First Nations Leadership Council

Second Submission to the BC Utilities Commission

Indigenous Utilities Inquiry

BC Assembly of First Nations
Union of BC Indian Chiefs
First Nations Summit

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Table of Contents

Part I – Primary Recommendations

Further to the First Nations Leadership Council's (FNLC) previous written submission *Exhibit C16-2*, FNLC stands focused on the jurisdictional authority of First Nations over energy production, transmission, and distribution within their territories, and the infringement of that jurisdiction by the *Utilities Commission Act* (UCA) and BCUC's regulatory process. First Nations seeking to exercise their jurisdiction by developing energy projects are impeded by onerous ratepayer applications with criteria that function primarily to keep electricity rates low, and do not consider socio-economic and other criteria important to Indigenous communities. FNLC's primary recommendations are that Indigenous utilities be exempted from regulation under the UCA, as are municipalities, and made recommendations for a transition plan to assist interested First Nations in the governance and economic capacity-building needed for them to effectively and fairly regulate their own electrical utilities.

The FNLC's primary recommendations for the Panel are as follows:

- *Territorial Approach to Exemption from the UCA and Nation Rebuilding*
- *Support for Nations' Self-Determined Dispute Resolution Institutions*
- *Indigenous Utilities Commission or other structure to support Governance*
- *Criteria for Definition of an Indigenous Utility*
- *Transformative Change and UNDRIP*

Territorial Approach to Exemption from the UCA

The BCUC's Draft Report from November 1st, 2019 took up the FNLC's previous comments in part, recommending that a First Nation be exempted from the UCA and have the opportunity to self-regulate when it provides utility service within the boundaries of its reserve land. This recommendation, while positive, does not go far enough in recognizing First Nations' rights within their territories as articulated in UNDRIP, nor does it align with the SCC's jurisprudence on Title. The Panel itself states in the Draft Report that a territorial approach would advance economic opportunity, reconciliation, energy security, self-determination. Yet, it shies away from making a recommendation with regards to territory due to the complexity of the issues related to territorial overlap between Nations and potential impact on existing utilities and ratepayers (p. 88). The Panel does not shy away from complexity in other scenarios, such as an exempt First Nation/utility contracting with BCUC to regulate all or parts of its operation. To fall back on colonial constructs such as reserve boundaries simply because there is difficult work involved is not consistent with the newly passed *BC Declaration on the Rights of Indigenous Peoples Act*. Article 26 specifies the rights of Indigenous peoples to control and develop resources within their territories, and the Act states that the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration. Furthermore, Article 3 states that the right of self-determination includes the right to freely determine political status, in this case including status as an overarching Nation beyond individual First Nations and First Nations reserves. Denying this Nation rebuilding effort continues past harmful divide-and-conquer strategies of Crown. **First Nations should have the opportunity to self-regulate when providing services within their territories off-reserve. First Nations rebuilding their governance structures, either individually or through partnerships, tribal councils or other collective structures be given the opportunity to self-regulate across their territory.**

Support for Nations' Self-Determined Dispute Resolution Institutions

The Draft Report's recommended exemption within reserve land would be subject to the First Nation demonstrating that it has an appropriate complaint and dispute handling process to protect all ratepayers. If it cannot, the BCUC would retain jurisdiction to handle complaints, and the BCUC would remain available to any ratepayer who wished to appeal a decision from the First Nations' dispute process. The contention that ratepayers would have recourse to the courts was not seen as adequate by the Panel from an access to justice point of view. It is unclear from these recommendations who would assess the appropriateness of the Nation's dispute handling process, nor what the criteria would be, although the Report suggests that the Nisga'a processes are a model as they offer dispute processes at least as robust as what a municipality would offer (p. 84). An expectation of identical or similar dispute resolution processes between Nations would undermine self-determination. **Nations' unique legal orders and governance structures must be considered when assessing their complaint and dispute handling processes, and this must be done by a qualified panel or body including Indigenous people and others with specialized knowledge. Further, funding should be made available for the development and capacity-building of these unique structures for interested Nations.** Finally, the BCUC's retention of jurisdiction as an appeals body is inappropriate for self-determining Nations, and must be regarded as part of a transition plan to full jurisdiction, with a detailed plan and funding in place to support Nations' development of their own institutions. Indigenous peoples have legal orders that are fair and democratic, and require support to revitalize these institutions which were forcibly dismantled by Canada and the province. **A plan should be put in place to reallocate subsidies of fossil fuel dependency towards funding Nation's governance rebuilding work and the research and development of Indigenous-led solutions.**

Indigenous Utilities Commission or other structure to support Governance

The Panel also stated that it was supportive of FNLC's recommendation for an independent Indigenous Utilities Commission (IUC) that would be empowered, by legislation or otherwise, to oversee and assist Indigenous utilities within the province. Yet, it hesitated to make a recommendation on the matter, stating that it "believes that the specifics of such proposal should be left to Indigenous Nations and government" (p. 59). Some First Nations intervenors were supportive of an IUC or similar structure, while others expressed that a new province-wide structure would need to respect First Nations' self-determination just as the BCUC does, and take a sub-regional approach to be effective. The FNLC has made substantive recommendations for the potential structure of such a body, recognizing precedents such as the First Nations Tax Commission while noting that an IUC would be unique, take into account Indigenous legal orders, apply to activity off-reserve, and would not exist under the *Indian Act*. While the development of any new structure would certainly require in-depth consultation with First Nations, declining to make a recommendation for future work is equivalent to taking a position against it. **The FNLC recommends that a taskforce composed of Indigenous people with the relevant expertise (in Indigenous governance and utility services) be created to investigate whether an Association, a Commission, or other model would be of value to First Nations, either in taking on a specialized regulatory or appeals role, or in providing non-binding expert advice and support to Nations for the provision of utility services and the development of dispute resolution processes.**

Criteria for Definition as an Indigenous Utility

The FNLC proposes the following criteria for the definition of an Indigenous utility:

- Majority or minority-ownership by a self-identified Indigenous Nation (not necessarily a band within the meaning of the *Indian Act* or Nation with a modern treaty or self-government agreement).
- The utility provides service within the Nations' self-identified territories (including territory beyond reserve land.) These first two criteria are not subject to assessment by the BCUC and support self-determination.
- If a Nation has less than a 5% ownership share, it and the majority owners should provide a joint submission as to equitable governance, shared benefits, a transition plan for a larger ownership share by the Nation, socioeconomic considerations, and other concerns articulated by the Nation. However, the presumption should be that the utility qualifies as an Indigenous utility.

Transformative Change and UNDRIP

Overall, the Draft Report does not recommend transformative change strongly enough. This is largely due to the Panel's primary concern over lack of protections for ratepayers. FNLC does not support the option to undertake the easiest possible regulatory change – that of continuing to regulate most Indigenous utilities under the UCA, but with a streamlined application process or diversified (such as socio-economic, climate, and self-governance focused) decision-making criteria for ratepayer approvals. Although these incremental changes would be an improvement over the current situation, they would fall far short of Title Holders' constitutional rights, as well as BC's implementation of UNDRIP into law within the province. Even if the recommendation for exemption is adopted, limiting exemptions to reserve boundaries would necessarily limit the economic viability of Indigenous utilities, and avoids the complex, but essential, work of addressing shared territories between Nations. If the BCUC is sincere in its intention to align its recommendation with UNDRIP (p. 71), and aiming to demonstrate the first act by a provincial regulator in accordance with the new *Declaration on the Rights of Indigenous Peoples Act* legislation, FNLC recommends the development of stronger regulatory changes that meet the minimum standards as well as the TRC's imperative of economic reconciliation.

Part II – Detailed Responses to the Panel's Recommendations

(p. 94 of the Draft Report)

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

- Assessment of what constitutes "the same protection" must respect that different Indigenous Nations have unique governance and dispute resolution structures. Requiring identical or similar structures to the BCUC, the Nisga'a, or other Nations with modern self-governance agreements is an infringement of self-determination, and does

not meet the UNDRIP minimum standard of Articles 5 and 20 as the right to develop and maintain political, legal, social, and economic institutions.

"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."

- The Panel quoted FNLC's statements on jurisdiction and sovereignty, saying that it agreed with its position concerning exemption from the UCA, but then recognized jurisdiction only on reserve lands (p. 90). This is not what was meant by FNLC.

- **A First Nation should have the opportunity to self-regulate when it provides utility service within its territories, including outside of its reserve boundaries.** The complexity in this proposal is not insurmountable and should not be a reason to preclude it.

- First Nations Intervenors provided examples during the Inquiry as to the existing viability of servicing agreements for off-reserve consumers which can be comprehensive and specify alternative dispute resolution.

- **FNLC recommends that to respect First Nations' Nation rebuilding efforts, the BCUC take a regional or territorial approach where individual First Nations are partnering or working together in tribal councils or other collective governance structures.** These collective structures or partnerships, as the case may be, should also be given the opportunity to self-regulate across territory, as they are an expression of self-determination and align with the SCC's decision as to the territorial nature of Title in *Tsilhqot'in*. This approach creates better economic opportunities at a viable scale, and has the potential to facilitate collaboration and revitalization of Indigenous governance and law. This is consistent with Article 26 of UNDRIP, the right to own, use, develop and control traditional lands, territories and resources, with due respect for Indigenous systems of land tenure; and Article 3, the right to self-determination, including the right to freely determine political status and freely pursue economic development.

- The Draft Report suggests that "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" (p. 88). The difficulty in achieving a s. 88 exemption is one of the very reasons for this Inquiry and should not be relied on as a solution. **Instead, the BCUC should convene a special panel or taskforce with relevant expertise to create a set of indicators and to support interested Nations who wish to self-regulate a utility service across territory.**

"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."

- Nations' unique legal orders and governance structures must be considered when assessing their complaint and dispute handling processes, and this must be done by a qualified panel or body including Indigenous people and others with specialized knowledge, such as in Indigenous governance. Further, funding should be made

available for the development and capacity-building of these unique structures for interested Nations.

- The decision-making criteria for this assessment needs to be made transparent and must be developed in collaboration with First Nations.

"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."

- BCUC's retention of authority as an appeals body is ultimately inappropriate for self-determining Nations. As First Nations pointed out in the Inquiry, BCUC has no such jurisdiction over municipal utilities. The FNLC supports the contention that in order to be successful in regulating our own utilities, Nations need to be responsible for our own decisions.

- Any appeals role for BCUC must be understood as a transition plan to full jurisdiction, with a robust plan and funding in place to support Nations' development of our own laws and institutions.

"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."

- The Panel made the following statement: "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" (p. 85).

- **This is a fundamental misinterpretation of the historical treaties.** Treaties did not need to include enumerated powers of government, as they were not a grant of power from the Crown to Indigenous peoples, but in fact a grant of land from Indigenous peoples to the Crown. Anything not enumerated in the treaties are the reserved rights of the Indigenous signatories, including governance rights (John Borrows and Michael Coyle, 2017. *The Right Relationship: Reimagining the Implementation of Historical Treaties*). The SCC's jurisprudence on treaty interpretation establishes that historical treaties must be considered as much from the perspective of the Indigenous signatories as from the Crown's perspective (*R. v. Marshall*, [1999] 3 SCR 456). The Indigenous signatories never intended to surrender their rights of self-determination. Persisting with a style of treaty interpretation that denies governance rights or rights across territory is inconsistent with s. 35, the Honour of the Crown, and UNDRIP.

"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." (p. 96).

- The FNLC proposes the following criteria for the definition of an Indigenous utility:

  - Majority or minority-ownership by a self-identified Indigenous Nation (not necessarily a band within the meaning of the *Indian Act* or Nation with a modern treaty or self-government agreement).
  - The utility provides service within the Nations' self-identified territories (including territory beyond reserve land.) These first two criteria are not subject to assessment by the BCUC.
  - If a Nation has less than a 5% ownership share, it and the majority owners must provide a joint submission as to equitable governance, shared benefits, a transition plan for a larger ownership share by the Nation, socioeconomic considerations, and other concerns articulated by the Nation. However, the presumption should be that the utility qualifies as an Indigenous utility.

- A special panel of Indigenous people and others with relevant expertise in Indigenous governance and utility provision must be convened to assess these submissions (ideally, by an independent body such as an Indigenous Utilities Commission or Association).

"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." (p. 59)

- FNLC urges that the creation and funding of Indigenous-led solutions, such as an IUC, to seriously take up the jurisdictional, capacity, and governance challenges associated with self-regulation is fundamentally important to the on-going process that has been opened by this Inquiry. Declining to make a recommendation is equivalent to taking a position against it.

- An IUC or Association would have as its main purpose to support Indigenous utilities who seek its assistance on an opt-in basis. The IUC would not simply replace the BCUC; another colonial structure purporting to have authority over First Nations is not the answer. An IUC would need to be developed with extensive consultation and engagement with a view to providing expert guidance on utility economics as well as issues related to jurisdiction and territory overlap. Further, as articulated by Intervenors in the Inquiry, an IUC would need to have sub-regional structure to respond to the unique needs of Nations in different parts of the province. It may require separate legislation, as submitted by other Intervenors in the Inquiry as well.

- **FNLC recommends that a task force of Indigenous people and others with the relevant expertise (in Indigenous governance and utility services) be created** to investigate whether an Association, a Commission, or other model would be of value to First Nations, either in taking on a specialized regulatory or appeals role, or in providing non-binding expert advice and support to Nations for the provision of utility services and the development of dispute resolution processes.

III) Responses to Proposed Topics for Discussion (p. 96 of the Draft Report)

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

- See Part II above

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

- This statement is not constitutionally sound, as the rights of First Nations to self-governance are constitutional rights and thus cannot simply be balanced on par with the rights or needs of any other person.

- This does not mean that First Nations' self-governance rights must necessarily exist in tension with the rights of individuals. This is a false dichotomy that mistakenly assumes a lack of legal norms, procedures, rights, obligations, and checks and balances within Indigenous societies. FNLC submits that an Indigenous legal perspective would place greater focus on the health of relationships.

- Supporting First Nations to develop their own robust complaint and dispute-resolution mechanisms will meet both ratepayer protection and self-governance goals simultaneously.

- As stated, UNDRIP Article 26 specifies the rights of Indigenous peoples within their territories. Limiting the exemption to reserve lands and continuing to regulate Indigenous utilities under the UCA within their territories does not recognize self-governance rights to that minimum standard.

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?

- See comments on Draft Report Recommendations 4 and 5, above.

- The Panel made an excellent point: "the regulator should ensure that ratepayers...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" (p. 76). This type of consultation and relationship-building would inform the dispute resolution process and could be part of a process of reconciliation.

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?

- Nations should have the opportunity to self-regulate on safety and service reliability if they decide they are prepared and understand the liabilities involved. They should be offered support and capacity-building to handle these issues themselves. Nations may

elect to contract with BCUC to regulate these areas if they do not feel prepared, but it should be at the exempt Nation's discretion.

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;

  - Yes. In the process of articulating appropriate dispute resolution, the First Nation has an opportunity to confirm how governance procedures protecting ratepayers are at arms-length from the utility owners, or otherwise provide fairness.

- 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;

  - Yes. Many First Nations may create shared ownership structures to enable financing and development as they build capacity. There is no minimum, but a less than 5% ownership share requires joint submissions as to the benefits to the Nation and shared governance.

- 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;

  - FNLC defers to the perspectives and needs of First Nations in this situation.

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

  - Yes.

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

  - FNLC defers to the perspectives and needs of First Nations in this situation.

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

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?

- As the sale is taking place between two self-determining groups, the two groups should have an opportunity to come to an agreement based on the self-regulation of the selling 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?

- Yes, as this would allow First Nations to make mutually beneficial agreements to potentially buy energy at lower rates than would otherwise be available, and to sell energy to a major customer.

- Retail Access must be made available to First Nations to overcome the difficulty of scale that impacts Nations' ability to obtain financing or achieve economic viability.

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?

- The potential for First Nations to generate revenue within their own territories is a preeminent concern for the goals of economic reconciliation, and should be given great weight in assessing the effects of energy sales. All barriers should be considered and removed. Further, production and sales of renewable energy at local levels should be a central policy goal in accordance with Paris climate targets and a just climate transition.

- **BCUC must take all steps necessary to exercise its mandate in managing market forces to include Indigenous utilities in the energy market, in accordance with BC's UNDRIP legislation.** The Province may need to establish a fund to subsidize any rate variability that major purchases of energy from an Indigenous utility might create.

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

- Yes.

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?

- Public interest issues include the economic independence of a First Nation or Nations, and enabling purchases of renewable, sustainable sources. Energy produced with solar, tidal, small hydro or geothermal power, for example, should not have to meet the standard of being comparable to market value. BC's commitments to the Paris targets of reducing GHG emissions by not only producing, but using, clean energy in BC are important public interest issues. First Nations have the potential to be leaders in this

renewable energy transition, contributing to energy security for their communities at the same time.

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?

- Streamline and simplify rate applications for Indigenous utilities.
- Adopt the suggestions from intervenors in the Inquiry regarding a “ceiling” of annual regulatory costs. Establish a fund to assist small utilities in the regulatory process.
- Use diversified approval criteria as outlined in the attached Response to Information Request with regards to non-economic decision-making criteria that a regulatory body should use when assessing rate proposals from Indigenous utilities.
- Understand that the BCUC is acting as a fiduciary with discretionary control over First Nations when making these determinations, and must act in their best interests.
- Provide advice and capacity-building when requested.