Written Comments on Indigenous Utilities Regulation Draft Report Summary

By D. J. Flintoff

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Chapter 1. Introduction

By Order G-282-19, the Commission amended the regulatory timetable such that written comments on the Panel's draft report are due on Monday, March 2, 2020. By Order G-26-20, the Commission amendeds the regulatory timetable established by Order G-282-19 to March 6, 2020.

In order to make a recommendation, the definition of an indigenous utility will need to be determined. As the definition is being compared to the exclusion in the UCA of a municipality or regional district and those definitions are being discussed in a parallel inquiry, the task of defining what an indigenous utility for the purpose of exclusion is becoming increasingly difficult.

1.1. Order G-104-18

1.1.1. Paramountcy

In the Reasons for Decision in Order G-104-18, the Panel found that in the matter of paramountcy:

> Further, the Panel also finds that a harmonious, coherent and consistent reading of the UCA and the Community Charter supports this conclusion. Section 10(1) of the Charter expressly provides that a municipal bylaw has no effect if it is inconsistent with a Provincial enactment. Section 121 of the UCA provides that nothing in or done under the Community Charter impair a power conferred on the BCUC. There is nothing unharmonious, incoherent or inconsistent about the interpretation made regarding the Municipal Exclusion as both the Charter and the UCA expressly recognizes that where an action taken by a municipality is contrary or in conflict with the action taken by the BCUC pursuant to the UCA then the lawful actions of the BCUC prevail.
>
> In the Decision, the Commission clarifies the interpretation of Section 121 of the UCA.

1.1.2. Municipal Exclusion

Also in the Reasons for Decision in Order G-104-18, the Panel found the following in the matter of Municipal exclusion:

> The Panel will address the interpretation of the Municipal exclusion with its findings on the object and scheme of the UCA. The Panel finds that when the words of the Municipal exclusion are read in their entire context and in their ordinary and grammatical sense, the only entities that can benefit from the Municipal exclusion are municipalities and regional districts. In making this finding, the Panel agrees with the submission made by FEI. The initial words of the Municipal Exclusion make it clear that only a municipality or regional district is entitled to this exclusion in respect of services provided by them. SSL is a corporate entity and is not a municipality or regional district.

In the Decision, the Commission clarifies the interpretation of the exclusion of municipalities and regional districts in the UCA with respect to ownership.

1.2. Exclusion vs. Exemption

As there is a great deal of effort being put into what is meant by “exclusion” in this inquiry, I believe it may be time to review the reason for the exclusion (the exclusion) of municipalities and regional districts as well as indigenous utilities. If the exclusion mechanism was removed from the UCA, what would be the effect and impact to those excluded?

I can’t speak as to why the specific exclusion is in the UCA, but I will address the exclusion in today’s terms.

Today, most municipalities, regional districts and indigenous utilities own or operate their utilities through another entity[1] which automatically makes them a public utility. As a public utility, those public utilities may seek exemption from the BCUC from certain sections of the UCA.

Why is this important in this Inquiry?

Well, we have about 148 First Nations that may be interested in entering the energy market in the Province. Each First Nation group may have different treaty arrangements and

[1] Government Business Enterprise, owned by a corporation, partnership, a third party, a franchise agreement, or operated by a third party.

claims. This being the case, any effort to develop a scheme to have “one size, fits all” may most likely fail.

However, if the exclusion is replaced with an exemption process based on the current UCA, then, if acceptable, each First Nation that accepts BCUC’s jurisdiction, as a public utility, could apply for an exemption from certain sections of the UCA based on its unique interests and the BCUC could make regulatory adjustments based on those unique interests.

This approach could address all the “Topics for Feedback” in the Panel’s draft report such as: ratepayer protection, complaint/dispute resolution, safety and service reliability and ownership issues; without infringing on the rights of First Nations unnecessarily. If the exclusion is eliminated from the UCA, the BCUC will be able to tailor the exemption for each First Nation to address the needs of the First Nation and the BCUC individually.

Further, this process may preserve the uniqueness of the rights of each First Nation while allowing the regulation of energy within the Province and safe coordination energy in the North American energy grid.

Also, the issue of accountability and transparency needs to be addressed. In the case of municipalities and regional districts accountability and transparency may be compromised if the utility is held in some sort of joint partnership or P3 corporate structure as the municipalities and regional districts may not have to respond to freedom of information requests.

Also, recent events with Wet’suwet’en Nation have highlighted the different interests of the elected council, the hereditary chiefs, BC and Canada. These recent events have adversely affected Canada and BC should proceed carefully to ensure the security of Canada’s energy supply as we continue along the path of reconciliation.

1.3. Mandatory Reliability Standards

The Mandatory Reliability Standards (MRS) was addressed by the BC Government when it amended the UCA by adding Section 125.2 giving the BCUC jurisdiction. Not only does MRS provide standards for transmission interconnection but also operation, generation and protection and control. So, depending on the size of the indigenous utility, there are other matters to be addressed when a indigenous utility seeks to connect to the transmission grid.

1.4. BCUC's Role

From the BCUC website, it states:

"The BCUC is an independent agency of the Government of British Columbia that is responsible for regulating BC's energy utilities, …, intra-provincial pipelines and the reliability of the electrical transmission grid. We work hard to ensure British Columbians get value from their utilities with safe, reliable energy services and fair energy …rates, while ensuring the entities we regulate have the opportunity to earn a fair return on their capital investments."

At this point in time, I believe that the reliability (security) of supply to the public wires needs to be considered to ensure British Columbians get value from their utilities with safe, reliable energy services and fair energy …rates.

The indigenous matters need to be addressed further by the politicians.

Chapter 2. BCUC's Proposed Recommendations

Comments on draft recommendations:

Regulation of Monopolies

1. That all ratepayers of Indigenous utilities receive the same protection as do ratepayers of non-Indigenous utilities.

I support this recommendation.

Regulation of Mandatory Reliability Standards

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.

I support this recommendation since this is necessary to provide security for the North American Electric Grid and should not be a jurisdictional issue.

Reserve Lands

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.

I support self-regulation only on reserve land subject to recommendations 4 to 6 below, but on checking with the Ministry the reasons for the exclusion of municipalities and regional districts has been lost over time. So, I do not support the inclusion of "in

much the same way municipalities and regional districts do" in recommendation #4. I do not support self-regulation on traditional lands.

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.

I support this recommendation.

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.

I support this recommendation, but I'm unsure if the jurisdictional issue can be resolved. Will BC have any authority on a First Nations reserve?

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.

Until the reasons for the exclusion of municipalities and regional districts are fully understood or removed from the UCA, I've certain issues with this recommendation. If the indigenous nations are not public utilities then the jurisdictional issue becomes complicated as normally Technical Safety BC should have jurisdiction over electrical safety. However, if the indigenous utility is deemed a public utility (with certain exemptions from regulation) then the BCUC has general supervision of safety. Generally, the BCUC only supervises public utilities. However, I strongly support safe operation of electrical systems and the jurisdictional issue must be set aside in favour of safe operation of the electrical system.

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.

Again, the municipal exclusion is preventing certain practical events to occur. Should the municipal exclusion still exist in the UCA or should it be removed so that the "obligation to serve" can be enacted by BCUC.

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.

As each of the 148 First Nations may have unique circumstances, I support making all of them public utilities and then allowing them to apply for exemption from certain sections of the UCA to reduce the regulatory burden. However, does BCUC have any jurisdiction on reserve lands.

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.

I support this recommendation.

Modern Treaty Lands – Nisg̲a'a

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

Until justification for the municipal exclusion is better explained I do not support this recommendation as worded. However, I support the Nisga's Nation ability to self-regulate a utility service restricted to the delivery of energy only on its own lands. If the Nigsa'a Nation attempts to distribute energy outside of its own lands or connect to the

electric grid then it should become a public utility under the UCA and apply for exemption from certain sections of the UCA.

8. Notwithstanding the Nisg̲a'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.

As stated above and since the Mandatory Reliability Standards (MRS) exist at the transmission level, this is reasonable and I would support this recommendation. However, if they also self-generate energy, then the MRS applies to generators but can it be enforced?

Other Modern Treaty Lands

9. Provided that a modern Treaty contains terms that are substantially similar to those set out in the Nisg̲a'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 Nisg̲a'a.

I support this recommendation that self-regulation apply on other modern treaty lands.

Lands Subject to Historical Treaties

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.

I support this recommendation.

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 Nisg̱a'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. ..

I support this recommendation.

Sechelt Indian Band and Sechelt Indian Government District

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 Nisg̱a'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.

No recommendation on the Sechelt Indian Band should be made until consultation with the Sechlet Nation has occurred.

Ceasing to be an Indigenous Utility

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

While I support the intent of this recommendation, the definition of an Indigenous utility is not provided with this recommendation and is still to be determined or recommended.

Definition of Indigenous Utility

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.

I support additional workshops to define 'Indigenous Utilities' especially where it involves traditional territories, unceded lands, overlapping traditional territories, overlapping of services with existing non-indigenous utilities, and after the political will has been determined on how one approach the issue of facilities in traditional territories.

Chapter 3. Topics for Feedback

Participants in the workshops will be able to ask questions and make comments about any aspects of the Draft Report that are of interest to them.

a. What are your views on the BCUC's proposed recommendations?

Generally accepted but only as noted in the preceding section.

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

No, I think that the issue of strand assets and negative impacts to the ratepayers of existing utilities have to be resolved first.

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?

Recent events have demonstrated that the BCUC may not be able to have a role as an appeal body in resolving complaints or disputes as its jurisdiction to do so is questionable.

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?

On reserve lands without connections to the North American grid, the indigenous utility should make arrangements with the BCUC, Technical Safety BC, or some other group to address safety, service and reliability.

On off-reserve lands with connections to the North American grid, the BCUC must provide regulation, and ensure safety and service reliability, as well as MRS standards.

e. Should the scope of the proposed recommendations (the minimum level of ownership or control required) be expanded to include specific areas/situations such as the following:

Personally I support the removal of the current exclusion clauses in the UCA that applies to municipalities and regional districts as it only complicates the issue of what is a public utility. If those exclusion clauses were to be removed, the matter become simpler as the ownership issue is removed from the discussion. However, as this issue is not being discussed then:

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

The scope of the proposed recommendations (the minimum level of ownership or control required) should not be expanded to include specific areas/situations above as it does not meet the exclusion requirement in the UCA.

- 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;

The scope of the proposed recommendations (the minimum level of ownership or control required) should not be expanded to include specific areas/situations above as it does not meet the exclusion requirement in the UCA.

- 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;

The scope of the proposed recommendations (the minimum level of ownership or control required) should not be expanded to include specific areas/situations above as it does not meet the exclusion requirement in the UCA.

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

The scope of the proposed recommendations (the minimum level of ownership or control required) should not be expanded to include specific areas/situations above as it

does not meet the exclusion requirement in the UCA. However, in this case the third party operator meet be declared a public utility while the First Nation/Band Council is not. If the First Nation/Band Council operates the utility through is own staff who then award a sub-contract to a third party, then the utility may be excluded under the UCA definition of a public utility.

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

Whether the First Nation/Band Council set the utilities' rates or not has no impact on the ownership issue and in this case the utility owner is a public utility.

f. If an exempt utility sells energy to a neighbouring First Nation, how should the sale of that energy be regulated on the other First Nation's lands?

The purchase terms and conditions should be determined by the First Nations involved. However, if the energy is wheeled over another non-indigenous utilities wires, then the BCUC should regulated the impact to the non-indigenous utility's customers.

g. If an exempt utility wants to sell energy to a different reserve or First Nation, and BC Hydro's transmission system is required to transport the energy, the Retail Access prohibition applies. Should the BCUC recommend that changes be made to the Retail Access prohibition?

DIRECTION NO. 8 TO THE BRITISH COLUMBIA UTILITIES COMMISSION states:

> ***Retail access***
> **7** Except on application by the authority, the commission must not set rates for the authority that would result in the direct or indirect provision of unbundled transmission services to retail customers in British Columbia, or to those who supply such customers.

No, I can see no reason to vary the retail access constraint.

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?

No, I can see no reason to vary the retail access constraint.

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

No.

j. The test for acceptance of an Energy Purchase Agreement (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 the market price. Should the BCUC consider public interest issues, particular to First Nations, in approving EPAs involving Indigenous utilities? On what basis might the BCUC do so, and what might those public interest issues include?

For EPAs between First Nation utilities, the BCUC should not be involved except for the charges used to wheel the energy over non-indigenous wires. For EPAs with BC Hydro, the EPA must be determined to be in the public interest and the need must be demonstrated and the contract price determined to the fair, just and reasonable.

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

The First Nations that choose to remain under BCUC jurisdiction by agreement must consider applying for exemption from certain parts of the UCA just like any other small utility within BC.

Chapter 4. Additional Matters from Order G-26-20

In Order G-26-20, BCUC amended the regulatory timetable established by Order G-282-19 such that written comments on the draft report are due on March 6, 2020.

In addition, the BCUC encourages participants to address the following matters where applicable to their written submissions:

1. Regulation of Indigenous Utilities on Traditional Territory

Several participants in the Inquiry have submitted that the BCUC should not regulate Indigenous utilities that operate within a First Nation's traditional territory (territory beyond reserve lands or Treaty lands). If providing written comments related to the regulation of Indigenous utilities on a First Nation's traditional territory, or lands subject to Indigenous self-government, participants are encouraged to address the following issues where they have a view:

• How and the extent to which the implementation of the Declaration on the Rights of Indigenous Peoples Act should impact the BCUC's recommendations;

> The legislation (B.C. Declaration on the Rights of Indigenous Peoples Act) sets out a process to align B.C.'s laws with the UN Declaration. It mandates government to bring provincial laws into harmony with the UN Declaration. It requires development of an action plan to achieve this alignment over time – providing transparency and accountability. And it requires regular reporting to the Legislature to monitor progress. In addition, the legislation allows for flexibility for the Province to enter into agreements with a broader range of Indigenous governments. And it provides a framework for decision-making between Indigenous governments and the Province on matters that impact their citizens.
>
> ***Whether UNDRIP applies to energy and traditional lands remains to be determined. B.C. is the first province to put the UN Declaration into action through legislation and recognize Indigenous peoples' human rights in B.C. law. These inherent rights are protected in Canada's constitution (section 35) and recognized***

in court decisions. However, recent events may negatively impact how our nations move forward. Considering recent events, I believe the issue of traditional lands is beyond the scope of this inquiry.

• If an Indigenous utility's service area overlaps with that of an existing utility's "franchise area" (or service territory), should the Indigenous utility be able to serve customers residing within the existing utility's franchise area?

Yes, but only those customers requesting indigenous utility service.

If so, to what extent and why?

The indigenous utility customers must request the service via a written contract.

To what extent, if any, should the BCUC's recommendations have regard to the resulting impact on the existing utility? Why or why not?

The rate impact may be significant on an existing non-indigenous utility who should be allowed to recover any cost impact through a stranded asset type of claim as a result of a loss of customers on a line.

Would any overlapped area be part of both utilities' service areas?

Possibly; however, their customers would have sign supply contracts to ensure rates over time exist.

Would one utility's claim have to prevail? How would competing claims be resolved and by whom?

The competing claims would have to be resolved by the utility and its regulatory bodies who govern the utility.

Please discuss the implications if the Indigenous utilities are regulated under a different regime than the existing utilities, including how issues of conflict should be addressed.

• Should Indigenous utilities operating on traditional territory serve only members of the First Nation, Indigenous people generally or should it have access to all potential customers within the territory? Please discuss the implications of any restrictions on who can be served.

The issue of traditional territory needs to be resolved and further analyzed. Recent events seems to indicate that the elected councils may only control what occurs on the reserves while the tribal chieftains may hold claim over the traditional territories. Regardless, the regulated utilities should be compensated for any loss of customers by the indigenous utilities.

• Consider these two situations:

(1) An Indigenous utility (IU) operating in another utility's (Utility A) franchise area could purchase bulk electricity from Utility A and distribute the electricity to its (the IU's) customers in that territory – thereby not reducing Utility A's demand; or

This scheme while not reducing Utility A's energy sold (not necessarily the same as demand) will actually negative impact the ratepayers served by Utility A as Utility A's profitability margin will be reduced because the same amount of energy will be sold at a lower rate to Utility B.

(2) the IU could generate its own electricity for sale to its customers - thereby reducing Utility A's demand.

- If an Indigenous utility operates in an existing utility's franchise area should there be any restrictions on the source of the electricity (or other type of energy sold)?

  No

- What factors, if any, should be considered?

The factors to be considered are:

- ***Are there any stranded or under utilitised assets held by Utility A?***
- ***Are Utility A's ratepayers negatively impacted?***
- ***How will Utility B compensate Utility A for any stranded or under utilitised assets, or financial impacts?***

2. Economic Opportunities from Indigenous Utilities

The BCUC has heard from many participants in the Inquiry that Indigenous utilities could provide First Nations with opportunities for greater participation in British Columbia's economy.

- Should the BCUC include the facilitation of economic opportunities for First Nations in its recommendations around a regulatory framework for Indigenous utilities?

  While I would have supported the facilitation of economic opportunities for First Nations, recent events have caused me to rethink this aspect of the inquiry. The matters of economic opportunities for First Nations are best left to the BC politicians and not the BCUC. So I do not support the facilitation of economic opportunities for First Nations at this time.

  The BCUC's mission is to ensure that ratepayers receive safe, reliable and non-discriminatory energy services at fair rates from the utilities it regulates, and that shareholders of those utilities are afforded a reasonable opportunity to earn a fair return on their invested capital.

- If so, how?

  If the BCUC wishes to include the facilitation of economic opportunities for First Nations in its recommendations around a regulatory framework for Indigenous utilities, it should first consider its ability to regulate the impact of such. Recent events have demonstrated the damage that can occur over a jurisdictional dispute. Since energy flows on the North American grid, who will honor the international energy contracts if a dispute occurs on traditional territories?

Chapter 5. Recent Developments

The recent Wet'suwet'en dispute between Canada, BC, the elected council and the hereditary chief over first nations right and title goes to the heart of the matter and the recommendation coming from this inquiry. While the dispute could be determined as valid, the damage to Canada by this dispute is still ongoing.

This still begs the question of how energy flow on wires in Canada and North America could be affected if another dispute of this nature erupts in the future.

So taking this into consideration, I would suggest the recommendation is:

1. ***To allow First Nations total control on Reserve and Treaty lands only and to provide compensation for the loss of customers and stranded assets to any other non-indigenous utilities affected to protect those ratepayers.***

2. ***When on traditional or unceded lands, the First Nations must first come to a political agreement with Canada and BC before a recommendation can proceed.***

3. ***The political question should remain with the politicians while the Inquiry's recommendation should focus on fair, just, and reasonable rates for regulated utilities as well as the overall public interest when considering energy projects within the province and the impact to ratepayers.***

4. ***The question of preferential treatment for indigenous utilities when it comes to award energy purchase agreements (EPA's), that I previously favoured, I now would like to shift my position away from that position. In light of recent developments, I think we need to look to the <u>security</u> of our energy sources and wires first and foremost. Hopefully, a political solution will be reached in the future. The need for these resources from EPA's will be determined by BC Hydro.***

5. ***Access to non-indigenous regulated "wires" should be under a rate schedule, if permitted, that takes into account the impact or upgrading of any "wires" to provide that service without compromising any other non-indigenous planned service. The upgrade costs should be borne by the indigenous utility making the request for access.***