COASTAL FIRST NATIONS
GREAT BEAR INITIATIVE

March 23, 2020

British Columbia Utilities Commission
Suite 410, 900 Howe Street, Vancouver, B.C.
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Attention: Mr. Patrick Wruck, Commission Secretary

Dear Mr. Wruck:

Re: British Columbia Utilities Commission (the "Commission") Indigenous Utilities Regulation Inquiry (the "Inquiry") – Project No. 1598998

Pursuant to the referenced Inquiry, Coastal First Nations – Great Bear Initiative ("CFN-GBI") respectfully submits the attached Reply Comments. Our comments are organised to be responsive to the Commission's questions as raised in Exhibit A-48, the submission of the Collective First Nations in Exhibit C13-12, and other submissions that addressed these matters, including in Exhibit C2-7 and C4-11.

Sincerely

Paul Kariya
Sr Policy Advisor

P.R. for Paul Kariya

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

In November 2019, British Columbia passed the *Declaration on the Rights of Indigenous Peoples Act* (the "Act"). This Act is intended to implement the United Nations Declaration on the Rights of Indigenous Peoples (the "UN Declaration"), which the Truth and Reconciliation Commission confirmed as the framework for reconciliation.

The purpose of this Inquiry is to provide meaningful policy recommendations to Government. To be meaningful, these recommendations must recognize the full policy context into which these recommendations will land. Recent legislation that precisely deals with one of the core elements of this inquiry – reconciliation – must surely meet the test of being a relevant part of that context.

BC Hydro appears to reject this view, stating that: "Until the Province [amends the *Utilities Commission Act* (the "UCA") to reflect the Act], the Commission is not required, or empowered, to do anything more than what is currently under the UCA, including in respect of creating economic opportunities for First Nations."[1]

This may or may not be true with respect to the Commission's issuance of an enforceable order under the UCA. It is certainly not correct, however, that the Commission is so constrained in making recommendations in this Inquiry.

Section 2 of the Terms of Reference for this Inquiry make clear that this Inquiry is being held in response to a referral to the Commission, by the Lieutenant Governor in Council ("LGIC"), under section 5(1) of the UCA.

That section reads: "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, <u>whether or not it is a matter in respect of which the commission otherwise has jurisdiction</u>." (emphasis added)

It is clear from this language that the Commission *can* advise the LGIC about how questions of regulating Indigenous utilities are affected by the Act and by provincial reconciliation objectives.

In our opinion, it is also clear that the Commission *should* do this. Section 3(1)(a) of the Terms of Reference makes a very broad instruction: "The commission must advise on the appropriate nature and scope, if any, of the regulation of indigenous utilities." Section 3(1)(b) makes clear that this broad question is not to limited by the following specific questions on which the LGIC is seeking the Commission's advice.

[1] Exhibit C2-7, page 10 of 11

Both the laws and the policies of the Province must inform what is "appropriate". These laws include the Act, and the policies include reconciliation (see, for example, the Collective First Nations Reply Comments, which point to Principle 8 of the Ten Draft Principles to Guide the Province's Relationship with Indigenous Peoples).[2]

In light of the above, we respectfully submit that the Commission can, and should, pay close attention to both the Act and the general goal of reconciliation as it develops its recommendations.

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 existing utilities? 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 conflicts should be avoided.

FortisBC has a statutory service territory while BC Hydro does not. Exhibits C2-6 and C4-10 speak to these issues, and CFN-GBI does not take issue with the facts laid out in these exhibits.

We also recognize that both BC Hydro and Fortis, on behalf of their customers, have made investments in infrastructure, and it is essential that the Commission consider the risk of stranding these assets when it makes its recommendation to Government. At a policy level, it may also wish to take account, at least in the case of FortisBC (because it does have a statutory service area), of lost investment opportunity if new utilities set up within its service boundaries.

But the Commission should not assume that the introduction of Indigenous utilities will lead to such stranding or lost opportunity, simply because it is conceptually possible. In many, if not most, cases, Indigenous utilities will come in at the geographic margins of the current utility systems, serving new rather than existing customers, with relatively small volumes of electricity. These are not conditions that lead to a material stranding risk.

Moreover, given that the rates of both FortisBC and BC Hydro are generally near or below the marginal cost of new supply, it seems highly unlikely that existing customers would be tempted away from existing utility suppliers.

[2] Exhibit C13-12, pages 4 and 5

We respectfully submit, therefore, that the Commission should not assume that it needs to regulate Indigenous utilities as a means of protecting the commercial interests of existing utilities and the interests of those utilities' ratepayers. Instead, in making its recommendations, the Commission should balance its expectations of the *realistic* costs (or risk) to those utilities against the policy goals of Indigenous reconciliation, including the goal of improved economic opportunities for Indigenous people.

This is a more nuanced test then the Commission might apply in considering whether to issue a CPCN to a potential new utility, because it involves policy goals that reach beyond the Commission's jurisdiction under the UCA.

We suggest, however, that it would not achieve the LGIC's interests in this inquiry, and would be an ironic result, for the Commission to recommend that Indigenous utilities cannot infringe existing utilities' service territories. After all, reconciliation is required, in part, because these utilities' systems have already infringed Indigenous traditional territories.

Implicit in the Commission's question is a concern about what will happen if the Commission ceases to regulate the arrival of new Indigenous utilities into an area where an existing utility already operates. Notably, the Commission raises concerns about "competing claims".

Here again, CFN-GBI sees the concern as more conceptual than real. For example, private companies, for their own use, are currently building transmission extensions into the northeast gas fields and pipelines that cross the Province. These occur beyond the reach of Commission jurisdiction, and there are no "competing claims" to be resolved. Moreover, BC Hydro's own tariffs (Tariff Supplements 87 and 88) provide an interconnection service for third party companies seeking build these systems, showing how this unregulated expansion can be undertaken while still protecting BC Hydro's ratepayers.

It is true that this approach *may* lead to a socially sub-optimal network of utility infrastructure. If that were to happen, that is a social cost, against which the reconciliation benefits of self-regulated Indigenous utilities should be weighed. We respectfully submit that the Commission's recommendations should consider this trade-off.

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 o any restrictions on who can be served.

CFN-GBI discussed this issue at some length in our earlier submissions. We argued that: (1) it is likely to be uneconomic for Indigenous utilities to be confined to on-reserve service; (2) that "electrically rational" systems would need to be allowed if Indigenous

utilities were to develop, and that such systems would likely involve service to off-reserve customers; (3) that service limits based on race are not appropriate; and (4) that Indigenous utility systems, which are likely to develop at the edges of the existing utility system (as private extensions do today) are unlikely to create a material stranding risk.

We have seen nothing in the record of this Inquiry to change our opinion on these matters. We remain convinced that confining self-regulated Indigenous utilities to on-reserve service would be highly detrimental to Indigenous opportunity and self-determination, while providing little practical protection to incumbent utilities.

The Commission has particularly asked if there should be any restrictions on those customers that can be served. In this respect, we believe that customers should not be allowed to arbitrage between regulated and unregulated service, or plan to rely on existing utilities as a backstop service without adequate compensation to the backstopping utility. How to protect incumbent utilities from such actions was well canvassed during retail access discussions with both BC Hydro and (then) West Kootenay Power, and the "access principles" developed in that context would likely remain broadly applicable here.

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 (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)? What factors, of any, should be considered?

As noted above and in our previous submissions, CFN-GBI is not persuaded by arguments that the incumbent utilities face a material stranding risk from the arrival of new Indigenous utilities.

This reflects both the scale of demand likely to be served by Indigenous utilities, and the fact that BC does not enjoy large and long-term generation surpluses (particularly when the ambitious demand side management levels contained in BC Hydro's forecasts are taken into account).

This means that any lost demand will be quickly made up by organic load growth, and in the meantime the incumbent utility (and its customers) may actually benefit from a delayed need to add new generation. After all, new generation added to a heavily depreciated electric system will almost certainly be more expensive than the average embedded cost of generation that is reflected in prevailing rates.

As such, CFN-GBI respectfully suggests that the Commission should, in making its recommendations, be precise about both the likelihood and materiality of any stranding risks that might arise from those recommendations. CFN-GBI believes that a significant advancement of Indigenous opportunity and self-regulation could be provided for without imposing any material costs or risks to the incumbent 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?

As noted in our response to Question 1, CFN-GBI believes that the Commission's recommendations should reflect the goals of the Act (and, by extension, the UN Resolution). This includes improved economic opportunities for Indigenous peoples.

Article 3 of the UN Declaration is instructive on the perspective from which the Commission might advance this objective. This Article guarantees Indigenous peoples the right to freely determine their political condition, and the right to freely pursue their preferred form of economic, social, and cultural determination.

We respectfully submit that the Commission's recommendations should reflect: (1) BC's legislative and policy intent to implement the UN Declaration; and (2) the extent to which that UN Declaration advocates for policies aimed at the right to self-determination.

Indigenous participants in this proceeding have been clear – self-regulation of utilities is an important component of this economic self-determination