



Leq'a'mel First Nation
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March 6, 2020

British Columbia Utilities Commission
Suite 140, 900 Howe Street
Vancouver, BC V6Z 2N3

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

Dear Mr. Wruck:

**Re: British Columbia Utilities Commission ("BCUC") - Indigenous Utilities Regulation Inquiry –
Project No. 1598998 – Leq'a'mel First Nation– Written Comments on Draft Report**

Pursuant to Commission Order G-26-20, attached are Leq'a'mel First Nation's Written Comments on the Draft Report dated November 1, 2019, in respect of the above proceeding..

Yours truly,
J Tyson for

Ellen Torng
General Manager

Leq'á:mel First Nation

Written Comments on Draft Report
March 6, 2020

British Columbia Utilities Commission Indigenous Utilities Inquiry - Project No. 1598998

A. Introduction

The Written Comments provided by Leq'á:mel First Nation ("Leqamel") are arranged below to address the BCUC's draft recommendations and certain topics for discussion that are contained on pages 94-97 of the draft report. Additionally, we address other matters that are contained in Exhibit A-48, which provides guidance for written comments.

A. BCUC Draft Recommendations

Regulation of Monopolies

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

1. **Response:** We understand this recommendation draws from the principle that where monopoly characteristics are present consumers require protection (regulation of the monopoly) and a good example of how protection applies would be related to the utilities of FortisBC and BC Hydro, although there are clearly more situations.

FortisBC is an investor owned utility that provides a service for compensation or profit . Further, it's executive management team is overseen by its directors who represent its investors. BC Hydro, by comparison, is also profit motivated although perhaps not in the exact fashion as FortisBC or a number of other investor owned utilities. Both utilities are given certain and somewhat exclusive service areas generally through the issuance of CPCNs.

The pursuits of these companies are the norm and well accepted. The pursuits of Indigenous communities are somewhat the same but not always achieved to the same degree. A Band must ensure that its members are provided with a number of utilities and must balance costs to achieve this. Profit or return on investment is generally not the main driver.

In the case of Leqamel, the band is actively exploring the prospect of owning and operating its own electrical utility. Most of the electrical infrastructure on its reserve was constructed by Leqamel at its cost. Creating a utility offers the prospect of recovering future infrastructure and maintenance costs and possibly a profit. Any compensation towards and/or above costs (no assurance that the proposed utility would be fully profitable) would be a source of additional funds that would go to its community members or at minimum, be used to defray ongoing operating costs.

Leqamel has plans for more infrastructure development that, will in turn, require a greater number of utility services. Its goal is to develop revenue from these developments and operate and maintain profitable utility investments.

We are confident we will achieve these goals but it will take some time. In the interim we believe that the implied “monopoly characteristics” of early stage Indigenous Utilities are muted or non-existent and as such oversight by the BCUC is not required. Moreover, costs to regulate would most likely hinder the growth of Indigenous Utilities.

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.**
 - 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.**
 - 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.**
2. **Response:** Leqamel agrees that First Nations should be able to self regulate when their utilities are located on reserve lands in the same fashion as afforded municipalities and Regional districts. We believe this recommendation should be the default mechanism and not subject to an “opt-out” provision. The recommendation as currently stated would be burdensome and costly. The Draft Report (p.74) addresses the concept of having the least amount of regulation needed to protect the ratepayer. This principle should recognize that Indigenous Utilities in many instances will be of smaller scale and, in our view, will require little or no direct oversight.

First Nations that have land codes pursuant to the FNLMA will have implemented a number of regulations and procedures one of which is a dispute resolution process. Stemming from this, Laqamel agrees that if an Indigenous Utility is unregulated it would be reasonable do have an appropriate complaint and dispute handling process to protect all rate payers. We also recognize that a dispute process of some nature would provide a degree of comfort to prospective rate payers and be a marketable benefit for new projects that Leqamel is currently assessing.

Any dispute resolution process would be subject to conditions of the underlying tariff and would be limited in scope; we would be amenable to suggestions on how this might be constructed and implemented.

Reserve Lands (cont'd)

6. **(PARTIAL RECOMMENDATION)** 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.

3. **Response:** Leqamel believes there is some inconsistency within Recommendation 6. On the one hand the recommendation states “...we do not consider it necessary to explicitly impose this obligation [obligation to serve] on a First Nation-owned utility.” and “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.”

In Exhibit C4-10, page 4, FEI, in respect of its service territory, indicates that exclusivity arises due to the combination of having to obtain a CPCN and that utility service would be provided most cost effectively by one firm. Given this benefit of exclusivity, it stands to reason that the utility would have an obligation to serve.

Leqamel does not see this obligation being relevant to Indigenous Utilities situated on reserve lands in the manner it applies in the Act. Should and/or when Indigenous Utilities expand to non-reserve territories this “obligation to serve” as well as associated extension policies would be considered.

B. Topics for Discussion (p. 96-97 Draft Report):

- 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?**

4. **Response:** Leqamel has indicated that in Response 2 that the matters for consideration in any dispute process would be generally confined to those conditions set out in a service contract or tariff sheet. The BCUC might have a role in the dispute process but its role would have to be well defined, which at this juncture is not clear. As Indigenous Utilities expand – particularly as more non reserve members become an expanding customer class – a well defined and transparent complaint

handling process, reflective of First Nation values and governance structures would insure customer protection and be of benefit to all parties.

It is unclear of the role BCUC would have as an appeal body to dispute resolutions that were not accepted or challenged by customers that had first gone through an Indigenous Utilities complaint process. Leqamel would require more information on how this appeal process would be administered before it could make a recommendation on the matter.

- 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;**
 - **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 utilities' assets are owned by a First Nation/Band Council but are operated by a third party; and**
 - **The First Nation/Band Council, by agreement with the utility owner, sets or approves the setting of rates for the utility.**

5. **Response:** Leqamel's position is that the statement "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." is sufficient for the purpose of describing an Indigenous Utility and the degrees and nature of describing its control or ownership structure does not add to the contents of the report.

One must assume that when an Indigenous Utility is formed much thought is carried out by band council and aided by administrators to ensure the determined corporate or partnership structure meets the interest of community members, prospective customers and the requirements of non-member investors and lenders. On p.38 of the Draft Report it states "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 preferences of Indigenous Nations."

Leqamel fully concurs with this statement.

- 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?**

6. **Response:** While Leqamel views Retail Access as having potential benefits, it is not immediately evident how this might apply in our current situation or in the situation envisaged in which Leqamel operates its own utility in order to recover its sunk and ongoing infrastructure costs associated with the provision of electricity on its reserves. Leqamel would be pleased to more closely examine the concept and opportunities associated with Open Access.

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?

7. **Response:** The forgoing raises the question of whether public interest issues particular to First Nations should be a factor in approving Energy Purchase Agreements.

Leqamel has a strong interests towards developing energy projects many of which involve run of river hydro facilities. Possible run of river sites exist in the Stave Lake watershed, which is central part of Leqamel's traditional territory. Lack of capacity and resources has not enabled Leqamel to benefit from past projects in this and surrounding areas. It is clearly in the public interest to ensure Leqamel participates in future projects within its traditional territory in a meaningful way that result in positive financial benefits.

"The Draft Report (p. 70) sets out certain guiding principles for its analysis and crafting of specific recommendations which include – in part – the following:

- 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 above principles, if properly applied, will have a positive impact on the formation of Indigenous Utilities. Further, these principle should also be applied to First Nation projects associated with EPAs in such manner to ensure that they are meaningful elements of the public interest.

Since the Draft Report was completed the BC Provincial Government, on November 26, 2019, passed Bill 41 aimed at implementing the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration), which the Truth and Reconciliation Commission confirms as the framework for reconciliation. The Draft Report (p. 71-72) provides a table (provided by Beecher Bay First Nation and Adams Lake First nation) showing certain principles set out Bill 41¹ that Leqamel believes are both of paramount importance to the regulation aspects of Indigenous Utilities as well all First Nations' pursuit of economic development.

C. 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;**

- 8. Response:** See also Response 7. Bill 41- Declaration on the Rights of Indigenous Peoples Act - will bring B.C. laws into harmony with the UN Declaration, which emphasizes the Indigenous rights to live in dignity, to maintain and strengthen Indigenous institutions, cultures and traditions and to pursue self-determined development, in keeping with Indigenous needs and aspirations.

In a factsheet the BC Government recognized past challenges with in collaborative decision making between the Province and First Nations² and stated that:

"The Declaration Act will provide structure and add clear processes for how joint decision-making would happen, with administrative fairness and transparency. Like any other government, Indigenous governments exercising decision making authority have clear processes and rules, as well as accountability for any decisions."

The Indigenous Utilities Inquiry provides a platform for a meaningful Input from Indigenous groups as to the oversight of the development of future Indigenous Utilities. We believe, as stated in Response 11, that the appropriate elements of the Declaration on the Rights of Indigenous Peoples Act should be reflected in the Commission's Final Report to the Minister and that it contain an outline for moving forward on an "action plan" set out under Article 4.

¹ Bill 41 (Nov. 26, 2019) DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT

² https://news.gov.bc.ca/files/BC_Declaration_Act-Factsheet.pdf

- **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? If so, to what extent and why? To what extent, if any, should the BCUC’s recommendations have regard to the resulting impact on the existing utility? Why or why not? Would any overlapped area be part of both utilities’ service areas? Would one utility’s claim have to prevail? How would competing claims be resolved and by whom? 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.**

9. Response: Our response is directed to Indigenous Utilities that would be developed on reserve lands to supply power to its members and non-members and ignores power projects or other sources of energy generation that may be owned by First Nations in which the resultant power would be generated off reserve lands and provided to a natural gas or electrical grid through a regulated PPA.

An example of an early stage utility would be the utility envisaged by Leqamel in which electricity would be purchased in bulk from BC Hydro and distributed over the Leqamel owned distribution system and sold to on-reserve tenants that involve mainly band members.

A second source of energy supply on Leqamel’s reserve is propane, which is supplied by a third party. Leqamel will also be examining how this second energy source could be integrated into its utility plans. The potable water used at the Holahcten reserve is entirely drawn from an aquifer. This source of water could be used for a heat pump application that could be integrated into a utility model. The foregoing utility description is for illustrative purposes but it could describe existing Indigenous Utilities .

Based on the foregoing described utility, which would now be a substantive operating entity, there could be benefits to expanding service off reserve, which may or may not result in the need for a CPCN.

Given the above utility description, energy would be required from either FortisBC or BC Hydro in order to operate an Indigenous Utility if it expanded off reserve and in this respect neither incumbent utility should incur any or little harm. If an element of harm existed some form of CPCN process might be warranted. Moreover, in certain circumstances incumbent utility loads might increase above a level that would not have existed had the Indigenous Utility not expanded beyond its reserve. This example is similar to what now exists in the alternative energy sector and could be described more as complementary rather than competing load. (FortisBC does not currently supply energy to the area near the Holachten reserve).

Leqamel also owns a transfer station located on its land in which there is a potential to utilize land-fill gas as another source of energy for the above described Indigenous Utility. At the margin, this additional energy source could be utilized by the Indigenous Utility described above. This additional energy source would either lead to the reduction of another energy source of the existing Indigenous Utility or facilitate the expansion of the utility service area to off reserve customers.

In the latter case, the result would either be a displacement of FortisBC customers, which would result in a cost to FortisBC, or the capture non-gas customers, in which case the impact to FortisBC could result in a lost opportunity.

Leqamel would expect that expansion of an Indigenous Utility to off reserve customers would require oversight, likely by the BCUC, and may also require a CPCN review or authorization.

- **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.**

10. Response: Please refer to Response 7. The main criteria to justify expanding an Indigenous Utility would be economic return. If there was some comparative advantage associated with an Indigenous Utility then there would be benefit and/or financial incentive to expanding beyond reserve lands.

As mentioned in Response 7, economic harm could come to an incumbent utility if its load was displaced but generally this would only occur if the Indigenous Utility had its own source of energy.

As an aside, if a First Nation had its own energy source, say an IPP, the generated electricity would most likely be sold to BC Hydro or Fortis although this might not always hold true.

Alternatively, no harm would occur to the incumbent utility if the service load was incremental.

D. Economic Opportunities from Indigenous Utilities

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

11. Response: There has been considerable material provided throughout this inquiry, much of which we feel, appears more relevant to existing larger utilities. Emerging Indigenous Utilities are relatively scarce or at least not well known or recognized and in this respect, many of the issues that have been discussed are difficult to address without real world examples.

Leqamel is seeking projects that will generate revenues for its band members for much needed social programs, infrastructure and so forth. We have expressed this objective in our Argument and it has been one expressed in detail by other intervenors.

We have also expressed our wish to carry out our pursuits through our right of self-determination and self government and are encouraged by the new Declaration on the Rights of Indigenous Peoples Act and the Government's intent to "...*help create more opportunities for Indigenous peoples, families, businesses and communities in B.C. It aims to establish a more secure, predictable*

and collaborative path forward – which will help develop B.C.’s economy and create good jobs, and protect Indigenous rights and the environment.”³

Declaration on the Rights of Indigenous Peoples Act commits the government to “...prepare and implement an action plan to achieve the objectives of the Declaration” and that the “...action plan must be prepared and implemented in consultation and cooperation with the Indigenous peoples in British Columbia.”⁴

Leqamel recommends that the appropriate elements of the Declaration on the Rights of Indigenous Peoples Act be reflected in the Commission’s Final Report to the Minister and that it contain an outline for moving forward on an “action plan” set out under Article 4.

³ https://news.gov.bc.ca/files/BC_Declaration_Act-Factsheet.pdf

⁴ Ibid. Article 4.