WEST MOBERLY FIRST NATIONS
Post Office Box 90, Moberly Lake, British Columbia, V0C 1X0

March 30, 2020

Via Email
Commission.secretary@bcuc.com

Commission Secretary, Je aa haanach'e:

Re: BCUC Indigenous Utilities Regulation Inquiry
Comments on Draft Report

This letter contains our submissions on the Draft Report. We are grateful to the Commission for the opportunity to comment on the Draft Report and to other intervenors for their submissions. Our submissions will focus specifically on Recommendation 8 in the Draft Report. West Moberly takes no position on the questions not addressed in these submissions.

Recommendation 8

For the reasons set out below, West Moberly endorses the following specific recommendations on the issues of self-regulated Indigenous utilities within historical treaty territories.

1. **Each Indigenous Nation that is a party to a historical treaty ("Historical Treaty Nations") should be given the opportunity to self-regulate in respect of its provision of utility services of any kind, including utility services located on its reserve lands, on lands it owns in fee simple, and in any other locations within the boundaries of its Treaty territory within British Columbia.**

2. **Historical Treaty Nations should be encouraged and supported in the development of robust dispute resolution processes, but such processes need not be overseen by the Commission.**

3. **Historical Treaty Nations should be able to acquire assets from BC Hydro or any other public utility at a reasonable cost and on such other terms as are necessary to facilitate effective and cost-efficient retail services. The BCUC or another agency should oversee such transactions.**

4. **Historical Treaty Nations should not be subject to an "obligation to serve", but should be encouraged to and supported to publish and maintain a clear and transparent extension policy.**

The Commission's Recommendation

As noted by others, there is some ambiguity in the Commission's Recommendation 8 regarding its application to areas outside of reserve lands but within historical treaty territories. For the reasons set out below each numbered paragraph,

West Moberly First Nations' Interest in this Inquiry

West Moberly First Nations is located on the west shores of Moberly Lake in the Peace River Valley of northeast British Columbia. West Moberly First Nations is a "band" within the meaning of the Indian Act. West Moberly has existing aboriginal and treaty rights recognized and affirmed under section 35(1) of the Constitution Act. As described in greater detail below, West Moberly is a party to Treaty No. 8.

West Moberly is currently exploring a number of potential utility service arrangements relevant to this Inquiry, including: generation of geothermal power and distribution of electricity to West Moberly members or other customers; generation of solar power and electricity distribution to West Moberly members and other customers, and other initiatives both within and outside of West Moberly reserve lands. West Moberly is committed to becoming energy sovereign, and these initiatives are crucial to the economic, social, and political independence of our people.

West Moberly is also one of several Treaty 8 First Nations that are in the process of completing Treaty Land Entitlement negotiations which could result in the acquisition of new lands as compensation for historic shortfalls in the allocation of reserve lands. Some of these lands to be acquired may be held in fee simple and others may become reserve lands. It is critical to West Moberly that the ability to self-regulate the provision of utility services applies to each category of lands: reserve lands, fee simple lands, throughout its traditional territory, and elsewhere within the territory of Treaty 8 that is within British Columbia.

Understanding Treaty No. 8

We believe some of the concerns that have been raised about self-regulated utility services in historic treaty territory arise form an overly narrow construal of the nature of Treaty rights. First Nations that are parties to Treaty No. 8 may hunt, fish, trap and carry out other traditional practices throughout the entire territory of the Treaty, except on lands that have been "taken up" (i.e. put to uses that are visibly incompatible with such practices). But Treaty 8 rights are not merely rights to extract resources. The Treaty also protects the right to manage traditional lands and resources as well. This is because in addition to the written text of Treaty 8, which records the protection given to a First Nation's hunting, fishing and trapping rights, the Crown also made oral promises to preserve the First Nation's traditional mode of life from forced interference. These oral promises have the force of law, as held by the Supreme Court of Canada in *R. v. Badger* decided nearly 25 years ago.

The traditional mode of life of West Moberly and its Dunne-za (Beaver people) ancestors is a "traditional seasonal round", which involved travelling throughout a large traditional territory not merely to hunt, fish, and trap, but to actively manage the natural and cultural resources throughout the territory. These traditional systems of management incorporated laws, customs, and practices passed down from one generation to the next to guide what, when, where, and how we live from and upon our territory. These management systems sustained these resources and protected them for future generations.

Treaty 8 was first made on the shores of Lesser Slave Lake in 1899 and adhered to afterwards by other Indigenous Nations. West Moberly's predecessor, the Hudson's Hope Band, was added to Treaty 8 in or about 1914. As noted by the FNLC, Treaty 8 did not include a relinquishment of any self-governmental rights. Treaty No. 8 included, among other things, the transfer of land ownership from Treaty Nations to the Crown in exchange for certain promise of the Crown, including the oral promise to protect the Nations' traditional modes of living on and from those lands. As held by the Supreme Court of Canada in *Mikisew,* these lands were to be honourably managed into the future for the mutual benefit of the treating parties.

Thus, the Crown has a Treaty obligation to protect and support the ability of West Moberly and other Treaty 8 Nations to actively maintain traditional land management processes and economic participation throughout the Treaty territory. This can and should include through modernizing British Columbia's utilities regulation so that West Moberly and other Treaty 8 Nations can continue to sustain themselves economically, socially, and politically from the provision and self-regulation of utility services throughout Treaty No. 8.

Reconciliation, UNDRIP, and DRIPA

The B.C. Government's passage of the Declaration on the Rights of indigenous Peoples Act in November 2019 should clarify and expedite efforts to promote the self-determination and self-sufficiency of Indigenous Nations in the context of this Inquiry. Section 3 of the Act states:

> In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

The Draft Report cites Articles 3, 4, 5, 18, 19, 20(1), 23, 26(1), and 32(1), and others have cited Article 26(2) which affirms the right to use, own, develop and control lands possessed or acquired by Indigenous peoples. In addition, Article 37(1) of the Declaration supports the full recognition of historical treaties, stating:

> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements

If British Columbia and the Commission are to support the Declaration, and recognize Treaty 8 rights, this recognition must include support for the ongoing role of West Moberly and other Historical Treaty Nations in the management of treaty lands, on- and off-reserve, and the modernization of the UCA or other laws which stand in the way of this paramount objective.

As FNLC and other intervenors have observed, complexity is not an excuse for delaying necessary actions to promote reconciliation. The Commission should be careful not to place undue weight on uncertainties or worst-case scenarios when attempting to modernize regulatory processes to achieve reconciliation. The injustice of inaction and the public benefits of enhancing Indigenous self-determination and self-sufficiency must also weigh heavily on the scale.

Service Areas and Territorial Boundaries

We do not believe any of the concerns raised related to territorial boundaries are an obstacle to self-regulation off-reserve, particularly within Treaty 8 territory. The boundaries of Treaty 8 have been agreed upon by Canada and Treaty 8 First Nations (the parties to the Treaty) since its formation over 100 years ago. The location of the western boundary is currently disputed by British Columbia. However, the issue was recently decided in *West Moberly First Nations v. British Columbia* f2017 BCSC 1700. The decision is under appeal, but the boundary dispute is not material to the issue of self-regulation because:

- the boundary will be confirmed by final determination of the court when appeals are exhausted;

- to our knowledge, there are no immediate Treaty 8 First Nation proposals within the disputed portions of Treaty No. 8; and,

- if there were such proposals, it would be open to British Columbia and such Treaty 8 Nation(s) to negotiate interim measures to address such a situation. Such arrangements have been made by British Columbia and Treaty 8 Nations in dozens of agreements in recent years.

We support a territorial model that allows Treaty 8 Nations to provide services anywhere within Treaty 8 territory (within British Columbia). This model encourages collaboration between Treaty 8 Nations and has maximal flexibility. It leaves open the possibility for consideration of multiple potential ownership and regulatory structures, from large-scale territory-wide multi-Nation partnerships (which allow enhanced capacity to scale, access to financing, etc) to focused opportunities in which a single utility is owned and regulated by a Treaty 8 Nation (to address targeted local needs of the nation and its customers).

As an alternative option, we would be open to exploring a sub-territorial model. Third party facilitation or dispute resolution services cold be deployed to assist Historical Treaty Nations and British Columbia in reaching agreement upon utility service areas within portions of the Treaty territory that correspond with their respective areas of interest or traditional territories. These areas of interest could, but need not, be identical to asserted “traditional territories”.

West Moberly has experience with territorial and sub-territorial arrangements relating to governmental and economic opportunities. As an example of the former model, West Moberly, Prophet River First Nation, Doig River First Nation, and Fort Nelson First Nation (all parties to Treaty No. 8) and British Columbia entered into an Economic Benefits Agreement in 2008

which, among other things, provided for the collaborative decision making and the sharing of provincial revenue in respect of development occurring throughout the entirety of Treaty 8 (not just within each First Nation's respective traditional territories). West Moberly and Prophet remain parties to that agreement and participate in governance (shared decision making) and economic activity (revenue sharing) throughout Treaty 8 territory, including within the portions of the territory disputed by British Columbia.

As for the second alternative, West Moberly, Saulteau First Nations and Halfway River First Nations (all parties to Treaty No. 8) entered a Regional Coal Agreement and Economic and Community development Agreement which, together, provide for shared decision making and revenue sharing with each Nation within non-identical but overlapping portions of Treaty 8 territory. These areas are not identical to each Nation's "traditional territory", as they reflect administrative concerns relevant to the coal sector and each party's interests.

The key point is that administrative boundaries for the purposes of utility service can be negotiated and agreed upon by the participating First Nations. This process of collaboration is pivotal to genuine reconciliation (see section 3 of DRIPA, cited above)—and is not a reason to shrink back from necessary regulatory modernization.

Rates and Accountability

Some policy concerns relating mainly to rates and accountability have been raised by intervenors opposed to Indigenous Nations providing self-regulated utility service throughout their traditional territories or within historical treaty territories.

With respect to the concern that Indigenous utilities operating off-reserve may lead to increased rates, we note, first, that the Commission need not endorse a myopic focus on rate reduction to the neglect of other relevant policy objectives. Achieving reconciliation is in the public interest of all British Columbians and all rate payers. The ongoing exclusion of Indigenous Nations from utility regulation is an unfortunate "externality" of the current system, and such costs have been paid for by Indigenous Nations themselves whose rights to participate in this arena have been denied. The cost of internalizing that externality is worth considering but is not the only factor to be weighed in the design of modern regulatory processes.

Self-regulating Indigenous utilities may actually drive rates down. West Moberly and other Indigenous Nations are positioned to provide utility services that could introduce some competition to public utilities. Indigenous Nations will likely utilize renewable energy from lower cost energy sources than those utilized by BC Hydro as well. For example, and with respect, the current regulatory and governance model for public utilities has not demonstrated that rates will remain low or even that they will weigh heavily against competing governmental objectives. The costs of Site C, for example, have soared from early estimates in the range of $6 billion to a current budget of $10.7 billion, and projections to increase above $12 billion by multiple independent experts. Rates will continue to increase because of the decisions made on Site C. And this says nothing of the nonfinancial costs. This project was built without the free, prior, and informed consent of every single Treaty 8 First Nation (not a single Impact benefit Agreement was made until after all major project approvals had been granted). In our view, the only reason the BC Government exempted Site C from review.

Another concern that has been raised is whether Indigenous utility service off-reserve to customers that are not members of the Indigenous Nation could create a monopolistic arrangement or lack the accountability similar to the political mechanisms which support UCA

exemptions for municipalities and regional districts. We submit that there should be no "obligation to serve" within the service area of the Indigenous utility. Indigenous utilities should be encouraged and supported by the BCUC to develop clear and transparent extension policies. It will be in the interests of Indigenous Utilities to provide services that are responsive to the needs of customers, as the combination of market factors and robust dispute resolution mechanisms is will create the necessary incentives. There will be no obligation on off-reserve customers to enter into service agreements with the Indigenous Utilities. When customers so choose, they will enter into detailed service agreements with the Indigenous utility. Those service agreements can provide the specific needs of the Indigenous Nation(s) and its customers, including rates, safety and reliability standards, dispute resolution, and other relevant terms. These agreements will be legally enforceable, which ensures common law remedies are available. We see no reason therefore to suspect a high quality of utility service could not be maintained by Indigenous utilities providing services off-reserve in the absence of direct regulation by the Commission under the UCA.

Supportive Role of the BCUC

We support the submissions of Beecher Bay and Adams Lake encouraging the Commission to adopt a supportive non-regulatory role in assisting Indigenous Utilities with resources and capacity in areas such as safety and dispute resolution. This would provide a meaningful role for the Commission in demonstrating reconciliation. We agree that an indigenous arm of the BCUC could provide culturally competent expertise appropriate to the unique challenges and opportunities relevant to Indigenous Utilities.

Retail Access

In order to fully enable Indigenous Utilities to access economic opportunities in their territories and to service customers outside of their reserve lands, it will be necessary to address the current restrictions on retail access. We submit that the BCUC or another agency should oversee the agreements between Indigenous Utilities and BC Hydro (or other public utilities) with a view to ensuring more affordable and practical access to the assets of public utilities, including transmission infrastructure. As observed, elsewhere, the existing electricity generation and transmission infrastructure has come at great cost to West Moberly and other Indigenous Nations, whose territories have been inundated and severely impacted by such development, in many cases without consultation or free, prior and informed consent. Providing meaningful access to this infrastructure is a small but meaningful step forward in achieving reconciliation for these impacted First Nations.

Thank you for the opportunity to comment on the Draft Report.

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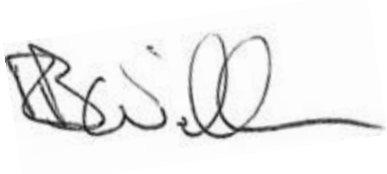

Chief Roland Willson
West Moberly First Nations

CC: