter of policy, BC should take actions that ensure Indigenous utilities and customers can benefit from BC Hydro’s Heritage Assets including access to an allocation of energy and capacity.\(^{401}\)

CanGEA suggests that the BCUC should consider recommending that BC Hydro actively seek out First Nations projects or partner with First Nations on new utility projects in areas that lack energy security.\(^{402}\)

\(^{392}\) Transcript Vol. 5, Gemeinhardt, pp. 208 – 209.
\(^{395}\) Transcript Vol. 12, pp. 587 – 588.
\(^{396}\) Exhibit C6-3, KGI Evidence, pp. 11, 12, 23
\(^{397}\) Transcript Vol. 12, Thompson, p. 662661662
\(^{398}\) Open Access Same-time Information System (OASIS) allows registered users to make reservations for transmission service on the BC Hydro transmission system.
\(^{399}\) CFN-GBI Final Argument, p. 10
\(^{400}\) Transcript Vol. 5, Starlund, p. 182. Transcript Vol. 8, Thompson, p. 369.
\(^{401}\) Exhibit C20-2, CFN-GBI Evidence, p. 15. See also: Transcript Vol. 3, Matthew, p. 82
\(^{402}\) CanGEA Final Argument, pp. 19 – 20.
4.4.2 Policy Decisions Affecting the Viability of Indigenous Energy Projects

Some participants express that recent policy decisions in BC, such as the construction of the Site C dam and the closure of the Standing Offer Program have significantly affected the viability of Indigenous utilities or independent power projects.

The decision of the Provincial Government to proceed with the construction of the Site C dam was cited as having a negative impact on the viability of smaller projects, with some active projects being discontinued. Chief Blaney submits that the energy concentrated into the Site C dam could have been distributed through all of the First Nations around the province.\(^{403}\) Thompson submits it is unfair that the decision to construct the Site C project was exempt from BCUC review, but enjoys BCUC protection.\(^{404}\)

Furthermore, the closure of the SOP has affected the viability of a number of projects by removing the opportunity to sell power to BC Hydro at a known price that provides financial security.\(^{405}\) KGI submits that the SOP was a relatively simple means of market access that required developers to recognize First Nations’ rights within traditional territory, and conferred real economic benefit. KGI submits the closure of the SOP program is contrary to commitments to UNDRIP and the TRC’s Calls to Action.\(^{406}\) The Collective First Nations submit that the suspension of the SOP means the BC Government is not living up to its own objective “to foster the development of first nation and rural communities through the use and development of clean or renewable resources”, as outlined in section 2(l) of the Clean Energy Act.\(^{407}\) Judith Sayers notes that the SOP and Indigenous utilities may not necessarily be exclusive, rather, that Nations would look at whatever opportunities are available that best provide economic development.\(^{408}\)

Starlund notes the importance of policy continuity in successive governments and co-operation between different levels of government.\(^{409}\)

CFN-GBI observes that for the legal and policy questions addressed in this Inquiry to be relevant, first there needs to be Indigenous utilities, and notes that the record for the Inquiry highlights the opportunities and obstacles facing First Nations seeking to enter the energy sector in the Province.\(^{410}\)

4.4.3 Capacity Issues for Indigenous Nations

Some participants highlight that some Indigenous Nations may not have the current capacity required to develop an Indigenous utility or energy project independently, for instance Chief Michell states “[e]very community I know is experiencing deficiencies in people, time, technology and money.”\(^{411}\)

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\(^{403}\) Transcript Vol. 5, Starlund, p. 182 – 183. Transcript Vol. 9, Chief Blaney, p. 392

\(^{404}\) Transcript Vol. 12, Thompson, pp. 664 – 665.


\(^{406}\) KGI Final Argument, p. 5

\(^{407}\) Exhibit C13-2, Collective First Nations Evidence, p. 2

\(^{408}\) Transcript Vol. 12, Sayers, pp. 584 – 585.

\(^{409}\) Transcript Vol. 5, Starlund, p. 183, 191

\(^{410}\) CFN-GBI Final Argument, p. 13

CanGEA highlights the 2017 study “First Nations and Renewable Energy Development in British Columbia” which indicates that 75% of survey respondents have projects in mind but are unable to pursue them due to three main barriers, with one of them being the lack of community readiness.412

4.4.4 Other Issues

The Panel heard from participants on a number of additional topics, some of which are beyond the scope of this Inquiry. Nevertheless, we recognise the importance of these matters and whilst we will not provide recommendations on these issues, we wish to acknowledge them:

• **Reconciliation with BC Hydro.** Adams Lake Indian Band and other members of the Secwepemc Nations are signatories to a protocol agreement with BC Hydro. The purpose of the protocol agreement is to guide reconciliation efforts between the parties including through the development of a reconciliation framework which may lead to new social, economic, and environmental arrangements between the parties.413 This is not the only type of such an agreement. BC Hydro also has similar agreements with 13 other First Nations. These agreements are similar in nature to the Secwepemc Nation Relationship Protocol Agreement and establish how BC Hydro will work with each First Nation and how BC Hydro will advance key interests such as: archaeology and cultural heritage, engagements, employment and training, etc.414

• **Zone 2 rates from BC Hydro.** The BCUC heard issues around zone 2 rates charged by BC Hydro to non-integrated communities in BC. For example, Tsay Keh Dene is in a non-integrated zone and submits that the subsidized zone 2 rate fails to reflect the real costs of energy as powered by the diesel power generators. Tsay Keh Dene has a proposed biomass energy plant which it states can outperform the current diesel generation model. However, it is finding it challenging to create a simpler energy transaction and cost structure due to the “intricate framework of funding” that currently covers the cost to provide energy. Rather, Tsay Keh Dene proposes a new funding framework to break down funding streams and reallocate them.415

• **Inclining block rate (two tier system).** Similarly, at a rate payer level Chief Webber of the Nuxalk Nation describes how the two-tier rate system causes a lot of issues for First Nations living in remote communities particularly with some community members being cut off as they cannot keep up with their BC Hydro bills.416 Chief Webber recommends that the tier system should be eliminated and a uniform rate should be implemented which is more affordable.

• **Taku River Tlingit project.** Collective First Nations flag a potential issue regarding a project to sell energy to Yukon Energy Corporation which includes the construction of a transmission line. Approval of this transmission line on Crown land would not be allowed unless it is regulated by the BCUC.417 Therefore, if this Inquiry recommends that Indigenous owned utilities including Taku River Tlingit should not be

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Michell, pp. 265 – 266.

412 Exhibit C7-10, CanGEA Response to BCUC IR 2.1
413 Exhibit C14-2, Adams Lake Indian Band Evidence, p. 3.
414 Exhibit C2-3, BC Hydro response to IR 1, Q1.6.1
415 Exhibit E-6, Tsay Keh Dene Letter of Comments, p 4
416 Transcript Vol 9, Chief Webber, p. 411–412.
417 Transcript Vol 12, Austin, p. 642-645
subject to regulation by the BCUC, then Taku River Tlingit may not be able to get approval to construct its transmission line down the existing highway right of way.

- **Summary of Indigenous utilities in other jurisdictions.** A comprehensive review of Indigenous utilities in other jurisdictions and countries was provided by FNMPC, Canadian Geothermal Energy Association and the FNLC. This included examining Indigenous utilities in the USA and New Zealand as well as other provinces in Canada. While these Indigenous utilities are operating in different environments than in BC there are important insights which may be considered as part of this inquiry.

- **Distribution Assets.** Leq’á:mel First Nation owns a mobile trailer park, where BC Hydro provides electrical power which is distributed through Leq’á:mel owned electrical lines and sold to residential customers through BC Hydro meters. Leq’á:mel First Nation receives no compensation for the use and maintenance of its electrical facilities.\(^{418}\) Hence, Leq’á:mel First Nation is exploring assuming the metering and billing function to generate revenue which they note would be considered an Indigenous utility pursuant to OIC 108.

- **Service to Kelly Lake Community.** Kelly Lake Community is a small community located just inside B.C, on the border with Alberta. Power was first supplied in the 1960’s and came through Alberta, with an agreement with the province of BC. This agreement has continued to the present day, and Kelly Lake currently receives power through Alberta rather than through the BC grid. Because of this, Duke submits the rates the Kelly Lake community are paying are not comparable to and are higher than those of other First Nations within BC.\(^{419}\)

### 4.5 Final Argument Responses to Specific BCUC Questions

By letter dated September 20, 2019,\(^{420}\) the BCUC posed six questions upon which it sought interveners’ positions in their final arguments. The purpose of these questions is to seek views on some of the ideas or concepts that have been raised in the course of the Inquiry. All of these questions link to evidence summarized in the preceding Sections. However, for clarity, these questions and a summary of interveners’ direct responses are provided in turn below.

1. **The need for regulation of monopoly service providers is generally considered necessary where there is a need to protect the consumer against potential abuse of monopoly power by the service providers. Is this an applicable and important factor for Indigenous utilities? Why or why not?**

CFN-GBI submits all consumers need protection from potential monopoly abuse, and the issue in this Inquiry is how that protection should be achieved. CFN-GBI notes the distinction between situations where political accountability can or cannot replace external regulation, which may affect the appropriate regulatory framework.\(^{421}\)

Flintoff believes unregulated monopoly providers can set the rates they desire without repercussions.\(^{422}\)

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\(^{418}\) Leq’á:mel First Nation Final Argument, pg. 6-7  
\(^{419}\) Transcript Vol. 7, Duke, pp. 335-340  
\(^{420}\) Exhibit A-38.  
\(^{421}\) CFN-GBI Final Argument, p. 14  
\(^{422}\) Flintoff Final Argument, p. 10.
BC Hydro considers the primary purpose of utility regulation is to ensure customers of monopoly suppliers receive essential services on a non-discriminatory basis and at reasonable rates, and such a principle should be applicable to Indigenous utilities.

Nisga’a Nation highlights that monopoly and public interest considerations around the need to regulate are not unique to non-Indigenous utilities. Nisga’a Nation submits that similar public interest considerations that support the exclusion of public utility services provided by municipalities apply to the Nisga’a Nation, while noting its distinct authority under the Nisga’a Treaty to enact laws. Further aspects of Nisga’a Nation’s position are outlined in Section 5.3.2.423

Collective First Nations submit that First Nations are being asked to prove they are capable regulators of their own utilities, and that the assumption should be they are more than capable until proven otherwise. Collective First Nations note that in their formative years, BC Hydro and FortisBC’s predecessors were not regulated except by the courts.424

KGI views protection against abuse of monopoly power as important, but that well functioning recourse mechanisms exist in organizations proposing to become Indigenous utilities.425

2. If the regulation of Indigenous utilities were undertaken by an entity other than the BCUC (for example, self-regulated by a First Nation), would it be appropriate for the BCUC to retain its jurisdiction to act upon complaints? Why or why not?

BC Hydro supports an on-going role for the BCUC with respect to the regulation of Indigenous utilities regardless of the form of regulation.426

CFN-GBI suggests a limited complaints role for the BCUC respecting non-members of Indigenous Nations. However, broader complaint jurisdiction would be inappropriate as this would result in the BCUC being a superior regulator to Indigenous regulation.427 Collective First Nations agree on the latter point, adding that it would be a signal that First Nations cannot be trusted to regulate, or have the competency to do so.428 Austin adds that if First Nations are to be successful in regulating their own utilities, they have to be responsible for their decisions, and that in turn, it is the courts that hold them accountable.429

Nisga’a Nation submits this question is based upon a flawed premise that the BCUC would retain jurisdiction in light of the Nisga’a Treaty. It also notes there is no such jurisdiction over municipal utilities.430

KGI submits that if another regulator existed, the BCUC would need to respect its authority and jurisdiction.431

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423 Nisga’a Nation Final Argument, pp. 6 – 8.
424 Collective First Nations Final Argument, pp. 7 – 8.
425 KGI Final Argument, p. 23
426 BC Hydro Final Argument, p. 11
427 CFN-GBI Final Argument, p. 15
428 Collective First Nations Final Argument, p. 9
429 Transcript Vol. 12, Austin, p. 601
430 Nisga’a Nation Final Argument, pp. 10 – 11.
431 KGI Final Argument, p. 23.
Flintoff submits that all parties must agree on issues of federal jurisdiction and Treaties.⁴³²

3. If the regulation of Indigenous utilities were undertaken by an entity other than the BCUC, should the BCUC retain its jurisdiction over system safety and reliability issues? Why or why not?

CFN-GBI submits there should be no presumption that Indigenous utilities are less able to effect safety and reliability regulation than do municipalities or regional districts, but that Mandatory Reliability Standards (MRS) are an exception due to the need for common application and enforcement across North America. However, CFN-GBI says it would not be unreasonable to extend deference to First Nations.⁴³³

Collective First Nations recognize the need for continued regulation of MRS. However, they submit it is not clear what the BCUC’s role is regarding safety, and that the BCUC should recommend that the Provincial Government consider setting objective safety standards for First Nation utilities, public utilities and municipal and regional district utilities beyond the subjective standards of “safe” and “unsafe” in sections 25 and 38 of the UCA. Collective First Nations note, however, that in practice any First Nation utility that is interconnected to BC Hydro and FortisBC will be required to comply with their interconnection requirements.⁴³⁴

Flintoff submits that Technical Safety BC may be a better choice to regulate safety.⁴³⁵

BC Hydro believes the BCUC should retain jurisdiction over safety, reliability and MRS even where an Indigenous utility is otherwise exempt from regulation under the UCA.⁴³⁶

Leq’á:mel First Nation is concerned about safety, and would be open to working with other First Nations and the BCUC towards safety standard measures and their means for standardization and implementation.⁴³⁷

KGI submits that reliability in Indigenous communities is relatively substandard, and that giving a voice to these communities is an important aspect of self-determination.

Nisga’a Nation’s position is summarized in the response to the previous question.

4. If Indigenous utilities are not to be regulated under the Utilities Commission Act, should there also be different regulatory treatment for non-Indigenous utilities that provide services on-reserve or, in the absence of a specific Treaty provision, on Treaty lands (for example, BC Hydro utility services in a non-integrated area)? Why or why not?

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⁴³² Flintoff Final Argument, p. 10.
⁴³³ CFN-GBI Final Argument, p. 15
⁴³⁴ Collective First Nations Final Argument, p. 9
⁴³⁵ Flintoff Final Argument, p. 11.
⁴³⁶ BC Hydro Final Argument, p. 11
⁴³⁷ Leq’á:mel First Nation Final Argument, p. 13.
No interveners supported a separate regulatory regime for non-Indigenous utilities operating on such lands. Nisga’a Nation says a new regulatory regime would create additional and unnecessary complications, while Collective First Nations submit the concept of self-determination does not apply to BC Hydro and that reconciliation does not apply in the same way as for First Nations.438

Beecher Bay and Adams Lake submit it is difficult to opine on such a question while the characteristics and regulatory environment of Indigenous utilities themselves are not known. However, they note that ultimately a collaborative approach will better meet the needs of all utility service providers.439

5. In the absence of alternative regulatory arrangements respecting Indigenous utilities, please provide examples of how the UCA or other existing legislation relating to utility regulation might be amended to protect the interests of Indigenous Nations, while working towards reconciliation.

While Nisga’a Nation’s position is that a Nisga’a utility should be excluded from the definition of “public utility”, it recognizes the issue of energy poverty experienced by Nisga’a citizens and other Indigenous communities. Nisga’a Nation encourages a separate review of cost allocation and rate design with a particular focus on Indigenous communities, like the Ontario Energy Board recommended in 2017.440

KGI submits that the BCUC needs to consider the cost of regulation to Indigenous utilities should they not be exempt.441

Collective First Nations state that light handed regulation or regulation by complaint would be half measures that require First Nations to prove they can be trusted to regulate.442

6. If there were to be a recommendation to establish an “Indigenous Utilities Commission” or similar body to regulate Indigenous utilities, do interveners have a view whether such a body could or should have some degree of authority over all Indigenous utilities, or should the jurisdiction of such a body be limited to some extent (e.g., confined to specific territorial limits)? Why or why not?

Collective First Nations say that it is premature to assume that an Indigenous Utilities Commission could be structured to represent the interests of all First Nations that might want to own utilities, who first need to establish themselves. In addition, that Indigenous utilities are likely going to be local enterprises with local concerns and objectives, and should be regulated locally initially.443

CFN-GBI suggests that if there is to be a recommendation regarding an “Indigenous Utilities Commission”, it should only be done with consultation that builds upon and beyond the record of this Inquiry.444

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439 Beecher Bay/Adams Lake Final Argument, p. 7.
440 Nisga’a Nation Final Argument, p. 14
441 KGI Final Argument, p. 24.
442 Collective First Nations Final Argument, p. 10
443 Collective First Nations Final Argument, p. 10
444 CFN-GBI Final Argument, p. 16
FortisBC submits that it is questionable whether such a body would yield any greater autonomy for any particular Indigenous group than BCUC regulation. FortisBC considers there would be a duplication of overhead and administrative costs. FortisBC notes that any views on an alternative administrative body are highly speculative and require further research.\footnote{FortisBC Final Argument, pp. 29 – 30.}

The Nisga’a Nation’s position on the scope of any provincial body’s jurisdiction to regulate a Nisga’a utility on Nisga’a Lands is the same, whether that body is the BCUC or an “Indigenous Utilities Commission”.\footnote{Nisga’a Nation Final Argument, p. 15}

BC Hydro supports the view that Indigenous Nations that would own or operate those utilities should be able to decide for themselves whether to opt-in to such a framework as an Indigenous Utilities Commission.\footnote{BC Hydro Final Argument, p. 12}

Flintoff notes that the establishment of such a body would extend timelines for the plans of Indigenous Nations.\footnote{Flintoff Final Argument, p. 13}

5.0 Panel Discussion and Recommendations

In this Section, we review the evidence and comments we received and provide our discussion, comments, findings and recommendations.

We first lay out broad general principles – relating to Indigenous issues generally and utility regulation specifically – that will guide our considerations, findings and recommendations. Then we consider the definition of an Indigenous utility.

We then consider the status of the land on which an Indigenous utility potentially operates and the First Nations governance structure on that land. In doing so we consider the current jurisdiction of the UCA in those circumstances and provide recommendations regarding this jurisdiction.

Finally, we consider alternatives to the UCA and the BCUC.

5.1 Relevant Context and Guiding Principles for Panel’s Analysis

We first establish some guiding principles for our analysis in this Section. We find the following to provide relevant context and guidance in our analysis and crafting of specific recommendations:

- Aboriginal peoples occupy a unique status in Canada, by virtue of their inherent title and rights as the first occupiers of the land, as recognized by Section 35 of the Constitution Act, 1982 which gives constitutional protection to their existing Aboriginal Rights and Title. SCC decisions have established that First Nations are \textit{sui generis} and while comparable to another level of government like our Federal and Provincial governments, are nonetheless distinct by virtue of their history, traditions, customs and practices.
• Colonialization has a continuing and lasting negative impact on First Nations’ peoples and their culture and traditions, land and resources.

• In terms of impacts of existing utilities on First Nations, many First Nations communities in British Columbia have seen extensive utility infrastructure placed on their lands without their consent, with no commensurate compensation, benefits or service to those communities.

• Many First Nations have expressed the desire to take on energy projects for a variety of reasons. This may entail changes to and flexibility in the current regulatory framework.

• The current jurisdictional uncertainty on Indigenous lands is a key barrier to the development of Indigenous utilities in the Province.

• The Province of British Columbia has committed to adopting and implementing UNDRIP and TRC’s Calls to Action. On October 24, 2019, the Provincial Government introduced legislation (Bill 41) to recognize and uphold the human rights of Indigenous peoples in BC.

While there is no certainty as to the timing or outcome of the actual implementation of UNDRIP, we believe that the principles set out in UNDRIP should nonetheless guide us in our recommendations regarding the regulation of Indigenous utilities. In particular, the following analysis of relevant UNDRIP provisions put forward by Beecher Bay First Nation and Adams Lake First Nation is helpful.449

<table>
<thead>
<tr>
<th>Article</th>
<th>Summary of Indigenous Peoples’ Right</th>
<th>Application to this context</th>
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<tbody>
<tr>
<td>3</td>
<td>Affirms the right to self-determination, which includes the right to freely pursue economic, social and cultural development.</td>
<td>This could include pursuing development of infrastructure, like utilities, to support and expand Indigenous community development.</td>
</tr>
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<td>4</td>
<td>Affirms the right to autonomy and self-government in matters related to internal and local affairs and ways and means for financing autonomous functions</td>
<td>This could include the ability to make decisions respecting and regulate Indigenous utilities or to enter into agreements with other bodies such as the BCUC or another, Indigenous-led commission respecting regulation.</td>
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<td>5</td>
<td>Affirms the right to maintain and strengthen distinct political, legal, economic, social and cultural institutions while also participating fully, where they so choose, in the political, economic and social and cultural life of the state.</td>
<td>The BCUC should broadly consider and work collaboratively with First Nations to identify the roles of Indigenous institutions in economic development and their relationship to “mainstream” institutions -such as in regulation of utilities.</td>
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449 Beecher Bay First Nation and Adams Lake First Nation’s Joint Final Argument, pp. 4-5.
<table>
<thead>
<tr>
<th>Article</th>
<th>Summary of Indigenous Peoples’ Right</th>
<th>Application to this context</th>
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<tr>
<td>20</td>
<td>Affirms the right to maintain and develop political, economic and social systems or institutions, and to be secure in and enjoy freely their traditional and other economic activities.</td>
<td>The BCUC should consider and contrast these rights with the experience of Indigenous peoples in the past (as discussed above) and seek opportunities to remove any existing barriers to fully realizing and recognizing these rights. In particular, the BCUC should consider the state’s obligation to recognize and protect these lands with due respect to the traditions of the Indigenous peoples.</td>
</tr>
<tr>
<td>26</td>
<td>Affirms the right to traditional lands, territories and resources; the right to own, use, develop and control those lands; and that states shall give legal recognition and protect to these lands, territories and resources (with due respect to the Indigenous peoples’ traditions and land tenure).</td>
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Several interveners have urged us to be bold in our approach in this Inquiry, to take a broad, generous and liberal view and to adopt an Indigenous lens with respect to our recommendations. We agree with those sentiments, and believe that our analysis, to the extent feasible, should strive to reflect the UNDRIP principles, recognizing nonetheless the following shortcomings in this Inquiry:

- Deviations from the current regulatory framework will likely require legislative changes which are beyond the BCUC’s jurisdiction and control.
- While we have heard from a cross section of Indigenous project proponents and existing utilities in the course of this Inquiry, what has been lacking is participation by individual ratepayers as to how their interests may be directly or indirectly affected. Similarly, there is no Federal government perspective in this Inquiry.
- Interveners have pointed out that this Inquiry including its Terms of Reference was developed in the absence of any consultation with First Nations and the Inquiry process does not incorporate Indigenous governance principles and legal orders. While we have endeavoured to encourage Indigenous communities to provide their input, there is no scope within the Inquiry for us to examine in a substantive manner the application of UNDRIP principles, principles of reconciliation or recognition of existing Aboriginal Rights and Title.
- The stringent timelines set for this Inquiry by OIC 108 do not enable us to consult as deeply with Indigenous communities as we would like, and more work remains to be done in that regard after the conclusion of this Inquiry.

With all that said, we aim to be flexible and open in our analysis of the many regulatory options that have been put before us and highlight what we regard as the relevant implications of their adoption for consideration.
5.2 Overarching Principles of Indigenous Utility Regulation

The fundamental issue that we have been asked to address in this Inquiry is whether Indigenous utilities should be regulated under the UCA or under another mechanism, self-regulated, or unregulated. In other words, should Indigenous utilities be subject to regulation? If so, why, how and to what extent should they be regulated?

In order to address this issue, we must answer the following specific questions:

- Why is regulation necessary at all?
- More specifically, why is regulation of public utility services necessary?
- If regulation of public utilities is necessary, is there something different or unique in the case of Indigenous utilities that warrants different treatment? If so, what should that treatment look like? If not, why not?

In short, regulation viewed objectively can be “something that can benefit the community as a whole.” Implicit in that proposition, though, is the recognition that there must necessarily be some trade-offs amongst the different private interests of affected parties, like those specific to small consumers, large industrial customers, shareholders, lenders, competitors, low-income groups, environmentalists and rural residents. In addition, regulation must balance not only competing private interests “but the various components of the public interest – long-term versus short-term needs, affordable rates versus efficient price signals, environmental values versus global competitiveness. That is how regulation serves the public interest.”

In the case of traditional public utilities, the barriers to entry into the market are high as a result of the large amounts of capital investment required to build out the utility infrastructure (such as poles and wires, or pipelines) and the desire to avoid duplication of infrastructure within any particular service territory due to concerns about the size of the infrastructure footprint and potential for stranded costs. These factors generally result in there being only one utility service provider within the territory serving captive customers. In short, the utility operates as a monopoly within a specific service area.

We begin by observing that proponents of Indigenous utilities emphasize that they wish to participate in energy projects (whether on their own or in partnership with third parties) in order to achieve specific goals including the following:

1. To operate independently of the existing grid due to reliability and affordability concerns or lack of existing connections to the existing grid;
2. To promote clean energy initiatives;
3. To advance long term sustainability goals;
4. To serve residents in the community at a lower cost; and
5. To build capacity and provide greater economic opportunity for their community.

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450 Exhibit A-5, BCUC letter dated May 10, 2019, p. 3.
451 Exhibit A-8, Hempling’s Utility Regulation Report, p. 2.
452 Exhibit A-8, Hempling’s Utility Regulation Report, p. 2.
5.2.1 Regulation of Monopoly Providers

A fundamental tenet of utility regulation is the “regulatory compact” by which a utility is granted a monopoly franchise to provide safe and reliable energy service at just and reasonable rates in exchange for the opportunity to earn a reasonable rate of return on its utility investment. Utility regulation provides consumer protection against the potential abuse of power by monopoly suppliers of products and services, and applies equally to all monopolies regardless of their underlying ownership. In many jurisdictions worldwide - in most developed countries- ratepayers enjoy this protection.

While we accept that there are unique considerations arising from the special nature and status of Indigenous Nations and uncertainty over jurisdictional issues which may support a different form of regulation for Indigenous utilities than that exists under the UCA, the Panel is of the view that all BC residents, irrespective of their residency or status, ought to have access to protection from monopolies. The fact that the Legislature eventually saw fit to make BC Hydro, along with other public utility energy providers, subject to BCUC regulation would at least suggest that from a policy perspective, the absence of any regulation was eventually perceived as something that is undesirable and far from ideal.

Most utilities are legal monopolies. As they face no pressure from competitors, monopolies may abuse their power in several ways, by:

- Excessive pricing – resulting in excess monopoly profits;
- Predatory pricing – where the monopoly is able to discourage competitors from entering the market through pricing below cost in the short term; and
- Cross-subsidization – excessive pricing in some areas, subsidizing low cost pricing in others.

The purpose of regulation is to protect the public from potential monopolistic behaviour on the part of a public utility while ensuring the continued quality of an essential service.

Nonetheless, the BCUC has emphasized that even where regulation is required to constrain potential abuses of monopoly power, two key principles ought to apply, specifically:

- Where regulation is required, use the least amount of regulation needed to protect the ratepayer; and
- The benefits of regulation should outweigh the costs of regulation.

The AES Inquiry Report further articulates guidelines related to these two key principles. In particular, the form of regulation should:

a. Provide adequate customer protection in a cost-effective manner;

b. Consider administrative efficiency;

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453 The regulatory compact is a well-established principle in common law.
454 The AES Inquiry Report, p.46. Exhibit A-8, Hempling’s Utility Regulation Report, p.5.
455 The AES Inquiry Report, p. 8.
456 The AES Inquiry Report, pp. 6-7.
c. Consider the level of expenditure, the number of customers, the sophistication of the parties involved and the track record of the utility in undertaking similar projects; and

d. Require the provision of sufficient information to allow the BCUC to assess the new business activity, and any rates to be set, against BC’s Energy Objectives and the requirements of the UCA and the Clean Energy Act. 457

We are of the view that these same principles and guidelines should apply to the regulation of Indigenous utilities, regardless of a utility’s specific ownership or operation. While we respect First Nations energy and self-government aspirations, we consider it important to ensure that certain of the underlying principles relating to regulation of monopolies are necessary, even for Indigenous utilities. Therefore, we recommend that all ratepayers of Indigenous utilities be accorded the same protections when taking service from non-Indigenous utilities.

In asking the question whether Indigenous utilities ought to be regulated, we must first determine whether Indigenous utilities operate in a monopoly environment that makes them susceptible to potential abuses of monopoly power against their utility customers, so as to warrant regulation or an exemption from regulation if monopolistic elements are not present.

5.2.2 Regulation of First Nations Owned Utilities

Accepting that monopoly service providers should be subject to some degree of regulation in order to protect consumers from potential abuse of monopoly power, the question then becomes: who should take on the task of regulation, and what should that regulation entail at a minimum? With regards to the question of who should regulate, Collective First Nations argue that “First Nations must be allowed to regulate the utilities they own or control. It is a matter of reconciliation and UNDRIP.” 458 As discussed earlier in Section 4.2.2, this position is echoed by a number of Interveners. 459

The Panel agrees that an important aspect of reconciliation is self-determination including the ability to implement laws and regulations. Any Indigenous utility regulatory scheme should have the following minimum safeguards:

- Consumers should be treated fairly, and should not be treated in a manner that is not unduly discriminatory or unduly preferential in respect of the rates they are charged and the services they receive.

- There should be some degree of protection for the interests of non-Indigenous ratepayers who are captive to the monopoly provider and thus unable to effectively influence the decisions of the Indigenous owners. While Indigenous voters have recourse to their Indigenous governments, ratepayers who are not members of the band or nation do not. The potential for individual recourse to the courts is illusory at best given the well-known inaccessibility of that option for many. That is one of the reasons why administrative tribunals were created, namely, to provide a more accessible, effective and cost-

457 Ibid., p. 18.
458 Collective First Nations Final Argument, p. 12
efficient alternative to traditional dispute resolution using the specialized expertise of non-lawyer members.

- The regulator should be transparent, ideally independent of and at arms length from the owners of the Indigenous utilities and should set out clear processes for fair and effective adjudication of disputes between the utilities and ratepayers.

- If the traditional rate setting models (such as cost of service and cost causation) and the regulatory compact are deemed inapplicable or too limiting for Indigenous utilities, the regulator should ensure that ratepayers nonetheless understand the basis for the rates, and that they may be paying more for their services in order to support First Nation societal values. In short, there needs to be consultation with ratepayers regarding a new regulatory construct that is not largely based on economics, and the implications of such changes for ratepayers.

- Issues of safety, reliability, quality of service and obligation to serve should be fully addressed.

- Questions of who ultimately should bear the burden of any stranded assets if and when that arises, who will have the right to decide and how will that decision be made (by the First Nations government, in consultation with all ratepayers, by the courts, etc.) all need to be addressed.

- The regulatory scheme needs to consider how it would interact or engage with other regulators, such as but not limited to the BCUC, if there are any overlaps or conflicting decisions.

5.2.3 Utility Regulation and the Development of Energy Infrastructure

For traditional utilities like BC Hydro and Fortis, the common view at least since September 1980, has been that such public utilities ought to be subject to independent economic regulation pursuant to the UCA.\textsuperscript{460} The rationale for such regulation is the need for an independent arbiter to balance the competing interests of ratepayers with those of the utilities, while taking into account the broader public interest. The UCA creates a third party independent regulatory agency, the BCUC, having expertise in energy regulation. The BCUC ensures that utility rates are not unjust, unreasonable, unduly preferential or unduly discriminatory while at the same time giving shareholders an opportunity to earn a reasonable rate of return on their investments. The need for an independent regulator is seen as providing a safeguard against the tendency of businesses to act in their own self-interest in terms of rate setting and capital investment. Not all interveners, however, accept the validity of that proposition.

Collective First Nations point out that both BC Hydro and the Lower Mainland portion of FortisBC Energy Inc.’s gas distribution system were free of regulation in their formative years and even after they became regulated pursuant to the UCA, the extent of BCUC regulation has been circumscribed by government directions issued from time to time. Collective First Nations say that in short, it may be a fallacy to assume that an independent regulator is a more effective or better means of regulatory protection for the public than any other form of regulation, such as self-regulation. Collective First Nations argue instead that “First Nations must be allowed to regulate the utilities they own or control.”\textsuperscript{461} Furthermore, they argue that this right to regulate:

...is a matter of reconciliation and UNDRIP supported by reference to the Framework Agreement on First Nations Land Management, the First Nations Land Management Act, the historical

\textsuperscript{460} Collective First Nations’ Final Argument, p.3.

\textsuperscript{461} Collective First Nations’ Final Argument, p.3.
regulation free period public utilities like BC Hydro and the Lower Mainland portion of FortisBC Energy Inc. gas distribution system enjoyed in their formative years and the exemption municipalities and regional districts enjoy under the UCA. This right to right may also flow from the provisions of Treaty settlements.\textsuperscript{462}

The Collective First Nations argue that Indigenous utilities ought to be entitled to the same opportunity on the basis of parity. Given the differences in size and scale between BC Hydro and individual Indigenous utilities, though, even if Indigenous utilities were free of regulation, it would be difficult for them to replicate the same economic advantage that BC Hydro enjoyed in that regulation-free period. Further, in the Panel’s view, providing Indigenous utilities with an equivalent opportunity to ‘catch up’ should be addressed through reconciliation efforts rather than abstaining from regulation.

While we accept that there are unique considerations arising from the special nature and status of Indigenous Nations and uncertainty over jurisdictional issues which may support a different form of regulation for Indigenous utilities than that exists under the UCA, we are concerned about the potential lack of ratepayer protection for people in BC, Indigenous or non-Indigenous, in the absence of any regulation. The fact that the Legislature eventually saw fit to make most public utility energy providers subject to regulation by the BCUC would at least suggest that from a policy perspective, the absence of any regulation was eventually perceived as something that is undesirable and far from ideal.

It is true that BC Hydro (as a combined gas and electric utility owned by the Province) built much of the existing utility infrastructure in this Province (including construction through Indigenous communities) largely free of the constraint of economic regulation. However, it is not possible to draw the conclusion that the outcome is better than it would have been if there had been economic regulation. It is possible that regulation could have resulted in lower rates and better outcomes.

\textbf{5.2.4 Treatment of Incumbent Utilities Providing Service to Indigenous Communities}

This Inquiry is focussed on Indigenous utilities. However, most Indigenous BC residents are currently served by one or more of the large incumbent monopoly utilities. For those incumbent utilities that presently provide retail energy services to Indigenous communities, the market is a monopoly in that there is no other utility that provides retail electrical and natural gas services to those communities currently. The view of many in this Inquiry seems to support the continued regulation under the UCA for existing incumbent utilities.

\textbf{5.2.5 Regulation of Safety and Reliability}

Safety was an issue for many interveners, who express the view that they rely on the existing regulatory framework to ensure that adequate safety protocols and procedures are in place. Some participants go on to express their desire that these safeguards include reliability and service quality. These participants emphasize the benefits of having an established framework and centralized support from a central body such as the BCUC exercising oversight of such matters, rather than having to individually create and find the capacity to provide such oversight.

\textsuperscript{462} Collective First Nations’ Final Argument, pp.3-4.
In this regard, Collective First Nations agree with the BCUC retaining jurisdiction over general system reliability given the vertically integrated nature of the Western Interconnection grid. Having separate regulatory agencies in such circumstances makes no sense. However, for areas other than reliability, Collective First Nations maintain that it is overly paternalistic for the BCUC to assume that Indigenous utilities lack the skill, expertise and capacity to carry out the necessary degree of regulatory oversight without interference.

The Panel recommends that regulation, with respect to Mandatory Reliability Standards, of all transmission infrastructure in the province remain under the jurisdiction of the BCUC, regardless of who owns or operates the infrastructure.

### 5.2.6 Disputes

In the area of dispute resolution, we have two diametrically opposed views. The incumbent utilities support the BCUC retaining the jurisdiction to resolve complaints and disputes between First Nations utilities and customers who are not members of that First Nation. They see the BCUC as having tried and true dispute and complaint resolution processes and practices in place that are effective and familiar. Most other interveners do not see the need for the BCUC to step in as an independent arbiter as long as that First Nation has provided for alternative forms of dispute resolution mechanisms in their own governance structures which are accessible to non-members. In fact, the mechanisms are generally perceived by the First Nations as more inclusive and accessible, more reflective of First Nations values and practices, and more effective in reaching a consensus outcome that is acceptable to all parties.

Collective First Nations suggest that it is not necessary for the BCUC to retain jurisdiction over the resolution of disputes involving non-First Nations parties since any aggrieved parties have the opportunity to ultimately seek recourse in the courts.\(^\text{463}\)

First Nations and Band Councils often have alternative dispute resolution mechanisms; non-members and entities must also have access to effective and cost-efficient dispute resolution. Courts can be very expensive and inaccessible to many ratepayers and should only be a last resort. We are of the view that the BCUC’s expertise in handling complaints about public utilities can, if used appropriately, be effective.

### 5.3 Regulatory Regimes on First Nations Lands

Participants present us with various arguments regarding the authority for regulating utilities. Indigenous Nation representatives are largely of the view that utility regulation falls within their jurisdiction based on the following factors:

- Federal law (on reserve)\(^\text{464}\)
  - *Indian Act*, s. 81(1) (f) provides the council of an Indian band to make by-laws in relation to the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works\(^\text{465}\).

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\(^{463}\) Transcript Vol. 12, Collective First Nations Oral Argument, p. 630.

\(^{464}\) Exhibit C4-2, FortisBC Evidence, p.8. Transcript Vol. 12, Austin, p. 582.

\(^{465}\) Exhibit C14-2, Adams Lake Evidence, p. 7.
\(\textit{First Nation Land Management Act}\)\(^{466}\) which provides participating First Nations the authority to make laws in relation to reserve land, resources and the environment

- Laws enacted by an Indigenous Nation pursuant to modern-day Treaties\(^{467}\)
- Indigenous Inherent authority over matters within an Indigenous Nation’s traditional territory\(^{468}\)

Submissions made on behalf of Adams Lake consider the by-law authority of the \textit{Indian Act} sufficient to encompass the regulation of Indigenous utilities.\(^{469}\) Other submissions, such as the Collective First Nations, reference the \textit{First Nations Land Management Act} as a definitive source of authority.\(^{470}\) The Nisga’a considers its Treaty authority sufficient to enact laws with respect to the governing of utilities on Nisga’a Lands.\(^{471}\) Other First Nations feel that their Inherent authority to govern their territories should override provincial laws in relation to Indigenous utilities within those territories. Many Indigenous interveners take the view that Aboriginal Title and Rights are not to be compromised without Indigenous consent and there should be recognition of inherent jurisdiction in terms of freedom to undertake projects on their own lands, whether they be reserve lands, unceded traditional territories or Treaty settlement lands.

In this Section, we review the application of the UCA on Indigenous lands. In doing so we consider arguments for exemption from the requirements of the UCA or an exception from the definition of public utility. In the subsequent Section we then consider what, if any, form of utility regulation the Provincial Government should enact.

We consider the following categories of Indigenous lands as contemplated in OIC 108:

- Reserve Land
- Treaty Lands (both modern and other)
- Lands subject to the jurisdiction of the Westbank First Nation
- Lands subject to the jurisdiction of the Sechelt Indian Band the Sechelt Indian Government District
- Traditional Territories potentially or actually subject to Aboriginal land claims

### 5.3.1 Reserve Land

Parties submit that on reserve land for which a Land Code has been enacted, the UCA does not apply. They argue that in this circumstance, the governing First Nation can enact laws in respect of the provision of utility services and establish entities to own or operate utilities.\(^{472}\) However, the BCUC has previously found that the UCA applies on Reserve Land, and though there are arguments against this finding, the Panel makes no determination on this point of law.

We find the \textit{premise} for the municipal exception to be unclear. However, we accept that many, but not all, ratepayers taking service from a municipality or regional district can exercise control in the management of


\(^{467}\) Transcript Vol. 10, Griffin, p. 486.


\(^{469}\) Exhibit C14-2, Adams Lake Evidence, p. 7

\(^{470}\) Transcript Vol. 12, Austin and Sayers, pp. 605 – 631.

\(^{471}\) Exhibit C21-3, Nisga’a Nation Evidence, pp. 2, 6 – 9.

\(^{472}\) See Section 4.2.1
those services through the electoral process. Similarly, there will be some non-members residing on a First Nation’s lands that do not vote or participate in the First Nation’s governance processes.

However, we agree with Fortis that the municipal exception suffers from shortcomings and are not of the view that a precedent with shortcomings should be copied in its entirety. That said, we also agree with those Interveners that argue that many First Nations and Band Councils have characteristics that are similar to those of municipal utilities. Subject to feedback during the workshop/comment period, the BCUC’s proposed recommendations are as follows:

- That a First Nation be provided the opportunity to self regulate with respect to utility services it provides on its reserve land in much the same way municipalities and regional districts are. Subject to the discussion below, this can be accomplished by enabling a First Nation or Band Council to “opt out” of BCUC regulation by notifying the BCUC of its intention.

- That the First Nation should demonstrate that it has an appropriate complaint and dispute handling process in place for all ratepayers. In the event it cannot do so the BCUC would retain jurisdiction to handle all complaints.

- That the BCUC complaint and dispute handling processes be available to any ratepayer who wishes to appeal a decision arising out of the exempt utility’s process. This should provide a less costly and more effective appeal mechanism than the courts.

- That the BCUC retain its jurisdiction with respect to MRS standards.

- With regard to safety and reliability generally, we note that these issues will be the subject of the workshop and comment period. If the Final Report recommends that the BCUC retains jurisdiction over safety and reliability, First Nations would not be able to opt out of those applicable portions of the UCA governing these issues.

In making these proposed recommendations, we have made no comment on the issue of the “obligation to serve.” The municipal exclusion does not require a municipality to provide service to every customer and we do not consider it necessary to explicitly impose this obligation on a First Nation-owned utility. Public utilities are generally expected to have a clear and transparent policy for apportioning costs of extending the system to serve new customers between its existing customers and those new customers (extension policy). We note that any potential customer who is dissatisfied with the application of the extension policy provided by the exempt utility has recourse to a robust complaint process.

Those First Nations that choose not to opt out would continue to be regulated by the BCUC subject to the terms of the UCA. The Panel is aware of the regulatory burden on small utilities and is considering approaches to mitigate that burden.

Any First Nation that seeks to acquire any assets from BC Hydro or any other incumbent public utility will continue be subject to BCUC regulation with respect to the approval of that transaction. In reviewing the transaction, the BCUC would consider, among other matters, the rate impact of the transaction on the incumbent utility’s ratepayers.
These proposed recommendations require further consideration. In particular:

a) Do the proposed recommendations strike an appropriate balance between the need for robust complaint mechanism and the rights of First Nations to self governance?

b) What is an appropriate complaints and disputes resolution process?

c) Should the BCUC continue to regulate safety and service reliability?

d) Should the proposed recommendations be expanded to include any of the following circumstances:

   o A utility’s assets are owned by a corporation of which the First Nation/Band Council is a shareholder or the sole shareholder;

   o A utility’s assets are owned by a partnership of which the First Nation/Band Council is a partner, a limited partner or a general partner;

   o The utility’s assets are owned by a third party, but the First Nation/Band Council has granted a franchise agreement, a licence and/or has enacted enabling bylaws to facilitate the construction and/or operation of the utility;

   o The utilities’ assets are owned by a First Nation/Band Council but are operated by a third party; and

   o The First Nation/Band Council, by agreement with the utility owner, sets or approves the setting of rates for the utility.

_We note these issues are being canvassed with respect to the municipal/regional district exception in a parallel Inquiry._473

e) BCUC will continue to regulate BC Hydro and Fortis on reserve lands, as will private utilities, regardless of their ownership (this issue is discussed further in Section 5.2.4). If the First Nation utility seeks to sell energy to, say, BC Hydro, and thereby enter into an Energy Purchase agreement, that transaction requires approval under section 71 of the UCA. The test for acceptance of an EPA, under section 71 of the UCA, is that it must be in the public interest. In particular, applicants should demonstrate that BC Hydro needs the energy and that the contract price is comparable to market price. Are there any additional public interest issues that the BCUC should consider that are particular to First Nations?

f) If an exempt utility sells energy to a neighbouring First Nation, what regulatory regime, if any, should apply to the sale of energy on the lands of the second First Nation?

g) Suppose an exempt utility sells energy to the same or a different First Nation and in order to transport the energy would require wheeling over BC Hydro’s transmission system. Under section 7 of Direction 8 to the BC Utilities Commission (Retail Access), this activity is currently not allowed. Should the BCUC recommend that a modification be made to Retail Access?

h) As a consequence of the proposed recommendations an exempt utility would be free to sell energy to an adjacent municipality. However, if the municipality is not adjacent, and capacity on BC Hydro’s transmission system is required to transport the energy to that municipality, the Retail Access prohibition applies. Should the Retail Access prohibition be modified to allow the exempt utility to do

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so? What effects, if any, should be considered with respect to sales of energy to non-Indigenous customers within an incumbent utility’s territory?

i) Should the exempt utility be free to sell its energy to members of its Nation/Band wherever they reside in the province?

j) What measures, if any, should the BCUC take to ensure that its processes are accessible to First Nations that choose to remain under its jurisdiction?

These topics will be further explored.

5.3.2 Treaty Lands

5.3.2.1 Modern Treaty Lands – Nisga’a Nation

In 2002, the first modern comprehensive Treaty and land claims agreement in British Columbia, the Nisga’a Final Agreement (Nisga’a Treaty) came into effect. It differs from preceding treaties, including those initiated by Governor James Douglas on the former colony of British Columbia in the 1850s and those throughout the rest of Canada. The Douglas treaties are brief documents similar in nature to the pre-confederation peace and friendship treaties of the east coast of Canada. While all treaties arguably signal a recognition of authority and rights in lands, modern treaties, such as the Nisga’a Treaty, are far more comprehensive in elaborating government relationships.

As the Nisga’a Nation proclaims, the Nisga’a Treaty “was also the first Treaty in Canada, and perhaps the world, to delineate and constitutionally protect an Indigenous Nation’s right to self-government and authority to make laws over its land and for its people.”474 Section 1 (e) specifically references the Nisga’a Nation and the Nisga’a Villages that are parties to the Nisga’a Treaty.

Although the Nisga’a Treaty recognizes Nisga’a Lisims Government’s power to enact laws regulating utilities on Nisga’a Lands which encompass not only the former reserve lands but also all Treaty settlement lands, it has not yet exercised that power. The Nisga’a Nation advises that it may do so in the future, including drawing down legislation for generation, transmission, storage, distribution and sale of energy within Nisga’a Lands.475

The Nisga’a Nation captures the potentially intricate interplay between Federal, Provincial and Nisga’a laws on Nisga’a Lands and the resulting problems in the following manner:476

The Nisga’a Treaty has “been carefully crafted to respect constitutional principles and to fit into the wider constitutional fabric of Canada”, 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 Utilities Commissions [sic] Act...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.

474 Exhibit C21-3, Nisga’a Nation Evidence, p.5, para. 22
To avoid this undesirable outcome, the Nisga’a Nation proposes that the UCA definition of “public utility” be amended to expressly exclude services provided by a Nisga’a utility on the basis that such exclusion would be similar to that for municipalities and regional districts. Specifically, the Nisga’a Nation proposes the exclusion to read:

(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 districts, the Nisga’a Nation or a Nisga’a Village within its own boundaries.\(^{477}\)

The Nisga’a Nation points out that this exclusion, which “has a separate legal and constitutional basis”, “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.”\(^{478}\)

While the practical effect of a legislative exclusion would be to remove a Nisga’a utility from BCUC regulation, the Nisga’a Nation emphasizes that it is neither a municipality nor regional district within the meaning of the Interpretation Act or the Local Government Act and is not seeking to be considered a municipality for the purposes of the UCA. “Unlike municipalities, the Nisga’a Nation has inherent jurisdiction and constitutionally protected rights, as set out in the Nisga’a Treaty.”\(^ {479}\) In this regard, the Nisga’a Nation suggests that the OIC definitions of “Indigenous Nation” and “Indigenous utilities” in this Inquiry are too broad and wrongly assume that all utilities owned or operated, in whole or in part, by an “Indigenous Nation” are “public utilities” that are subject to BCUC regulation. The Nisga’a points out that: \(^ {480}\)

The Nisga’a Nation’s powers and law-making authorities under the Nisga’a Treaty differ fundamentally from the other Indigenous groups included in the definition of “Indigenous Nation”. Because of the difference, the Nisga’a Nation should be explicitly excluded from the UCA definition of “public utility”, and should not be subject to the same general regulatory approach that may apply to other “Indigenous utilities” as defined in the OIC. Including all Indigenous groups into one general definition will not take into account fundamental differences between the groups and, in the case of the Nisga’a Nation, may conflict with the provisions of the Nisga’a Treaty.

In advocating for a specific exclusion for services provided by a Nisga’a utility, the Nisga’a Nation proposes that a fundamental requirement must be that the Nisga’a Nation is providing the service, either directly or through contractors, within Nisga’a Lands and the Nisga’a Nation is directing that service. The Nisga’a utility may provide services to Nisga’a citizens, non-Nisga’a residents and businesses operating on Nisga’a Lands. The Nisga’a Nation should have broad flexibility to determine the corporate structure of a Nisga’a utility and the type of services it will provide without affecting the specific exclusion. The rates and terms of service would be determined by the Nisga’a utility, in accordance with principles established under the Nisga’a Nation’s own regulatory regime.\(^ {481}\)

\(^{477}\) Nisga’a Nation Final Argument, p. 3.
\(^{478}\) Exhibit C21-3, Nisga’a Nation Evidence, p.2, para. 10.
\(^{479}\) Exhibit C21-3, Nisga’a Nation Evidence, p.3, para. 12.
\(^{480}\) Exhibit C21-3, Nisga’a Nation Evidence, pp. 3-4, para. 16.
\(^{481}\) Exhibit C21-3, Nisga’a Nation Written Evidence, pp. 12-13, paras.50-56.
In terms of having the ability to influence the decisions of the Nisga’a utility, the Nisga’a Nation emphasizes that pursuant to its Nisga’a Constitution, Nisga’a citizens have opportunities to elect representatives of the Nisga’a Lisims Government and Nisga’a Village Governments, and can express their interests and concerns to the respective government entities about any aspect of a Nisga’a utility service. In terms of complaints and dispute resolution mechanisms between the Nisga’a utility and ratepayers, the Nisga’a Nation points to the following safeguards:

Further, the Nisga’a Lisims Government must ensure appropriate procedures for the appeal or review of administrative decisions of Nisga’a Public Institutions. Any board or commission established to hear complaints from a Nisga’a Utility would be subject to such provisions. In accordance with the Nisga’a Government Chapter, this recourse is available to both Nisga’a citizens and non-Nisga’a residents on Nisga’a Lands.

We acknowledge the potential interplay between Federal, Provincial and Nisga’a laws on Nisga’a Land and the breadth of subject matters regulated under the UCA. This issue is ultimately for the courts to decide. To avoid any uncertainty, the Nisga’a is suggesting an exception to the UCA to allow it to regulate a utility it owns or operates, in much the same way a municipality or regional district would. We generally agree with Nisga’a’s suggestion.

The Panel has reviewed the submission of the Nisga’a and the Nisga’a Final Agreement and is satisfied that the protection for all ratepayers is at least as good as those protections provided for ratepayers of municipal utilities. We therefore intend to recommend that the Nisga’a Nation be given the ability to self regulate, in the same way that municipalities and regional districts are, when it provides utility service on its own lands.

The Nisga’a proposed the following amendment to the definition of public utility in section 2 of the UCA which could be one way to meet the recommendation above:

(c) a municipality, a regional district, the Nisga’a Nation or a Nisga’a Village in respect of services provided by a municipality, a regional district, the Nisga’a Nation or a Nisga’a Village within its own boundaries.

However, we note that there remains some uncertainty concerning the scope of the municipal exception and that there is currently a process underway to further consider this issue. In particular, that inquiry is considering the following issues:

Whether a utility affiliated, in some way, with a municipality or regional district is considered a public utility as defined by section 1 of the UCA. Forms of affiliation include, but may not be limited to:

a. The utility’s assets are owned by a corporation of which the municipality or regional district is a shareholder or the sole shareholder;

b. The utility’s assets are owned by a partnership of which the municipality or regional district is a partner, a limited partner or a general partner;

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482 Exhibit C21-3, Nisga’a Nation Written Evidence, p.13, para. 57.
483 Exhibit C21-3, Nisga’a Nation Written Evidence, p. 14, para.58
484 Exhibit C21-3, Nisga’a Nation Written Evidence, p.2. footnote 3.
485 Nisga’s Final Agreement, Chapter 11, Nisga’a Government para. 16-23.
c. The utility’s assets are owned by a third party, but the municipality or regional district has granted a franchise agreement, a licence and/or has enacted enabling bylaws to facilitate the construction and/or operation of the utility;

d. The utilities’ assets are owned by a municipality or regional district but are operated by a third party; and

e. The municipality or regional district, by agreement with the utility owner, sets or approves the setting of rates for the utility.

If the language suggested by the Nisga’a Nation is adopted, the ambiguities listed above would apply and require resolution. In the previous Section, we listed a number of issues related to the exemption of First Nations owned utilities. We recommend that the Nisga’a consider that broader list of issues in the context of the recommendation we are proposing and provide their thoughts during the workshop and comment period.

We recognize the Nisga’a may wish to include safety and reliability in their self-regulation. Notwithstanding the Nisga’a’s authority over their own lands, because of the interconnected nature of the North American bulk electric system we recommend that the BCUC’s jurisdiction over Mandatory Reliability Standards continue to apply.486

5.3.3 Other Modern Treaty Lands

Other Modern Treaty Lands correspond to the definition in Section 1(f) of OIC 108. Besides the Nisga’a Nation, a number of modern treaties have recently been concluded in this Province with constitutionally protected jurisdiction. However, none participated in this Inquiry beyond the Nisga’a Nation. For those nations, a model similar to that proposed by the Nisga’a may be appropriate, depending on the particular capacity, resources, and robustness of the First Nation and other governance structures that are put in place pursuant to those treaties. Any specific exclusions to the UCA should be considered in direct consultation with the affected First Nations on a case by case basis.

Provided that the relevant modern Treaty contains terms that are substantially similar to those set out in the Nisga’a Treaty, we would recommend that the same treatment as is accorded the Nisga’a Nation be accorded to that modern Treaty First Nation on the basis of parity.

5.3.3.1 Lands subject to Historical Treaties

Section 1(d) of the OIC defines an Indigenous Nation as a “Treaty Nation”. Given that section 1(f) appears to describe a First Nation that has signed a “modern treaty”, we interpret 1(d) as a First Nation that is subject to any other non-modern treaty (Historical Treaties).

Historical Treaties include reserves and territories wherein the Treaty bands can exercise specific rights. Unlike modern treaties, they, don’t enumerate government powers and First Nations authority. As such, unless a Historical Treaty band chooses to opt into the First Nations Land Management Act, the First Nations Financial Management Act, or a similar sectoral government or negotiates a specific self-government Act, it remains subject to the Indian Act, including s. 88.

486 Section 125.2 of the UCA and any regulations there under.
Accordingly, the Panel is inclined to recommend that First Nations that are parties to Historical Treaties be covered by the same recommendations outlined in respect of Reserve Land. However, we welcome comments on this recommendation during the workshop and comment period.

5.3.4 Westbank First Nation

Westbank First Nation submits that “it has maintained an accountable transparent government to both Westbank First Nation Members and the greater non-Member population” for more than 10 years.487

However, the Westbank First Nation Self Government Agreement itself does not appear to have any wording that is similar to the wording in Chapter 11 Sections 16-23 of the Nisga’a Treaty, although Section 54 of the Self Government Agreement provides some limited protection to non-Members living on Westbank Lands or having an interest in Westbank Lands. It requires that they have “mechanisms through which they may have input into proposed Westbank Law and proposed amendments to Westbank Law that directly and significantly affect such non-Members.”488 Beyond that, there is no explicit process for resolving disputes or complaints involving non-Members. There also does not appear to be any explicit power given to the Westbank to regulate public utilities or energy utilities beyond the provision of water and sewage services on the reserve. Further, there is an express acknowledgment that the agreement is not a treaty, that the lands remain reserve lands as defined under the Indian Act and that provincial laws of general application continue to apply except to the extent that they are inconsistent with or in conflict with Westbank Law.489

In accordance with Section 54 of its Self Government Agreement, the Westbank First Nation enacted its Advisory Council Law in 2017 to provide non-Members the right to run for election to its Advisory Council which is designed to give a voice to non-Members on matters that affect their interests.490

Provided that the Advisory Council Law applies to resolution of utility complaints, we are inclined to recommend that the Westbank First Nation be provided the same opportunity as the Nisga’a to self-regulate with respect to the provision of utility services on its reserve land. To provide greater clarity, we invite the Westbank First Nation to give us further input as to how this law applies to utility complaint resolution during the workshop and comment period.

5.3.5 Sechelt Indian Band and Sechelt Indian Government District

Section 1 (c) of OIC 108 specifically names the Sechelt Indian Band and the Sechelt Indian Government District established under the Sechelt Indian Band Self-Government Act (Canada). Unfortunately, we did not have the benefit of either party’s participation in this Inquiry. Accordingly, in our analysis of their governance framework, we must rely on publicly available information. We have reviewed the Sechelt Indian Band Self-Government Act and the Sechelt Band Constitution.491 We note that they seem to set out a structure similar to that of the Westbank First Nation, with certain notable exceptions outlined below.

487 Exhibit C12-3, Westbank First Nation
488 Westbank First Nation Self Government Agreement, s.54.
489 Westbank First Nation Self Government Agreement
With respect to Sechelt Indian Band (SIB) lands, the Sechelt Indian Government District (SIGD), the local government, was created by the \textit{Sechelt Indian Band Self Government Act} and established as a local government by the \textit{Sechelt Indian Government District Enabling Act}. The SIGD participates on the Sechelt Coast Regional District by appointing a SIGD member to the Council of the Sechelt Coast Regional District. Under the \textit{Sechelt Indian Government District Enabling Act}, the Lieutenant Governor in Council has the ability to confer “municipal benefits” on the District Council by regulation. However, no such regulations have been passed in respect of either the SIB or the SIGD, and neither of those parties are “municipalities” or “regional districts” within the meaning of the \textit{Interpretation Act}.

On the SIB’s website, it states the SIGD can:

- Levy property taxes annually on residents and businesses;
- Purchase services such as fire protection, road maintenance, sewer collection and disposal, garbage collection and recycling services; and
- Participate in the Sunshine Coast Regional Government by appointing a Council member to the SCRD Board.

It is unclear, however, how far the SIB’s ability to provide services extends.

With respect to the protection of non-Member ratepayers, the SIB has an Advisory Council which is an advisory body to the District Council. The District Council itself is made up of members of the Council of the Sechelt Indian Band who is elected by band members only.

The Advisory Council has the ability to do the following\textsuperscript{492}:

(a) planning the servicing program for the Sechelt Indian Government District,

(b) estimating the costs of the servicing program referred to in paragraph (a),

(c) recommending a servicing program, including the proposed financing for it, to the District Council, and

(d) receiving and considering petitions relating to the provision of a service in the Sechelt Indian Government District.

The Advisory Council is elected every three (3) years by anyone living in the area who is an elector. An elector does not need to be a band member. The election process relies on the election process outlined in Parts 3 and 4 of the \textit{Municipal Act} now know as the \textit{Local Government Act} (Parts 3 and 4). These sections outline who is eligible to vote at an election, which is the same for municipalities. Although there is no express dispute resolution process in place, electors have the ability to vote out the Advisory Council if, for example, they dispute the utility rates they are paying.

\textsuperscript{492} s.4(1) of \textit{Sechelt Indian Government District Enabling Act Advisory Council Regulation}
Based on our analysis of the above, it appears uncertain that either the Sechelt Indian Band or the Sechelt Indian Government District qualifies for the current municipal exception under the UCA. **Nonetheless, we would recommend that those entities be accorded the same opportunity as other First Nations to self-regulate the provision of utility services on their reserve lands, provided that the Advisory Council has the power to resolve utility complaints.** To assist us in making this recommendation, we invite the Sechelt Indian Band and the Sechelt Indian Government District to give us further insight into their processes during the workshop and comment period.

### 5.3.6 Traditional Territories

The Panel has received a number of submissions on whether the geographic area served by an Indigenous utility should include traditional territory. We acknowledge the benefits to First Nations from having a service territory that is larger than its reserve or Treaty lands. Those benefits include economic opportunity, reconciliation, energy security and self-determination. On the other hand, including traditional territory in the service area of an Indigenous utility could impact the incumbent utility and impact its customers’ rates. **Given the complexity of issues, the BCUC makes no recommendations in relation to Indigenous utilities that may seek to operate within traditional territories outside of their reserve lands.** A First Nations owned utility can apply to the BCUC on a case-by-case basis for a s. 88 exemption from regulation on traditional territory. In addition to ratepayer impacts, the BCUC may consider factors such as the need to regulate, dispute resolution, impact on existing utilities, and impact on other First Nations.

### 5.4 What is an Indigenous Utility?

The definition of Indigenous utility in the Terms of Reference is very broad. Too broad, in fact, to be anything other than a useful starting point for determining what should be the defining characteristics of an Indigenous utility. The Panel received numerous submissions on the four areas outlined in the Terms of Reference:

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.

FortisBC notes further differentiation among “Indigenous utilities” is required for the definition to have practical application.\(^{493}\) Alternatively, the term will need to be redefined to apply to a narrower group of utilities. Nisga’a Nation and FNLC both comment that the broad definition ignores the distinctiveness among Indigenous groups, and Collective First Nations note that the broad definition leaves wide open the possibilities for exploitation of Indigenous groups.\(^{494}\)

Before considering what the definition of an “Indigenous utility” should be, we note that a useful definition depends on the context in which that definition will be used. On its face the definition of Indigenous utility could extend to any utility with some degree of ownership by an Indigenous person or persons, and/ or the territory in which it operates or its customers reside.

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\(^{493}\) FortisBC Final Argument, pp. 11–12.

\(^{494}\) Nisga’a Nation Final Argument, p. 4; Exhibit C16-2, FNLC Evidence, p. 6.
For example, it could be argued that the fact that BC Hydro has Indigenous customers and operates on Indigenous lands makes it an Indigenous utility. However, we do not feel that is a useful definition, largely because it ignores the context in which that definition is made. Reviewing the submissions and arguments we have received and the discussion in the previous Sections, there is a broad agreement among First Nations that utility services provided by the Nation or the Band Council should be distinguished and considered for self-regulation. While among non-First Nations groups, there may not be complete agreement with this position, there is an acknowledgement that it is not an unreasonable request. Most First Nations also acknowledge that utilities such as BC Hydro operating on their lands should continue to be subject to regulation by the BCUC, although that view is not unanimous.

We recommend that the definition of Indigenous utility should be further explored during the workshops. We have outlined above recommendations for the regulation of utility services provided by First Nations. The workshop topics further explore different ways that service is provided, thereby defining an Indigenous utility. We also recommend that consideration be given, during the workshop period, to any further context in which the definition of Indigenous utility is required.

5.5 Alternative Regulatory Schemes

In a previous Section, we outlined the minimum safeguards that we believe that any regulatory scheme should have. The Panel recognizes that in the absence of regulation by the BCUC under the UCA, many participants in this Inquiry have expressed that a First Nation should “self-regulate” any utility it owns, according to its own needs, laws and structures. Ultimately, the decision of the appropriate regulatory scheme would be the choice of the First Nation.

5.5.1 Delegated Authority

We find attractive from a practical perspective the Nisga’a suggestion that, even if it is exempt from the UCA, it may opt into an existing regulatory scheme or contract specifically with the BCUC to regulate a Nisga’a Utility. That approach could be effective and efficient, because it provides an exempt nation or band the opportunity to delegate all or part of the regulatory burden to an existing body without recreating the infrastructure and processes associated with a separate regulatory regime.

As a contractual arrangement between two parties, the terms of that outsourcing arrangement can also be crafted to suit the specific needs of the nation or band and the existing regulatory agency (e.g. full or partial regulation; short term or long term agreement). It has the further advantage of allowing the nation or band to focus its attention and energies on the main utility business without the distractions of attending to the regulatory scheme.

From an external stakeholder or investor perspective, the use of a familiar or known regulator with proven history and experience and established regulatory criteria may be more attractive and promote greater investor confidence than a completely new regulatory regime. This solution is also consistent with the concept of reconciliation and does not offend the requirement of Free, Prior and Informed Consent.

However, as there is no specific proposal before us, we make no specific recommendations at this time.
5.5.2 Self Regulation of all Utilities by a First Nation

The FNLC:

takes the firm position that First Nations in BC have jurisdiction over energy generation, transmission, and distribution in our territories. This sovereign authority and jurisdiction is undermined by BCUC regulation of Indigenous utilities. Our submission will address both jurisdictional concerns and recommend transitional strategies that address regulatory barriers for Indigenous utilities today.

As part of its international responsibilities towards Indigenous peoples in BC and its climate commitments, BC and the BCUC must ensure that First Nations have every opportunity, unim peded by undue cost or regulatory constraint, to rebuild self-governance, improve quality of life, mitigate and adapt to climate change, and attain economic independence through renewable energy development. Furthermore, any regulatory amendments or administration of renewable energy programs must occur in accordance with Title, Rights, and Treaty Rights, and in accordance with the United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP).

Indigenous utilities must, at minimum, be exempted from being regulated as public utilities within the meaning of the Utilities Commission Act (UCA), and regulations must be introduced that support the economic viability of First Nations-led renewable energy projects. Specifically, any regulatory body overseeing utilities must be directed to consider the full social, health, and economic costs of energy when approving Indigenous utility rate applications. In addition, the regulatory body must offer a streamlined rate application process that does not unduly burden Indigenous utilities. As a transition plan to full jurisdiction, the FNLC recommends separate legislation to establish an Indigenous Utilities Commission (IUC) with equivalent powers to the BCUC, to act as a quasi-judicial body in accordance with the Indigenous legal orders of the Nations it regulates. 495

BC Hydro argues that:

Non-Indigenous utilities should continue to be regulated by the Commission under the UCA, regardless of where they provide services within the Province. Whether customers of a non-Indigenous utility providing services on-reserve would have appropriate protections and recourse, either directly against the non-Indigenous utility or through accountability of the Indigenous government to the customers, should be determined on a case-by-case basis under the UCA. The Commission should retain jurisdiction over all BC Hydro utility assets and operations across the Province, and BC Hydro should not be subject to any new regulator which regulates Indigenous utilities. 496

We agree with the position of FNLC concerning the exemption of Indigenous utilities, and we have recommended an exception to the definition of public utility for Indigenous utilities providing services within their reserve boundaries.

495 Exhibit C16-2, FNLC Written Evidence, p. 5.
496 BC Hydro Final Argument, pp. 11-12.
Under the current regulatory regime, it is uncertain whether First Nations have the jurisdiction to regulate all utilities on First Nations territories. Further, even if First Nations have the jurisdiction, regulation of utilities by numerous authorities requires careful and ongoing coordination between jurisdictions and with utilities. Unless there is common regulation, any utility that operates in more than one jurisdiction or in areas with overlapping jurisdictions is likely to find it overly onerous. This could have the effect of increasing costs to ratepayers. Accordingly, we do not recommend this alternative.

We do, however, acknowledge that to the extent a Treaty allows a First Nation to make its own laws regarding utility regulation, that Nation could potentially replace the UCA and the BCUC with a regulatory regime of its own.

5.5.3 Indigenous Utilities Commission

The concept of an Indigenous-led regulator operating separately from the UCA was attractive to some First Nations. Several interveners introduced the concept of an Indigenous Utilities Commission (IUC) to regulate Indigenous utilities. The FNLC proffered the idea of legislation to create an IUC with a mandate to consider the full social, health and economic costs of energy. Under this proposal, the IUC would support decision-making and dispute resolution according to First Nation-specific legal and social orders, priorities and values.

Some proposed a legislative framework conceptually similar to the First Nations Financial Management Board, the First Nation Tax Commission, or the First Nations Land Management Board, with an Indigenous regulatory body that supports First Nations in the enactment of utility laws and dispute resolution mechanisms, and that offers oversight. Others suggested a hybrid of an Indigenous self-regulated utility with regulatory oversight by BCUC for areas which impact the broader community or non-First Nations entities.

In contrast, some interveners (e.g. KGI) did not object to the BCUC as a regulator, being neutral as to the choice of regulator as long as it has the requisite competence. The key concern to these parties was the cost of regulation for Indigenous utilities that cannot engage in the same way as large utilities. KGI proposes that an acceptable level of regulatory overhead burden should not exceed $10,000 per year.497

Chief Michell expresses the view that his utility should be regulated in relation to safety and reliability, stating: “British Columbians need fairness, consistency, transparency and honesty...You make me prove that my Indigenous utility can provide safe and reliable energy. Don't you tell me what my rate is, that's for me to decide....”498 So long as it was fair and objective, he was indifferent as to whether BCUC, the UCA, or the Indigenous associations regulated his utilities.499

Along a similar vein, the FNMPC proposes the formation of a BC Indigenous Utility Association or Cooperative to address issues in a collective and collaborative manner. The FNMPC cites as an example the US tribal utilities associations which encourages members to share interests, technical skills and community concerns and to collaborate in sharing best practices. Such an association or cooperative could begin a dialogue to identify and manage potential conflicts between provincial and Indigenous jurisdictions.

498 Vancouver Community Input session, vol.6 p 267
499 ibid, p. 274
The Panel is supportive of the idea of an IUC to regulate First Nations owned utilities that are exempt from UCA regulation but believes that the specifics of such proposal should be left to Indigenous Nations and government.

5.6 Ceasing to be an Indigenous Utility

We received seven submissions on this topic. Parties support regulation under the UCA when a utility ceases to be an Indigenous utility. Collective First Nations state “the new owner should be subject to regulation in the same manner as any other public utility.” Similarly, “[i]f the criteria [of an Indigenous utility] are not satisfied, then the utility would require regulation under the Act.”

Fewer parties expressed views on whether the sale of an Indigenous utility to another utility (whether Indigenous or non-Indigenous) should require BCUC authorization. Both Coastal First Nation and Collective First Nation agree that it is not necessary for the BCUC to authorize the sale.

Flintoff submits that a situation may arise where an Indigenous utility is sold by one Indigenous Nation to another, and if the “purchasing” Indigenous utility ceases to be accountable to its customers (because it is a different First Nation), then the purchasing utility would become a public utility, subject to the UCA.

Chief Michell of the Kanaka Bar Indian Band states that this situation would not arise:

> Everything I build at my community is owned by my community and will be owned by my community for the next thousand years. I do not design and build stuff for sale to the market. That’s what separates me from other people. What makes me Indigenous is once we invest in something, it’s there forever. … What defines me is that we invest in infrastructure for our future generations, certainly not for flipping for a profit.

The Panel’s proposed recommendation is: if a utility ceases to meet the definition of an Indigenous utility it becomes subject to regulation under the UCA. The Panel notes that the definition of “Indigenous utility” will be subject to the discussions in the workshop and comment period. When the utility becomes subject to the UCA, the BCUC will, at that time, make any such investigations and determinations that may be required to ensure that rates are consistent with the terms of the UCA.

We invite any further submissions or comments from parties on this matter during the workshop and comment period.

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500 Exhibit C13-2, Collective First Nation Evidence, p. 24, see also Exhibit C20-2, Coastal First Nation Evidence, p. 18
501 Exhibit E6, Tsay-Keh-Dene Letter of Comment, p. 2
502 Exhibit C20-2, Coastal First Nation Evidence, p. 18
503 Exhibit C5-2, Flintoff Evidence, p. 36.
504 Transcript Vol. 6 Chief Michell, p. 271
6.0 Next steps for the development of a regulatory framework

Many participants have noted that this Inquiry cannot be the end of the dialogue regarding Indigenous utilities, and that further consultation and collaboration will be required in the development of any regulatory framework concerning Indigenous utilities.

FNLC submits that the Inquiry, with its short timeframe for engagement, cannot be considered sufficient for a process of consultation or to meet the standard of free, prior and informed consent articulated in UNDRIP. Further, more research and engagement are needed to implement a transition plan to place Indigenous utilities within the authority of First Nations.505

Some participants highlight that following this Inquiry, there is a need for any regulatory framework or changes to legislation to be developed in consultation or partnership with Indigenous Nations.506 Examples were given about how this could advance. FNMPc cites the example of working with the provincial government in the redevelopment of environmental assessment legislation, which facilitated Indigenous participation and leading their interests in the process.507 Chief Blaney suggests that the umbrella agreement used in the Yukon Treaty process, whereby common issues to First Nations were negotiated together and specific interests were negotiated separately, could be a potential model for developing a regulatory framework.508

Beecher Bay and Adams Lake consider that there are a range of possible outcomes on Indigenous utilities and regulatory approaches that may advance reconciliation, and to fully incorporate the principles of UNDRIP will require adequately funded community-driven processes.509

KGI notes that there needs to be a substantive conversation involving the Government of BC and BC Hydro regarding the future of Indigenous utilities.510

Some cite the need to discuss issues raised in this Inquiry further with members of their community before being able to provide a view, which may require more time than the Inquiry timeline allows.511

As a result of receiving these comments the Panel committed to issuing this draft Report by November 1, 2019 and has asked the Provincial Government to grant the BCUC for a two-month consultation process, including a series of workshops to consult with Indigenous communities and others on the contents of the draft Report. Subsequently, the Inquiry timeline was extended by three months, therefore allowing more time for discussion of issues raised in the Inquiry.

We are mindful that many interveners urge us, in considering the viability and practicality of these various options, to engage in more consultation with affected First Nations about the implications of adopting one or more of these options and the impacts and unintended consequences that they may create. While we do not

505 Exhibit C16-2, FNLC Evidence, p. 5.
508 Transcript Vol. 9, Chief Blaney, pp. 395 – 401.
509 Beecher Bay/ Adams Lake Final Argument, p. 9
510 Transcript Vol. 12, Thompson, p. 657
wish to rule out any one of the options and will work collaboratively these may not satisfy all interested parties. Depending on the feedback that we receive to this draft Report, a further process may be required.

We also emphasize that in presenting the proposed recommendations for further consideration, we are not precluding any innovative proposals. Rather, any recommendations that ultimately flow out of this Inquiry are intended to serve as the foundation for further dialogue which may be more appropriately undertaken directly between Indigenous Nations and the Provincial and Federal governments, with or without the assistance of the BCUC.

7.0 Guidance for Workshops and Comments on Draft Report

Further to the publication of this Draft Report, the BCUC will be hosting six workshops in BC to gather feedback and comments on the Report and the draft recommendations. Additionally, the BCUC will be receiving written comments on the Draft Report until March 31, 2020.

Participants in the workshops will be able to ask questions and make comments about any aspects of the Report that are of interest to them. We also outline below some key high-level points and questions on which we would welcome discussion and feedback in the workshops and in writing. These are outlined below.

7.1 Proposed Recommendations

Subject to feedback during the workshop/comment period, the Panel’s proposed recommendations are as follows:

<table>
<thead>
<tr>
<th>Regulation of Monopolies</th>
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<tbody>
<tr>
<td>1. That all ratepayers of Indigenous utilities receive the same protection as do ratepayers of non-Indigenous utilities.</td>
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<tr>
<th>Regulation of Mandatory Reliability Standards</th>
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<td>2. That the BCUC retain jurisdiction with respect to approval, compliance and enforcement of Mandatory Reliability Standards applicable to all transmission infrastructure in the province, regardless of who owns or operates the infrastructure.</td>
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<tr>
<th>Reserve Lands</th>
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<tr>
<td>3. That a First Nation be given the opportunity to self regulate when it provides utility service on its reserve land, in much the same way municipalities and regional districts do. Subject to recommendations 4 to 6 below, this can be accomplished by enabling a First Nation or Band Council to “opt out” of BCUC regulation by notifying the BCUC of its intention.</td>
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<tr>
<td>4. That the First Nation should demonstrate that it has an appropriate complaint and dispute handling process in place to protect all ratepayers. In the event it cannot do so the BCUC would retain jurisdiction to handle all complaints.</td>
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<tr>
<td>5. That the BCUC complaint and dispute handling processes be available to any ratepayer who wishes to appeal a decision arising out of the First Nation utility’s complaint process.</td>
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</table>
6. Safety and reliability (other than MRS) will be the subject of the workshop and comment period. If the Final Report recommends that the BCUC retains jurisdiction over safety and reliability, First Nations would not be able to opt out of those applicable portions of the UCA governing these issues.

In proposing these recommendations, we have not made any comment on the issue of the “obligation to serve.” The municipal exclusion does not require a municipality to provide service to every customer and we do not consider it necessary to explicitly impose this obligation on a First Nation-owned utility. Public utilities are generally expected to have a clear and transparent policy for apportioning costs of extending the system to serve new customers between its existing customers and those new customers (extension policy). We note that any potential customer who is dissatisfied with the application of the extension policy provided by the First Nation utility would have recourse to a robust complaint process.

Those First Nations that choose not to opt out, would continue to be regulated by the BCUC subject to the terms of the UCA. The Panel is aware of the regulatory burden on small utilities and is considering approaches to mitigate that burden.

Any First Nation that seeks to acquire any assets from BC Hydro or any other incumbent public utility will continue be subject to BCUC regulation with respect to the approval of that transaction. In reviewing the transaction, the BCUC would consider among other matters the rate impact on the incumbent utility’s ratepayers.

Modern Treaty Lands – Nisga’a

7. That the Nisga’a Nation be given the opportunity to self-regulate, as do municipalities and regional districts, when it provides utility service on its own lands.

8. Notwithstanding the Nisga’a’s authority over their own lands, we recommend that the BCUC retain jurisdiction over Mandatory Reliability Standards, because of the interconnected nature of the North American bulk electric system.

Other Modern Treaty Lands

9. Provided that a modern Treaty contains terms that are substantially similar to those set out in the Nisga’a Treaty, we would recommend, on the basis of parity, that a modern Treaty Nation be given the opportunity to self-regulate when it provides utility service on its own lands, in the same manner as we have proposed for the Nisga’a.

Lands Subject to Historical Treaties

10. We are inclined to recommend that First Nations that are parties to Historical Treaties by covered by the recommendations outlined in respect of Reserve Land. However, we welcome comments on this recommendation during the workshop and comment period.

Westbank First Nation

11. Provided that the Advisory Council Law applies to resolution of utility complaints, we are inclined to recommend that the Westbank First Nation be given the opportunity to self-regulate when it provides utility service on its own lands, as we have proposed for the Nisga’a. To provide greater clarity, we invite the Westbank First Nation to give us further input as to how this law applies to utility complaint resolution during the workshop and comment period.
12. It appears uncertain that either the Sechelt Indian Band or the Sechelt Indian Government District qualifies for the current municipal exception under the UCA. Nonetheless, we would recommend that those entities be given the opportunity to self-regulate when they provide utility service on their own lands, as we have proposed for the Nisga’a, provided that the Advisory Council has the power to resolve utility complaints. To assist us in making this recommendation, we invite the Sechelt Indian Band and the Sechelt Indian Government District to give us further insight into their processes during the workshop and comment period.

13. If a utility ceases to meet the definition of an Indigenous utility it becomes subject to regulation under the UCA.

14. The definition of Indigenous utility should be further explored during the workshops. We have outlined above recommendations for the regulation of utility services provided by First Nations. The workshop topics further explore different ways that service is provided, thereby defining an Indigenous utility. We also recommend that consideration be given, during the workshop period, to any further context in which the definition of Indigenous utility is required.

### Questions for Workshops and Comment Period

Our proposed recommendations are intended to provide a starting point for further discussion. **We welcome feedback and comment during the workshops and the subsequent written comment period on the following questions regarding our proposed recommendations and regulatory model.**

**Topics for Discussion**

a) What are your views on the BCUC’s proposed recommendations?

b) Do the proposed recommendations strike the right balance between the need for ratepayer protection and the rights of First Nations to self governance?

c) What might an appropriate complaints and disputes resolution process look like and should there be minimum safeguards? Should the BCUC have a role as an appeal body in resolving complaints or disputes?

d) Are there specific areas which should not be exempt, such as safety and service reliability? If so, what are those specific areas and which body/bodies should regulate those areas?

e) Conversely, should the scope of the proposed exception be expanded to include specific areas/situations such as the following:

   - A utility’s assets are owned by a corporation of which the First Nation/Band Council is a shareholder or the sole shareholder;
   - A utility’s assets are owned by a partnership of which the First Nation/Band Council is a partner, a limited partner or a general partner;
| **o** The utility’s assets are owned by a third party, but the First Nation/Band Council has granted a franchise agreement, a licence and/or has enacted enabling bylaws to facilitate the construction and/or operation of the utility;  |
| **o** The utilities’ assets are owned by a First Nation/Band Council but are operated by a third party; and  |
| **o** The First Nation/Band Council, by agreement with the utility owner, sets or approves the setting of rates for the utility. |

*For the above questions, where appropriate, please consider the minimum degree of ownership or control required.*

The Panel notes these ownership issues are being canvassed with respect to the municipal/regional district exception in a parallel inquiry.\(^{512}\)

f) If an exempt utility sells energy to a neighbouring First Nation, what regulatory regime, if any, should apply to the sale of energy on the lands of the second First Nation?

g) Suppose that an exempt utility wishes to sell energy to a different reserve or First Nation and must use the BC Hydro’s transmission system to transport the energy (Retail Access). This activity is currently not allowed. Should the BCUC recommend that changes be made?

h) As a result of the proposed recommendations, an exempt utility could sell energy to a municipality. However, if BC Hydro’s transmission system is required to transport the energy, the Retail Access prohibition applies. Should the prohibition be changed? What effects, if any, should be considered with respect to sales of energy to non-Indigenous customers within an incumbent utility’s territory?

i) Should the exempt utility be free to sell its energy to members of its Nation/Band wherever they reside in the province?

j) The test for acceptance of an EPA is that it must be in the public interest. In particular, applicants should demonstrate that BC Hydro needs the energy and that the contract price is comparable to market price. Should the BCUC consider public interest issues particular to First Nations in approving Energy Purchase Agreements involving Indigenous utilities? On what basis might the BCUC do so, and what might those public interest issues entail?

k) What should the BCUC do to assist in Indigenous utility regulation, reduce the regulatory burden, and improve the accessibility of its regulatory processes for First Nations that choose to remain under its jurisdiction?

We look forward to receiving your feedback and comments on our proposed recommendations including your thoughts on the questions arising from our proposed regulatory model.

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\(^{512}\) British Columbia Utilities Commission An Inquiry into the Regulation of Municipal Energy Utilities.  
https://www.bcuc.com/ApplicationView.aspx?ApplicationId=695
DATED at the City of Vancouver, in the Province of British Columbia, this 1st day of November 2019.

Original signed by:

__________________  __________________
D. M. Morton        __________________
Panel Chair / Commissioner

Original signed by:

__________________  __________________
A. K. Fung, QC      __________________
Commissioner

Original signed by:

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E. B. Lockhart       __________________
Commissioner

Original signed by:

__________________  __________________
C. M. Brewer         __________________
Commissioner
## Glossary and List of Acronyms

<table>
<thead>
<tr>
<th>Term</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certificate of Public Convenience and Necessity (CPCN)</td>
<td>A certificate issued by the BCUC that grants a person authority to begin the construction, extension, or operation of a public utility plant or system.</td>
</tr>
<tr>
<td><strong>Clean Energy Act (CEA)</strong></td>
<td>BC government energy efficiency legislation to support the Province's energy, economic and greenhouse gas reduction priorities. The <em>Clean Energy Act</em> specifies BC's energy objectives.</td>
</tr>
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<td></td>
<td><a href="https://www2.gov.bc.ca/gov/content/industry/electricity-alternative-energy/energy-efficiency-conservation/policy-regulations">https://www2.gov.bc.ca/gov/content/industry/electricity-alternative-energy/energy-efficiency-conservation/policy-regulations</a></td>
</tr>
<tr>
<td><strong>Constitution of Canada</strong></td>
<td>The Constitution of Canada includes the <em>Constitution Act, 1867</em>, and the <em>Constitution Act, 1982</em>. It is the supreme law of Canada. The <em>Constitution Act, 1867</em> reaffirms the division of powers between the Federal Government and the Provincial and Territorial Governments. The <em>Constitution Act, 1982</em> recognizes Aboriginal Rights and Title.</td>
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<td><a href="https://www.justice.gc.ca/eng/csj-sjc/just/05.html">https://www.justice.gc.ca/eng/csj-sjc/just/05.html</a></td>
</tr>
<tr>
<td>Cost of service</td>
<td>The regulator (BCUC) determines the Revenue Requirement — i.e., the “cost of service” — that reflects the total amount that must be collected in rates for the utility to recover its costs and earn a reasonable return.</td>
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<tr>
<td>Crown corporation</td>
<td>Crown corporations are public sector organizations established and funded by the B.C. government to provide specialized goods and services to citizens.</td>
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<td>More information can be found at <a href="https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations">https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations</a></td>
</tr>
<tr>
<td>Duty/ obligation to serve</td>
<td>The duty/ obligation to serve is the obligation to (a) provide the services defined by a public utility’s franchise agreements and its statute, (b) maintain quality.</td>
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<td>Term</td>
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<tr>
<td>Term</td>
<td>levels defined by commission rule, and (c) comply with commission rules and orders. The duty/obligation arises under the UCA but also exists at common law.</td>
</tr>
<tr>
<td>Electricity Purchase Agreement (EPA)</td>
<td>Agreement between a generator and a purchasing utility for sale of electricity. Subject to Section 71 of the UCA.</td>
</tr>
<tr>
<td>First Nations Land Management Act (FNLMA)</td>
<td>First Nations Land Management Act enables First Nations to opt-out of 40 sections of the Indian Act relating to land management. First Nations can then develop their own laws about land use, the environment and natural resources and take advantage of cultural and economic development opportunities with their new land management authorities. <a href="https://www.aadnc-aandc.gc.ca/eng/1327090675492/1327090738973">https://www.aadnc-aandc.gc.ca/eng/1327090675492/1327090738973</a></td>
</tr>
<tr>
<td>Independent Power Producer (IPP)</td>
<td>IPPs develop and operate projects such as wind, hydro and biomass. IPPs include power production companies, municipalities, First Nations and customers. <a href="https://www.bchydro.com/work-with-us/selling-clean-energy/meeting-energy-needs/how-power-is-acquired.html">https://www.bchydro.com/work-with-us/selling-clean-energy/meeting-energy-needs/how-power-is-acquired.html</a></td>
</tr>
<tr>
<td>The Indian Act</td>
<td>The Indian Act is the principal statute through which the federal government administers Indian status, local First Nations governments and the management of reserve land and communal monies. <a href="https://www.thecanadianencyclopedia.ca/en/article/indian-act">https://www.thecanadianencyclopedia.ca/en/article/indian-act</a></td>
</tr>
<tr>
<td>Indigenous Utilities Commission (IUC)</td>
<td>A body proposed by FNLC with similar functions to the BCUC, led and directed by First Nations to provide expert guidance to Indigenous utilities in BC and empowered by statute to operate independently from government.</td>
</tr>
<tr>
<td>Mandatory Reliability Standards (MRS)</td>
<td>The BC transmission system is part of a much larger, interconnected grid, requiring work with other jurisdictions to maximize the benefits of interconnection, remain consistent with evolving North American reliability standards, and ensure BC’s infrastructure remains capable of meeting customer needs. Reliability standards includes: a reliability standard, rule or code established by a standard-making body for the purpose of being a mandatory</td>
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<td><strong>reliability standard for planning and operating the North American bulk electric system.</strong></td>
<td>More information can be found at: <a href="https://www.bcuc.com/industry/mandatory-reliability-standards.html">https://www.bcuc.com/industry/mandatory-reliability-standards.html</a></td>
</tr>
<tr>
<td><strong>Open Access Same-time Information System (OASIS)</strong></td>
<td>Open Access Same-time Information System (OASIS) allows registered users to make reservations for transmission service on the BC Hydro transmission system. <a href="https://www.bchydro.com/energy-in-bc/operations/transmission/transmission-scheduling/oasis.html">https://www.bchydro.com/energy-in-bc/operations/transmission/transmission-scheduling/oasis.html</a></td>
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<tr>
<td><strong>Order in Council (OIC)</strong></td>
<td>An Order in Council (OIC) is a government order recommended by the Executive Council and signed by the Provincial Lieutenant Governor in Council.</td>
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<tr>
<td><strong>Standing Offer Program (SOP)</strong></td>
<td>The SOP was developed to streamline the process for selling electricity to BC Hydro for independent power producers with small-scale renewable energy projects. After a Government review of BC Hydro the SOP was suspended indefinitely except for five First Nations projects that BC Hydro committed to proceed with in March 2018. More information on the SOP can be found at <a href="https://www.bchydro.com/work-with-us/selling-clean-energy/standing-offer-program.html">https://www.bchydro.com/work-with-us/selling-clean-energy/standing-offer-program.html</a></td>
</tr>
<tr>
<td><strong>Stranded asset</strong></td>
<td>An asset which is obsolete before the end of its useful life</td>
</tr>
<tr>
<td><strong>Utilities Commission Act (UCA)</strong></td>
<td>The <em>Utilities Commission Act</em> is the legislation the BCUC operates under and administers. The UCA can be found at <a href="http://www.bclaws.ca/Recon/document/ID/freeside/00_96473_01">http://www.bclaws.ca/Recon/document/ID/freeside/00_96473_01</a></td>
</tr>
<tr>
<td><strong>United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)</strong></td>
<td>UNDRIP delineates and defines the individual and collective rights of Indigenous peoples, including their ownership rights to cultural and ceremonial expression, identity, language, employment, health, education and other issues.</td>
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<tr>
<td>Western Interconnection Grid</td>
<td>The Western Interconnection is a physically and electrically defined area that comprises the infrastructure of the Bulk Electric System. It extends from Canada to Mexico. It includes the Canadian provinces of Alberta and British Columbia, the northern part of Baja California in Mexico, and all or part of the 14 Western states in between.</td>
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<td><a href="https://www.wecc.org/Pages/101.aspx">https://www.wecc.org/Pages/101.aspx</a></td>
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</table>
PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 108, Approved and Ordered March 11, 2019

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the attached order, British Columbia Utilities Commission Inquiry Respecting the Regulation of Indigenous Utilities, is made.

Attorney General

Preseting Member of the Executive Council

Authority under which Order is made:

Act and section: Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 5

Other:

O20266403

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BRITISH COLUMBIA UTILITIES COMMISSION INQUIRY RESPECTING
THE REGULATION OF INDIGENOUS UTILITIES

Definitions

1 In this order:
   “Act” means the Utilities Commission Act;
   “indigenous nation” means any of the following:
       (a) a band within the meaning of the Indian Act (Canada);
       (b) the Westbank First Nation;
       (c) the Sechelt Indian Band and the Sechelt Indian Government District
           established under the Sechelt Indian Band Self-Government Act (Canada);
       (d) a treaty first nation;
       (e) the Nisga’a Nation and Nisga’a Villages;
       (f) another indigenous community within British Columbia, if the legal entity
           representing the community is a party to a treaty and land claims
           agreement within the meaning of sections 25 and 35 of the Constitution
           Act, 1982 that is the subject of Provincial settlement legislation;
   “indigenous utility” means a public utility that is owned or operated, in full or in
   part, by an indigenous nation.

Referral to commission

2 By this order, the Lieutenant Governor in Council, under section 5 (1) of the Act,
   requests that the commission advise the Lieutenant Governor in Council respecting
   the regulation of indigenous utilities in accordance with the terms of reference set
   out in section 3 of this order.

Terms of reference

3 (1) Subject to subsection (2), the terms of reference, in accordance with which the
   commission must inquire into the matter referred to it by section 2, are as follows:
       (a) the commission must advise on the appropriate nature and scope, if any, of
           the regulation of indigenous utilities;
       (b) without limiting paragraph (a), the commission 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 Act or under another mechanism, or be unregulated?

(iii) If it is appropriate to regulate indigenous utilities under the Act, 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 Act 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?

(2) It is a further term of reference that the commission must submit to the minister responsible for the Hydro and Power Authority Act reports as follows:

(a) an interim report describing the commission’s progress to date and the commission’s preliminary findings must be submitted no later than December 31, 2019;

(b) a final report describing the results of consultations undertaken by the commission and the commission’s findings and recommendations must be submitted no later than January 31, 2020.
PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 559, Approved and Ordered October 31, 2019

Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that section 3 (2) (b) of Order in Council 108/2019 is amended by striking out “January 31, 2020” and substituting “April 30, 2020”.

[Signatures]
Attorney General

Presiding Member of the Executive Council

Authority under which Order is made:

Act and section: Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 5

Other: OIC 108/2019

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