

BRITISH COLUMBIA UTILITIES COMMISSION  
IN THE MATTER OF THE UTILITIES COMMISSION ACT  
R.S.B.C. 1996, CHAPTER 473

And

British Columbia Utilities Commission  
Indigenous Utilities Regulation Inquiry

VANCOUVER, B.C.  
September 27, 2019

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**PROCEEDINGS**  
(ORAL ARGUMENT)

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**BEFORE:**

<b>D.M. Morton,</b>	<b>Chairman/Panel Chair</b>
<b>C.M. Brewer,</b>	<b>Commissioner</b>
<b>A. Fung Q.C.,</b>	<b>Deputy Chair/Commissioner</b>
<b>B. Lockhart,</b>	<b>Commissioner</b>

**VOLUME 12**

## APPEARANCES

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Commission Counsel

D. AUSTIN,  
J. SAYERS

Nuu-chah-nulth Tribal Council, the Cowichan Tribes, the Gitanyow First Nation, Homalcow First Nation and B.C. First Nations Clean Energy Group (Collective First Nations)

C. LUSZTIG

Coastal First Nations

T. THOMPSON

Kitselas Geothermal Inc. and Kitselas First Nation

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**VANCOUVER, B.C.**

**September 26, 2019**

**(PROCEEDINGS RESUMED AT 9:01 A.M.)**

THE CHAIRPERSON: Thank you, and please be seated.

Good morning and welcome, everyone, to this oral hearing phase of the BCUC Inquiry into Indigenous Utility Regulation. My name's Dave Morton, with me are my -- I'm the chair to the panel. And with me are my co-panelists, Anna Fung on my left and Carolann Brewer on my right, Blair Lockhart on her right.

What we're going to do today is we're going to hear oral argument from interveners and it will also provide the panel with the opportunity to ask questions, which hopefully you would be prepared to answer and we thank you in advance for doing so.

Before we get started, I'd like to just introduce the Staff team. We have Laura King, Nicola Simone and Phil Stallard. And our legal counsel is Lino Bussoli. And sitting over there is the hearing administrator, Hal Bemister, and also looking after the transcript is Keith Bemister.

On that note then, I'd like to get started. I'm going to call for appearances and if you're an intervenor and you're attending the proceeding here today, please come up and state your for record. And please let me know if you're intending to make an oral

1 argument to the panel.

2 So I'll hand it over to Mr. Bussoli, thank  
3 you.

4 MR. BUSSOLI: Thank you, Mr. Chair. First in the order  
5 of appearances is the Nuu-chah-nulth Tribal Council,  
6 Cowichan Tribes, Gitanyow First Nation, Homalcow First  
7 Nation and the B.C. First Nations Clean Energy Working  
8 Group.

9 MR. AUSTIN: Good morning Mr. Chair. My name is David  
10 Austin, A-U-S-T-I-N. I'm representing the Nuu-chah-  
11 nulth Tribal Council, the Cowichan Tribes, the  
12 Gitanyow First Nation, Homalcow First Nation and B.C.  
13 First Nations Clean Energy Group. To make things  
14 easier we're going to refer to ourselves as the  
15 Collective First Nations. And I have with me this  
16 morning Judith Sayers, who's going to do part of the  
17 oral argument. And she will go first, and when Judith  
18 starts she will introduce herself and provide more of  
19 a background for you.

20 I'd also like to thank, in a very deep and  
21 meaningful way, the Commission and the Commission  
22 Staff's efforts to engage First Nations in this  
23 process. The Commission and Commission Staff have  
24 just bent over backwards to engage First Nations and  
25 that's very very much appreciated.

26 THE CHAIRPERSON: Thank you for that, Mr. Austin, I

1 appreciate it. Thank you.

2 MR. BUSSOLI: Next is the Coastal First Nation.

3 MR. LUSZTIG: Good morning Mr. Chairman and panel. My  
4 name is Cameron Lusztig, last name is spelled L-U-S-Z-  
5 T-I-G. Thank you. I should say, we won't be speaking  
6 today.

7 THE CHAIRPERSON: Thank you, sir. Thank you.

8 MR. BUSSOLI: And finally we have Kitselas Geothermal  
9 Inc.

10 MR. THOMPSON: Good morning, Mr. Chairman. My name's  
11 Tim Thompson, last name's spelled T-H-O-M-P-S-O-N.  
12 I've been asked to speak on behalf of both Kitselas  
13 Geothermal Inc and the Kitselas First Nation today.

14 THE CHAIRPERSON: Thank you. So, Mr. Bussoli, are  
15 there any other matters?

16 MR. BUSSOLI: Those are all the appearance for today.

17 THE CHAIRPERSON: Okay, thank you, sir. Please go  
18 ahead Mr. Austin.

19 MR. AUSTIN: Thank you, Mr. Chairman. Our oral  
20 argument, which we're hoping will be more of a  
21 conversation between the Collective First Nations and  
22 the panel, is going to be split into two parts.  
23 Judith Sayers is going to take the first part and then  
24 I will be taking the second part. In relation to the  
25 second part, I will be providing responses to the BCUC  
26 questions. I will be doing a brief summary of certain

1 aspects of the law and some other additional points.

2 Judith, could you please introduce yourself  
3 and make your oral arguments?

4 MS. SAYERS: Thank you.

5 **ARGUMENT BY MS. SAYERS:**

6 MS. SAYERS: Good morning.

7 THE CHAIRPERSON: Good Morning.

8 MS. SAYERS: (Native language spoken). My traditional  
9 name is Kekinusuqs. I'm from the Hupacasath First  
10 Nation of the larger Nuu-chah-nulth Nation. And I'd  
11 like to acknowledge that we're on the unseeded  
12 territory of the Squamish, Tsleil-Waututh and Musqueam  
13 peoples.

14 I am currently the president of the Nuu-  
15 chah-nulth Tribal Council and nine of our 14 nations  
16 are involved in clean energy or are building projects  
17 -- or we're hoping to build projects.

18 **Proceeding Time 9:06 a.m. T02**

19 The other First Nations, the other  
20 Collective First nations, I am the coordinator,  
21 informal chair of the B.C. First Nations Clean Energy  
22 working group. And we are an informal group that work  
23 together to create opportunities for First Nations, or  
24 to lobby. My experience in the clean energy industry  
25 goes back to 2002 when my First Nation started to  
26 build a clean energy project, a run-of-the-river

1 project, that came online in December of 2005. And I  
2 have been involved with many things. I was chief in  
3 my community for 14 years, and I have also been on the  
4 Clean Energy Board for almost nine years, and part of  
5 quite a few other organizations relating to clean  
6 energy.

7 Today I wanted to convey to you the need  
8 for First Nations to have their own utilities on their  
9 lands, as well as to regulate their own utilities.  
10 You know, our opportunities were shut down, if I can  
11 describe it that way, when the government decided to  
12 continue to build Site C, and then put a hold on the  
13 standing offer program, and the micro-SOP.

14 So, what opportunities do we have? And  
15 many First Nations are working really hard on becoming  
16 energy independent in their own communities, but there  
17 is no economic component to that. And so this is one  
18 opportunity if we could become utilities on our own  
19 reserve on our own lands. Many of the First Nations  
20 we represent have housing developments, industry and  
21 other kinds of businesses on their lands. And I'm  
22 saying "their lands" because we do have some Treaty  
23 Nations that have Treaty settlement lands, and some  
24 have reserves. Some are part of the *First Nations*  
25 *Land Management Act* and have land codes. Some are  
26 under the *Indian Act*. So it's a real collective of

1 different kinds of laws that apply to First Nations.

2 Through the years we have been building  
3 capacity to engage in the clean energy industry, and  
4 have been able to embrace that. We use the number of  
5 125 First Nations that have one or more projects, or  
6 are actually receiving royalty payments. There is not  
7 that many of those, but most of our First Nations are  
8 building one or more projects, and have come a long  
9 ways in the industry, and many of those are  
10 partnerships with other energy companies, And they  
11 have been a really good partnership. And I always say  
12 that B.C. is one of the best places in building  
13 partnerships in clean energy, and because the industry  
14 has in most part embraced those partnerships.

15 So, when we look at this situation of clean  
16 energy, we have to look at some of the commitments  
17 that have been made by the provincial government. And  
18 those include implementing United Nations Declaration  
19 on the Rights of Indigenous Peoples, implementing the  
20 Truth and Reconciliation Commission, and embracing  
21 reconciliation as a whole.

22 So, taking this seriously, there are many  
23 articles within the Declaration which say that First  
24 Nations have the right to develop their own resources,  
25 to develop their own economic institutions, to be able  
26 to provide free prior informed consent to what goes on

1           their lands. And those are key and critical, and  
2           those are things that First Nations have been  
3           advocating I think since contact. That we need to be  
4           able to control our own lives, which brings in the  
5           concept of self-determination. And self-determination  
6           means that we freely determine our own economic,  
7           social, and cultural development.

8                         So if we look at the way it is now, and we  
9           don't even have the ability to be a utility? We can't  
10          even control that utility? That goes contrary to  
11          everything that is there. And in my mind, the B.C.  
12          government has committed to implementing UNDRIP, and I  
13          think as a Crown corporation, BC Hydro should be also  
14          embracing that, and saying "Yes, First Nations have  
15          the right of self-determination, and yes, we have to  
16          give them every opportunity they can to continue  
17          developing in the clean energy industry, creating  
18          revenue, creating jobs and capacity."

19                                 **Proceeding Time 9:11 a.m. T3**

20                         The provincial government is drafting  
21          legislation as we speak to implement UNDRIP. And we  
22          know that it's going to be like the bill that died in  
23          the federal laws, that they're going to have to have  
24          their laws consistent with UNDRIP. And their hope is  
25          that by the end of this session, at the end of  
26          November, that they will be implementing UNDRIP and

1           having that legislation through.

2                       So, I mean, why don't we start this now?  
3           That First Nations be able to build their own  
4           utilities, regulate their own utilities. And I get a  
5           little bit – I don't know how to describe it – but you  
6           know, it seems funny to me that BC Hydro and Fortis  
7           believe that we cannot regulate our own industry, that  
8           we need someone else to do it for us. The days of  
9           paternalism are gone, the days of having to be policed  
10          for every single thing I think are long passed. And  
11          our ability to compete in this world and to do things  
12          that are the best for our members and those that live  
13          on our lands is something that every government is  
14          committed to.

15                     And I can't see anybody trying to gouge our  
16          members, especially in light of the high unemployment  
17          and those kinds of things, the social situations we  
18          find ourselves in. They're not going to be over  
19          pricing electricity. I think in a competitive world  
20          you just don't do that. And that's what we live in  
21          and that's what we'd be working with.

22                     And so, I just think that, you know, we  
23          need to embrace the ability of First Nations to be  
24          regulating themselves, to be able to put their own  
25          utilities. These are federal lands and they are under  
26          federal jurisdiction, lands and resources are under

1 federal jurisdiction. And I think in that case then  
2 that's what we need to be able to do.

3 So I really think that, you know, in light  
4 of the political climate that we're living in,  
5 especially talking about reconciliation, which to me  
6 means righting the wrongs of the past. And some of  
7 those wrongs, I think, come back to depriving First  
8 Nations of an opportunity to create revenue and jobs  
9 without even talking to us, because they didn't. They  
10 did talk to those First Nations affected by Site C,  
11 but they didn't ask the rest of the First Nations in  
12 the province how going ahead with Site C, putting a  
13 hold, indefinite hold on the SOP would affect us.

14 And we once -- we did a survey out of the  
15 University of Victoria, Clean Energy BC and the BC  
16 First Nations Clean Energy Working Group, where we  
17 surveyed 105 of the 203 First Nations in the province.  
18 And we were able to, from that we were able to find  
19 that First Nations wanted to invest \$3.3 billion in  
20 the clean energy industry. And if we double that,  
21 that's almost 7 billion, for those that didn't  
22 participate, and that's just an assumption. So, we do  
23 know 3.3 billion for 105 First Nations. So you see  
24 the amount of interest, the amount of people that  
25 really want to engage in the clean energy industry.  
26 And I think that's all part of being self-determining

1 nations, by creating that capacity.

2 And the great thing about the clean energy  
3 industry, of course, is that it's within our  
4 environmental standards. Small impact on the  
5 environment, and that's the kind of development most  
6 First Nations want to do, a sustainable development.  
7 And so it's been an exciting industry to be involved  
8 in. And if I follow my career path since 2002 and  
9 where I've been able to be involved in the industry,  
10 you know, I've just seen First Nations embracing this  
11 industry, wanting this industry. I get phone calls  
12 all the time from First Nations telling me what's  
13 going on and what's not going on in their communities.

14 So I think this is one opportunity. The  
15 *Clean Energy Act* says that we're supposed to be  
16 involved in the *Clean Energy Act*. The premier, when  
17 he announced they were going to continue on Site C,  
18 said he was going to make First Nations opportunities.  
19 So, where are there? So I believe this is one of  
20 those opportunities that I hope can open up and make  
21 us a part of a thriving industry that we were a big  
22 part of, and want to continue to be there.

23 Thank you for your time.

24 **Proceeding Time 9:15 a.m. T04**

25 THE CHAIRPERSON: Thank you, Ms. Sayers. Do you have  
26 any questions?

1 COMMISSIONER FUNG: Thank you very much, Ms. Sayers,  
2 for your comments. I really appreciate you taking the  
3 time to address us this morning and share your  
4 thoughts. I am just wondering whether you have any  
5 thoughts on this, and that is assuming we agree with  
6 you that First Nations ought to be regulating their  
7 own utilities, how do you see that regulatory  
8 jurisdictional power extending to non-Indigenous  
9 peoples or businesses that may be operating within  
10 your territory?

11 MS. SAYERS: Well, let's take for instance a reserve  
12 that -- Squamish, where they have Park Royal, and all  
13 of those industries there. So I think they would of  
14 course put a utility in place when they are ready for  
15 that, and I think they would give them the opportunity  
16 to buy their power. And maybe make a part of their  
17 lease. I'm just kidding. No, but I think they would  
18 offer that opportunity, and I think that is why  
19 competitive pricing is important. You know, do they  
20 continue with BC Hydro, do they go with Squamish First  
21 Nation? And I think they would promote and ask people  
22 to be buying their power, and that is how the world  
23 operates today.

24 So, you know, they would put in place their  
25 own laws, their own regulatory framework and then  
26 administer it. I think that is something that is

1 quite capable, and there is a lot of reserves that do  
2 have industrial development on them. Kamloops Indian  
3 band, Osoyoos. There are many First Nations that  
4 might just have -- like Tsleil-Waututh, they have  
5 Ravenswood, they have the housing, that they can  
6 provide power to.

7 So I think the opportunity is there and I  
8 think just asking people to come and buy their power  
9 and grow their utility is really important.

10 COMMISSIONER FUNG: And do you see the power of the  
11 First Nations to control and regulate their own  
12 utilities being limited to the areas, specific areas  
13 of operation or not?

14 MS. SAYERS: Well, I would like to see utilities being  
15 able to provide power within their territorial area,  
16 at the very least their reserves or settlement lands.  
17 But again, that's a limited opportunity. So if we  
18 wanted to like convey power to another First Nation  
19 community or another business within the territory  
20 that no one else has done, build the transmission  
21 lines, get the power there, you know, that's all part  
22 of the opportunity. And so I would see that as  
23 another vision.

24 Like we already have the Taku River Tlingit  
25 who are building a power line from their community and  
26 going into the Yukon, that's what they're trying to

1           build. So we have examples in place already of that  
2           happening. But they are not regulating their own  
3           utility.

4 COMMISSIONER FUNG:           Right. Okay, thank you very much.

5 THE CHAIRPERSON:           Okay.

6 COMMISSIONER BREWER:        Thank you for your presentation,  
7           Judy. I am just wondering, so one of the things I  
8           guess that have to be considered in regulating, as you  
9           know, is the infrastructure within the communities and  
10          whatnot. How do you see that being -- would the  
11          utility rent the existing infrastructure? How would  
12          you see -- and I would see that may in fact require a  
13          role for BCUC or something like that. I don't know,  
14          but I'd like to get your thoughts on that.

15 MS. SAYERS:           Well, I would think within community,  
16          within a reserve, and remember some of the reserves in  
17          the Interior of course are very large. Their ability  
18          to put their own micro grids in, transmission lines,  
19          getting their power out, I think could be done within  
20          the regulation, and possibly outside those reserves  
21          there could be -- we'd have to look at other models.  
22          But I really think the ability to put in their own  
23          microgrids. And as First Nations are becoming grid  
24          independent we are seeing more and more of that, their  
25          ability to put in their microgrids, feed things to  
26          their community buildings and to their businesses.

1 **Proceeding Time 9:20 a.m. T5**

2 So, you know, partnerships, getting the  
3 money together to do that, doing it on their own,  
4 financing, I think all of that is possible as we see  
5 those kind of things already in place in just  
6 developing energy that we sell to the grid.

7 COMMISSIONER BREWER: And one other question. Would  
8 you see the -- or do you see the self-regulation as a  
9 part of a larger -- like would you have like a  
10 conglomerate of, I guess -- like you have a collective  
11 right now that you're speaking for, and would you see  
12 that as -- I'm just wondering about how you might be  
13 financing and whatnot the -- I guess an institution  
14 that would regulate. And I'm not saying the  
15 institution has to be like the BCUC, but some kind of  
16 an intuitional piece.

17 MS. SAYERS: I haven't -- I don't think we've gone that  
18 far. I don't think it's out of the realm of  
19 possibilities, you know, as we look at developing, as  
20 part of some of the solutions. Right now I think a  
21 lot of the First Nations are concerned with feeding  
22 their own communities, and then looking outside for  
23 opportunities. And, you know, we really are looking  
24 at self-determination and the ability to do your own  
25 power.

26 But, you know, different groups, regional

1 groups coming together to present power, you know, I  
2 think that's definitely something that could happen,  
3 but we haven't got to that point yet, and so -- but  
4 then again, we haven't had that opportunity. So if  
5 there's an opportunity, I think a lot more minds will  
6 start clicking and coming together in finding what is  
7 the best solution, what is the best way to regulating  
8 the utility and to operate bringing power within their  
9 territories.

10 THE CHAIRPERSON: Thank you. I have a couple of  
11 questions too, please. We've heard from other parties  
12 in this proceeding, and reading through the evidence  
13 that's been submitted and the IRs that have gone back  
14 and forth on that evidence, there's a strong sentiment  
15 -- and you've echoed that today -- that First Nations  
16 should be -- I'll just use the term broadly, should be  
17 in control of matters on their own land, however  
18 that's defined, whether it's *Indian Act* land or treaty  
19 land or whatever it may be.

20 MS. SAYERS: Yes.

21 THE CHAIRPERSON: And that's largely I would say  
22 supported by UNDRIP, as you've pointed out today. And  
23 we've heard some First Nations say that when it comes  
24 to treaty land in particular, that the province should  
25 have and has no jurisdiction whatsoever, which would  
26 include the *Utilities Commission Act*. And you would



1 BC Hydro and Fortis and the way that they're regulated  
2 through the BCUC. But I think where the exclusion  
3 lies is on First Nations lands.

4 THE CHAIRPERSON: Right, okay.

5 MS. SAYERS: If that's -- I don't know if that answers  
6 your question.

7 THE CHAIRPERSON: Sorry, when you say the exclusion is  
8 on First Nations lands, meaning?

9 MS. SAYERS: Like, if BC Hydro and Fortis are operating  
10 on our lands. Then -- and First Nations want to take  
11 over, then it should be First Nations.

12 THE CHAIRPERSON: Right. There should be an  
13 opportunity to, say, take over the distribution  
14 infrastructure and operate a utility. But if that  
15 doesn't happen, then BC Hydro should continue to  
16 provide service and those rates should be continue to  
17 be regulated by the BCUC. Is that correct?

18 MS. SAYERS: Yeah, we have no problem with that  
19 whatsoever. Yeah.

20 THE CHAIRPERSON: Okay. Also, with regard to your  
21 comments about the adoption of UNDRIP and, you know,  
22 the perhaps inevitable amount of time that that may  
23 take. I would also like to point that we -- that this  
24 Commission, we don't really have any control over our  
25 Act and we can't change our Act, we can't regulate any  
26 differently than our Act lays out. And this inquiry

1 is only intended to -- or is only asking for  
2 recommendations.

3 So, I can simply make no prediction as to  
4 when there would be any changes, no matter what  
5 predictions we make. And if those changes end up  
6 being mired in, you know, a broader set of changes  
7 that are precipitated by the adoption of UNDRIP. Then  
8 it's difficult to say what the timeline could be.

9 So, given that, it would be particularly  
10 helpful, and I'm not asking you to do this today, but  
11 it would be particularly helpful to identify  
12 transitional recommendations that we can make that can  
13 be done. That can be made quickly and can be made,  
14 let's say, by Ministerial order as opposed to by  
15 legislative change. And, you know, that would be a  
16 faster route to getting change. So, you know, perhaps  
17 you and Mr. Austin could think about that. That'd be  
18 particularly useful.

19 MS. SAYERS: I think that's a whole jurisdictional  
20 argument that Mr. Austin will be making. And, you  
21 know, the ability of BCUC to be actually regulating on  
22 a reserve on federal lands with federal resources,  
23 which I've never understood how the BCUC can actually  
24 claim jurisdiction because of that. So, yeah, no,  
25 it'd definitely be part of the legal arguments.

26 THE CHAIRPERSON: And I think, finally, I just want to

1           have a brief conversation about what, at least I see,  
2           is two different threads. Well, there's a least two  
3           different threads that are going on in this proceeding  
4           and that I think I heard in your discussion just now.  
5           And one of those is the regulation of a utility that's  
6           owned or partially owned by a First Nation that's  
7           providing energy to its community or communities. And  
8           the ability to rate regulate that and have control  
9           over the economic development of the community and  
10          through the utility.

11                        Then there's also this issue of the  
12          standing offer program and the relationship of IPPs  
13          that are owned, or partially owned and operated by  
14          First Nations, and that may not actually sell any  
15          energy to the local community, may sell all of its  
16          output to BC Hydro, typically through the standing  
17          offer program.

18                        Would you agree that those are largely  
19          separate issues?

20 MS. SAYERS:        Yeah, I think so. The standing offer  
21          program was a program that was easily accessible and  
22          able to, you know, sell your power to the and it was  
23          the model that First Nations were embracing because it  
24          was there. You go to the bank with it and get your  
25          funding.

26 THE CHAIRPERSON:        Yes.

**Proceeding Time 9:29 a.m. T07**

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MS. SAYERS: And so that was a totally different program. But when we are talking about First Nations utilities, it is a different stream that I see. So yeah, I think that there -- you know, it's just like hopefully we're going to sell power to companies on our reserve, then you enter into an agreement with them on how that would look. So onto your own power to do so, your jurisdiction.

THE CHAIRPERSON: So are there instances or many instances of where those two models are combined and you would have a First Nations utility that provides some energy to its own community and sells some of the excess energy to BC Hydro?

MS. SAYERS: I think that we would take advantage of every economic opportunity. And so if BC Hydro did open up their programs again for bidding in electricity, I'm sure First Nations would do that.

THE CHAIRPERSON: Yeah.

MS. SAYERS: But you know, as a competitive utility, I'm sure that they would try and sell their own power as well. And I think that has kind of been our vision. I know way back when we built our program, we only took a 20-year contract, because we hoped to be able to then sell our own power, and that was always our vision and our view. But you needed the contract

1           for 20 years to get our financing.

2 THE CHAIRPERSON:       Understood.

3 MS. SAYERS:        So, I think it will be two streams, and I  
4           think if you've got two opportunities you are going to  
5           use them to the best of your advantage and making the  
6           best decision for your economic development. So if  
7           you can sell your own power, be your own utility, why  
8           not stay that way? But if you're not getting  
9           customers or it is a better deal to go with BC Hydro,  
10          then I think First Nations utilities would also look  
11          at that as an option.

12 THE CHAIRPERSON:     Okay. Is there any opportunity then  
13          now to -- I appreciate that the standing offer program  
14          is closed, but in your view is there any opportunity  
15          to sell any energy to BC Hydro or to Powerex? You say  
16          none?

17 MS. SAYERS:        There is none, unless, you know, you can  
18          build a project that you can transmit power on the  
19          powerlines, but we haven't had that. So right now we  
20          are able to sell power on the net metering program.  
21          And it's not even selling power, it's just --

22 THE CHAIRPERSON:     Yeah, it's small scale.

23 MS. SAYERS:        Yeah, so there is none, and it's a very  
24          dismal picture out there for First Nations, you know,  
25          because many people have spent millions of dollars  
26          developing a project but haven't been able to enter

1           into an EPA with BC Hydro.

2 THE CHAIRPERSON:       Can you sell energy outside of the  
3           province? Is that an option that is available to you?

4 MS. SAYERS:           We thought about that, and I haven't  
5           really studied if there are any issues in doing that.  
6           So you'd have to wheel your power, or build your own  
7           transmission lines to sell.

8 THE CHAIRPERSON:       Or wheel it over Hydro using the  
9           OATT, yeah.

10 MS. SAYERS:           And I don't think Alberta will buy our  
11           power. Maybe State-side.

12 THE CHAIRPERSON:       Yeah.

13 MS. SAYERS:           I haven't studied that fully, but it could  
14           be an option if you could actually get it over there  
15           and sell it.

16 THE CHAIRPERSON:       Okay. All right. I think those are  
17           my questions then. Thank you very much, I appreciate  
18           that.

19 MS. SAYERS:           Thank you.

20 **ARGUMENT BY MR. AUSTIN:**

21 MR. AUSTIN:           I'd just like to follow up a bit on the  
22           concept of exporting electricity outside the  
23           jurisdiction. People looked at that for about 30  
24           years, and the problem always is the cost of  
25           transmission. And what people don't appreciate is  
26           with the change in technology with respect to

1 renewable generation, the cost of renewable generation  
2 pricing is going down significantly, whereas the cost  
3 of existing transmission or new transmission is going  
4 up at least the rate of inflation.

5 So, when you think this through, as a  
6 percentage of the total purchase price, the costs of  
7 transmission relative to the cost of generation has  
8 gone up markedly. So, how are you going to compete  
9 with local, renewable generation in the export market  
10 when you have to pay such a large transmission bill  
11 for the cost of using the transmission and losses.

12 **Proceeding Time 9:34 a.m. T8**

13 On a historical basis there was the concept  
14 of electricity by wire or electricity by pipe, because  
15 the idea was if you use natural gas in British  
16 Columbia for generation and you used the electrical  
17 transmission wires, you could compete in markets such  
18 as California.

19 The answer to that was an absolutely, "No  
20 thank you," because it was much cheaper to transport  
21 natural gas by pipeline to California, use that  
22 natural gas when it gets to California to generate  
23 electricity, than it was to generate it in British  
24 Columbia and use the electrical transmission lines.

25 So it's always been an historical problem  
26 and the problem has always been the cost of

1 transmission and losses on both sides of the border.

2 THE CHAIRPERSON: But, Mr. Austin, as I understand it,  
3 we do sell a substantial amount of energy to  
4 California. And most of our energy is hydroelectric,  
5 but we're selling that to California.

6 MR. AUSTIN: We dump it into California. We're not  
7 specifically building projects for export to  
8 California, because you cannot get a long-term firm  
9 electricity purchase contract. When I say -- I use  
10 the word "dump", I don't say that in any sort of anti-  
11 dumping way or in violation of any law, but that's  
12 essentially --

13 THE CHAIRPERSON: It's energy that's excess to our  
14 needs, I think is what you're saying.

15 MR. AUSTIN: It's excess to our needs. It was never --  
16 the generation wasn't built with the idea that it  
17 would be used for export. It's incidental to building  
18 that generation for domestic purposes.

19 THE CHAIRPERSON: Can I also -- may I ask you another  
20 question also, just to go back to what you talked  
21 about at the beginning there about transmission costs.  
22 Are you saying that they're inordinately high or  
23 unfairly high or they're just high because that's the  
24 nature of the --

25 MR. AUSTIN: That's the reality, is that transmission  
26 lines, especially the long distance transmission

1 lines, are very expensive to own and maintain, let  
2 alone building new transmission lines. The original  
3 transmission lines in the west, from here to  
4 California, were not built for the purposes of  
5 specific projects being built say, for example, in the  
6 state of Washington, and that electricity --  
7 California. The electric transmission lines were put  
8 in for security of supply.

9 So that you had one utility being able to  
10 help out another utility in times of need. That's why  
11 the grid was put together in the western United  
12 States. It wasn't put together for the purposes of  
13 developing projects on the Columbia River in the  
14 United States and selling that electricity to  
15 California.

16 As a matter of fact, that was something  
17 that the residents of Washington, Oregon, did not want  
18 to happen. They did not want those projects on the  
19 Columbia River being used as the generating source for  
20 industry and commerce in California. That's the  
21 history of it. But now with the cost of renewable  
22 generation going down the way it is, that transmission  
23 cost barrier is becoming even more formidable than it  
24 has been in the past.

25 In terms of my portion of the presentation,  
26 I want to provide some answers to the BCUC questions,

1 and since this is a transcript, I will read the  
2 question into the record and then provide a response.

3 The first question is:

4 "The need for regulation of monopoly service  
5 providers is generally considered necessary  
6 where there's a need to protect the consumer  
7 against potential abuse of monopoly power by  
8 the service providers. Is this an  
9 applicable to and important factor for  
10 Indigenous utilities? Why or why not?"

11 The issue isn't whether there is a need to  
12 protect consumers against potential monopoly abuse by  
13 service providers.

14 **Proceeding Time 9:38 a.m. T9**

15 But whether First Nations, with redress to the courts  
16 if necessary, can provide the required protection if  
17 they own or control the utilities they regulate.

18 So think that through carefully. It's not  
19 a question of whether there's a need to protect  
20 consumers from monopoly abuse, it's a question of who  
21 does it. And what's interesting in these proceedings,  
22 and it's got nothing to do with the Commission, the  
23 tenor seems to be that it's up to the First Nations to  
24 prove that they can regulate the utilities that they  
25 own or control. And that just seems to be the  
26 subsurface trend in terms of some of the IRs and some

1 of the submissions.

2 And when you look at it in that context,  
3 the first question you ask yourself is, well, has the  
4 regulation of public utilities in this province been  
5 hugely successful? And the answer to that -- and  
6 again, it's got nothing to do with the Commission.  
7 It's got everything to do with the level of provincial  
8 government participation in the regulation of  
9 utilities, public utilities, in this province.  
10 Especially in relation to BC Hydro.

11 In my lifetime the public utilities,  
12 meaning BC Hydro and now what is the core of Fortis  
13 Gas' distribution system, were not regulated at all up  
14 until about the early '80s. So, they, in particular  
15 BC Hydro in relation to its large hydroelectric  
16 projects, wasn't regulated. And in terms of the core  
17 of Fortis Gas, which is the Lower Mainland  
18 distribution system, since it was owned by BC Hydro it  
19 wasn't regulated either. So, both of those entities  
20 had the advantage of being able to build their  
21 businesses in an unregulated environment.

22 And what First Nations, or the Collective  
23 First Nations are saying, why don't we have that  
24 chance? With a twist that they're saying, we'll  
25 regulate it, and we'll get into the legal aspects of  
26 this in relation to on-reserve First Nations utilities

1 later on. But think about the history. The history  
2 is that there was no regulation except for the common  
3 law.

4 And there's this idea that somehow the  
5 common law doesn't exist anymore. And there's really  
6 two branches of the common law that I'll discuss a bit  
7 later. And that's in relation to the common law under  
8 the *First Nations Land Management Act*, meaning access  
9 to the Federal Court for appealing decisions that are  
10 made under the *First Nations Land Management Act*. And  
11 the common law as it applies to lands outside the  
12 reserves. And the common law still applies to lands  
13 outside the reserves in relation -- because of  
14 *Chastain v. BC Hydro*. So, there's that aspect of it.

15 But what First Nations are being asked to  
16 do is prove that they can be competent regulators,  
17 especially in relation to non-First Nations members  
18 who would be taking service from a First Nations  
19 utility.

20 **Proceeding Time 9:43 a.m. T10**

21 But what is interesting about that is, in  
22 the current regulatory scheme there is no special  
23 concern about First Nations who are taking service  
24 from utilities such as Fortis or British Columbia.  
25 They are considered to be just like everybody else.  
26 But yet for the purposes of a First Nation utility,

1       serving a non-First Nation member, we seemingly have  
2       to pay extra special attention to this non-First  
3       Nation member.

4               I think that there was -- in Exhibit C12-3,  
5       the Westbank First Nations succinctly address the  
6       matters of First Nation trust and capability. What  
7       they said is,

8               "WFN lands are home to over 10,000 non-  
9       member residents on two Indigenous reserves.  
10       For over the course of 10 years we have  
11       maintained an accountable and transparent  
12       government to both WFN members and the  
13       greater non-member populations."

14               That's evidence that First Nations are more  
15       than capable of providing services and regulating  
16       themselves. But we don't hear about those examples.  
17       We are always concerned about the one non-member First  
18       Nation, one non-member individual who is subject to  
19       First Nations' laws and regulations, and about whether  
20       they are being protected. So I think there has to be  
21       a fundamental rethink of what is trying to be  
22       accomplished here.

23               What is trying to be accomplished is that  
24       to provide First Nations with more economic  
25       opportunity, is it that they have to prove that they  
26       can regulate themselves? Or is it that we should be

1 completely concerned about a non-member First Nation  
2 who is taking service from a First Nation utility?  
3 And the Collective First Nations' view is we should be  
4 concerned about the economic opportunities that the  
5 First Nations were denied, as opposed to spending so  
6 much time trying to protect the non-member First  
7 Nations who is taking service from an indigenous  
8 utility.

9 Now, in relation to the history of  
10 regulation of public utilities such as Fortis and BC  
11 Hydro, it is useful to look at Exhibit C2-3, which is  
12 BC Hydro's responses to Collective First Nations IRs  
13 1.1.1, 1.1.2, 1.1.3, 1.1.4 and 1.2.1. Also to look at  
14 Exhibit C4-5, FortisBC responses to Collective First  
15 Nations IRs No. 1 and No. 3. Because in those IRs  
16 Fortis agrees that no, it wasn't subject to regulation  
17 in its formative years, meaning when it was part of BC  
18 Hydro. And BC Hydro in its responses acknowledging  
19 that there have been numerous directives issued to the  
20 B.C. Utilities Commission in terms of regulation of BC  
21 Hydro.

22 **Proceeding Time 9:48 a.m. T11**

23 And also that the laws of the province of  
24 British Columbia do not apply to BC Hydro unless  
25 they're specifically enumerated in the *Hydro and Power*  
26 *Authority Act*. People forget that, but that's what

1 the law is.

2 So, in terms of the existing regulation,  
3 the question you have to ask yourself – and I'm asking  
4 a lot of questions here and not providing that many  
5 answers – is that, is that really, truly a level  
6 playing field? And the answer is no. Has it been  
7 highly successful? Well, very recently the government  
8 of the province of British Columbia put about \$1.1  
9 billion into BC Hydro to shore it up financially. So  
10 from a regulatory perspective, how did that happen?

11 THE CHAIRPERSON: I can't answer that, sorry, Mr.  
12 Austin.

13 MR. AUSTIN: But I'm saying it's not the regulator,  
14 it's the level of participation that the province of  
15 British Columbia engages in that makes the concept of  
16 a level playing field for regulation, or saying that  
17 the existing regulatory system is superior to anything  
18 that First Nations could put into place on their own.

19 COMMISSIONER LOCKHART: But Mr. Austin, is it for any  
20 First Nation utility? Or is it for any non-BC Hydro  
21 utility that wants to operate? I mean, do the  
22 arguments --

23 MR. AUSTIN: There's examples of directives issued to  
24 the B.C. Utilities Commission in relation to Fortis.

25 COMMISSIONER LOCKHART: No, I appreciate that, but  
26 insofar as you're suggesting there should

1 opportunities for First Nations utilities, I take your  
2 point, you know, righting the wrongs. But is that the  
3 goal, to right the wrong? Or what about having the  
4 opportunities extended to any utility that wants to  
5 operate?

6 MR. AUSTIN: I can't speak for any utility that wants  
7 to operate, because this is an Indigenous First  
8 Nations Utility Inquiry, And my client is a First  
9 Nation. So I would have to get instructions and have  
10 to talk to Judith.

11 Well, Judith, what do you think? Should  
12 non-First Nations utilities be exempt from regulation  
13 by the B.C. Utilities Commission? And I think my  
14 response back would be, do you think we could get at  
15 least a toe-hold and get things going before we face  
16 the prospects of even more competition. Because right  
17 now we're going to have to compete in part with  
18 existing public utilities who are very, very well  
19 established. Who have got access to capital that the  
20 First Nations utility certainly not going to have  
21 access to.

22 COMMISSIONER LOCKHART: All right, thank you.

23 THE CHAIRPERSON: Mr. Austin, I wonder if you could  
24 explain a little bit about this notion of competition.  
25 I'm not quite sure I understand. Who's competing with  
26 who and on what basis is this competition?

1 MR. AUSTIN: Initially -- it's highly likely, if you  
2 look at the Beecher Bay example, that there's not  
3 going to be any competition with the likes of BC Hydro  
4 and Fortis, Because the First Nations will be looking  
5 at new opportunities, not the operations of the  
6 existing utilities. It's very difficult to compete  
7 with the existing operations of utilities because the  
8 systems, they're duplication of, say for example  
9 distribution systems, is expensive.

10 **Proceeding Time 9:52 a.m. T12**

11 But if there has to be a new distribution system built  
12 and it's on, say, for example, First Nations reserve  
13 land or within their traditional territory, that's  
14 really not competition to the existing utilities  
15 because what the expansion of the distribution systems  
16 will be is they'll be interconnected.

17 THE CHAIRPERSON: There's a competition for a new  
18 market, presumably, is it not?

19 MR. AUSTIN: There is a competition for a new market,  
20 yes.

21 THE CHAIRPERSON: But do you think that that's -- are  
22 you suggesting that competition is an essential  
23 element of this issue of regulation? I'm not  
24 disagreeing, I'm just wondering. Yeah.

25 MR. AUSTIN: I think Judith would best answer that.

26 MS. SAYERS: Well, I think that the First Nations are

1 looking at providing electricity to their lands. And  
2 if that excludes BC Hydro, then that's just a point of  
3 the development. So on their lands they're not going  
4 to be asking BC Hydro to come on and provide power.  
5 You know, especially in the case of Beecher Bay, they  
6 have a beautiful new development that they want to  
7 power, and why can't they do that on their own? And  
8 it's not something that BC Hydro is going to be  
9 missing out on because it's not their opportunity,  
10 it's a First Nations opportunity.

11 THE CHAIRPERSON: Right. Well, the Beecher Bay example  
12 I think is a good one, because I was on that panel and  
13 I, you know, I simply -- I don't recall competition  
14 being an issue in that proceeding and, frankly, I  
15 didn't -- it wasn't considered by the panel and wasn't  
16 brought up in any of the materials. But I think it's  
17 an interesting point. And I don't want to read a lot  
18 into -- too much into what you're saying, but I think  
19 you're maybe suggesting that part of the regulation of  
20 utilities in this province is to protect the monopoly  
21 service territory that BC Hydro or Fortis has. Am I  
22 wrong to be reading that into what you're saying?

23 MS. SAYER: No, I think you're right. And I think that  
24 it comes from the submissions that BC Hydro and Fortis  
25 have made that, you know, that they're worried about  
26 the competition, that the First Nations are taking

1 away from their market share, especially when they  
2 want to grow their need for demand.

3 THE CHAIRPERSON: Right. Thank you.

4 MR. AUSTIN: I think in theory, yeah, there is an  
5 element of competition, but what's the degree or level  
6 of -- the amount of competition? And I think that's  
7 the more important aspect of it, is First Nations  
8 utilities are not going to be taking huge chunks of BC  
9 Hydro's and/or Fortis's market share.

10 And in addition to that, in terms of the  
11 need to reduce greenhouse gas emissions, it's highly  
12 unlikely that First Nations would even want to go  
13 into, say, for example, the gas distribution business,  
14 because the gas distribution system business with its  
15 greenhouse gas emissions is an industry that really is  
16 going to have to make some very large changes. And  
17 from a First Nations perspective, why would they want  
18 to step into something like that at this point in  
19 time?

20 So that's just a sidelight in relation to  
21 First Nations want to participate in the economy, but  
22 they don't want to participate in a way that will  
23 cause them grief, especially in terms of financial  
24 losses, five, ten, or fifteen years hence. They're  
25 like everybody else.

26 COMMISSIONER LOCKHART: Sorry, Mr. Austin. Thank you.



1 COMMISSIONER LOCKHART: All right, thank you.

2 MR. AUSTIN: Question number 2:

3 "If the regulation of Indigenous utilities  
4 were undertaken by an entity other than the  
5 BCUC, for example self-regulated by a First  
6 Nation, would it be appropriate for the BCUC  
7 to retain its jurisdiction to act upon  
8 complaints? Why or why not?"

9 With no disrespect to the Utilities  
10 Commission, no, it wouldn't be appropriate, because if  
11 First Nations are to be successful in regulating their  
12 own utilities, they have to be responsible for their  
13 decisions. And if they make a decision and it's not  
14 an appropriate decision then, at least in relation to  
15 First Nations that have land management codes, there's  
16 redress to the Federal Court. For First Nations  
17 utilities that are not on reserve there's redress to  
18 the common law. There is no need for the B.C.  
19 Utilities Commission to be involved. And again, it's  
20 not in any way disrespectful to the B.C. Utilities  
21 Commission. But if a group is going to be self-  
22 determinate, it needs to be held accountable for its  
23 decisions and it's the courts that will hold them  
24 accountable.

25 COMMISSIONER FUNG: Mr. Austin, can I just stop you  
26 there. I may agree with you about accountability, but

1 I'm a little concerned about your statement that the  
2 people who have complaints can always go to the  
3 courts, whether it's the Federal Court or the Supreme  
4 Court. Because as you and I both know, the whole  
5 issue of access to justice is a huge one in this  
6 province. And for you to say that people can always  
7 go to the courts, maybe, but they can't afford a  
8 lawyer. And how many of the ordinary public are going  
9 to be able to and file something in the Federal Court  
10 to the, you know, Supreme Court and actually be  
11 assured that they're going to have the complaints  
12 dealt with appropriately?

13 MR. AUSTIN: Well --

14 MS. SAYERS: Why can't the First Nations have a dispute  
15 resolutions process in their regulation of some sort?  
16 I think many would consider that an important part of  
17 regulation, so that people have that redress of some  
18 sort. And I just think it'd be part and parcel of the  
19 regulation. And it could be an independent tribunal  
20 or whatever they find is the best dispute resolution  
21 process.

22 MR. AUSTIN: We'll get to that, because that is a  
23 requirement of the *First Nations Land Management Act*.  
24 That there is an arbitration proceeding or a dispute  
25 resolution process. And when I speak about access to  
26 the courts, at last in relation to land codes, that's

1 **Proceeding Time 10:02 a.m. T14**

2 And I agree that access to the courts can  
3 be expensive, it can be time consuming, but it's our  
4 way of ultimately deciding disputes. And what is  
5 interesting is that in Exhibit A-34 we asked, meaning  
6 the Collective First Nations, an information request  
7 of Daria, and my apologies if I get the pronunciation  
8 of the name incorrectly, Barbaie, the question of,  
9 "Are the decisions, orders and the like of  
10 the regulators listed in Appendices B  
11 subject to judicial review? If yes which  
12 ones?"

13 So if you look at the *Utilities Commission*  
14 *Act* there is redress to the Court of Appeal of British  
15 Columbia under certain circumstances. So we wanted to  
16 understand in a broader level how many other, say for  
17 example, utilities like commissions have similar  
18 provisions? And the response was,

19 "In general, decisions and orders of  
20 regulators for both Indigenous and non-  
21 Indigenous utilities may be subject to a  
22 judicial review in accordance with the  
23 provincial or territorial legislation. A  
24 review of the legislation with respect to  
25 the ability to seek judicial review is not  
26 within the scope of the Consultants work  
which is set out in section 2 - Scope of the

1 Report, "Jurisdictional Review of the  
2 Regulation of Indigenous Utilities in  
3 Canada."

4 But based on my own personal experience, I  
5 know that most utilities commissions or like bodies  
6 have provisions that allow redress to the courts. And  
7 so for the purposes of at least the *First Nations Land*  
8 *Management Act* there will be a dispute resolution  
9 process. And if that doesn't work then there's access  
10 to the courts. So that's really no different than  
11 most utilities commission or like bodies across the  
12 country.

13 COMMISSIONER BREWER: Can I just ask you a question,  
14 Mr. Austin, about would you -- would you expand a  
15 little bit on the dispute resolution process in the  
16 FNLMA and just what -- like I suppose I'm interested  
17 in, you know, whether that is -- the degree to which  
18 it's been challenged and that sort of thing. Has it  
19 been used -- is it used and had it been challenged?  
20 Just to give the panel some information.

21 MR. AUSTIN: To my knowledge it hasn't been challenged.  
22 I'm not -- I haven't seen an example where it's been  
23 used. So I can't, I can't provide any guidance in  
24 that respect, but what I think I should do is hand out  
25 the *First Nations Land Management Act* so that I can at  
26 least point you to the relevant section of the *Land*

1           *Management Act* with respect to dispute resolution.

2                               While we're doing this I should also hand  
3           up an extract from the Framework Agreement on the  
4           First Nations Land Management.

5   COMMISSIONER FUNG:       So, Mr. Austin, do you want these  
6           marked as exhibits?

7   MR. AUSTIN:           That was going to be the next question,  
8           Mr. Bemister. He knows his alphabet numbers, I don't.  
9           I think maybe we should have two numbers because if we  
10          put one number on them we'll --

11   THE HEARING OFFICER:       C13-10, and C13-11.

12                               (COPY OF *FIRST NATIONS LAND MANAGEMENT ACT* MARKED  
13           EXHIBIT C13-10)

14                               (COPY OF FRAMEWORK AGREEMENT ON THE FIRST NATIONS LAND  
15           MANAGEMENT MARKED EXHIBIT C13-11)

16   MR. BUSSOLI:           So Mr. Chair that would be -- the Act  
17           would be C13-10 and the Framework would be C13-11.

18   THE CHAIRPERSON:       Thank you, Mr. Bussoli.

19   MR. AUSTIN:           What I'm going to do is I'm going to  
20           advance the introduction of the material on the *First*  
21           *Nations Land Management Act*, so that it might be  
22           easier to understand some of the points I'm making.  
23           And to do that I want to go through a little bit of  
24           history because I was involved in a development on  
25           First Nations reserve land in the 1990s before the  
26           introduction of the *Framework Agreement on First*



1           have a unique connection to, and  
2           constitutionally protected, interest in  
3           their land, including decision making,  
4           governance, jurisdiction, legal tradition  
5           and fiscal relations associated with those  
6           lands. Canada has committed to implementing  
7           the United Nations Declaration on the Rights  
8           of Indigenous Peoples in a manner consistent  
9           with the Canadian *Constitution*."

10                   Well, that promise was made long ago and I  
11           think as Commissioner Fung was indicating earlier, by  
12           nodding, recognized that the most recent attempt by  
13           the federal government died on the order paper.

14 THE CHAIRPERSON:       What is the year of this, Mr. Austin?

15 MR. AUSTIN:            Pardon me?

16 THE CHAIRPERSON:       What is the year?

17 MR. AUSTIN:            1996.

18 THE CHAIRPERSON:       This is 1996? Thanks.

19 MR. AUSTIN:            And the final paragraph in the preamble  
20           says:

21                   "The First Nations should have the option of  
22           withdrawing their lands from the land  
23           management provisions of the *Indian Act* in  
24           order to exercise control over their lands  
25           and resources for the use and benefits of  
26           their members."

So this was done back in 1996.



1                    "...except to the extent..."

2                    People tend to look at "except to the  
3 extent" but skip right by, "subject to any other act  
4 of Parliament". So, the federal government passed the  
5 *First Nations Land Management Act* and it specifically  
6 deals with the operation and management of those lands  
7 by First Nations.

8                    Now, if you turn to your *First Nations Land*  
9 *Management Act* and go to section 6(1)(i), this is  
10 where it says that if First Nations wish to establish  
11 a land management regime in accordance with the  
12 framework agreement in this Act, they have to adopt a  
13 land code applicable to all land in the reserve that  
14 shall include the following matters. So the land code  
15 has to include a provision that deals with,

16                    ..."the establishment or identification of a forum  
17 for the resolution of disputes in relation to  
18 interests or rights in First Nation land..."

19                    So if a First Nations sets up a utility and  
20 passes laws under its land code, it's a requirement of  
21 the *First Nations Land Management Act* that there be  
22 "identification or a forum for the resolution of  
23 disputes in relation to interest or rights in First  
24 Nation land." So that's a requirement.

25 THE CHAIRPERSON:        Mr. Austin, I have a question,  
26 please. So, is section 88 of the *Indian Act*

1           superseded by the *Land Management Act*?

2 MR. AUSTIN:           In the Collective First Nations' view the  
3 answer is, yes. What it does, is it -- the federal  
4 government, in terms of constitutional law, occupies  
5 the field. And then you get into the concept of  
6 paramountcy as was described in part in the  
7 Newfoundland Court of Appeal reference decision that's  
8 in our submission.

9 THE CHAIRPERSON:       Because in the *Beecher Bay* decision  
10 it was found that the *Land Management Act* did allow  
11 for certain sections of the *Indian Act* to be opted out  
12 of, but not section 88. That was the finding in --

13 MR. AUSTIN:           But that was not correct because what  
14 section 88 says is -- it's the first part of section  
15 88 that people miss. Which is, "Subject to the terms  
16 of any treaty in any other Act of Parliament...", so  
17 *First Nations Land Management Act* occupies, from the  
18 federal perspective, the field in relation to reserve  
19 lands. And as we go further along in the *First*  
20 *Nations Land Management Act*, it's the Collective First  
21 Nations' position that it specifically provides -- not  
22 specifically, but generally provides for provision of  
23 local services, which the Collective First Nations'  
24 view is that includes utility services. And utility  
25 services consist not only of electricity, but also  
26 water and sewer or refuse pickup or other things that

1 are local services.

2 THE CHAIRPERSON: Because they're related to land?

3 MR. AUSTIN: Because they're related to land. Because  
4 you cannot develop land without, in this day and age,  
5 electricity. We may to get the point in the future  
6 where you don't need an electric grid, but we're not  
7 there yet.

8 **Proceeding Time 10:17 a.m. T17**

9 COMMISSIONER LOCKHART: But doesn't this only apply in  
10 the case where a First Nations establishes a land  
11 management regime in accordance with the Framework  
12 Agreement? Do some First Nations establish land  
13 management regimes outside of the Framework Agreement?

14 MR. AUSTIN: Not that I'm aware of, because they would  
15 have to be going back to this concept in the early  
16 1980s of surrender of land, which is extremely  
17 difficult, time consuming and not something that  
18 anybody should pursue given the ability to set up a  
19 land code under the *Land Management Act*.

20 COMMISSIONER LOCKHART: Okay, thank you.

21 THE CHAIRPERSON: Sorry, just another question. So as  
22 I understand it the *Land Management Act* is putting  
23 into force the Framework Agreement, is that a  
24 reasonable characterization?

25 MR. AUSTIN: It is, it's in a sense, it's a successor  
26 to the Framework Agreement.

1 THE CHAIRPERSON: And section 4(1) of the *Land*  
2 *Management Act* says,

3 "The Framework Agreement is hereby ratified  
4 and brought into effect..."

5 So the Framework Agreement was with a  
6 specific group of entities, of First Nations. And the  
7 Framework Agreement says that the parties wish to  
8 enter into an government to government agreement. So,  
9 does that mean the *Land Management Act* only applies to  
10 these parties or it applies to everyone?

11 MR. AUSTIN: No. The effect -- I'm not fully  
12 conversant in this area and I haven't researched it.  
13 But I think what happened was that since the Framework  
14 Agreement existed with those First Nations, in a sense  
15 it had to be grandfathered. And then the *First*  
16 *Nations Land Management Act* comes in on top of that,  
17 because there are over -- there are now about a  
18 hundred First Nations that have passed land codes  
19 across the country.

20 THE CHAIRPERSON: So obviously it's not just applying  
21 to those six or whatever it is.

22 MR. AUSTIN: Exactly. I wish I could provide you with  
23 more information, but I don't have the answer to that.

24 COMMISSIONER FUNG: But Mr. Austin, the definition of  
25 First Nation in section 2(1) means a band named in  
26 Schedule 1. So it would seem to me that if you're not

1           named in Schedule 1 specifically, then this agreement  
2           doesn't apply to you.

3 MR. AUSTIN:       Schedule 1 is amended all the time,  
4           because what you have to do is you literally apply to  
5           the federal government --

6 THE CHAIRPERSON:    To opt out of it, yeah.

7 MR. AUSTIN:       -- not to opt out, to say we want to have  
8           -- we would like to have a land code. You go through  
9           the procedures, you get approval and then it's my  
10          understanding that you end up in Schedule 1.

11 COMMISSION FUNG:    So what happens to those First  
12          Nations that choice not to establish their land code?  
13          What's the status then with respect to dispute  
14          resolution and jurisdiction, et cetera?

15 MS. SAYERS:       Well, they would remain under the Indian  
16          Act, and so the Land management, so they would be only  
17          putting in place processes according to their own  
18          policies and regulations. And I think it's important  
19          to note that in section 88(8) it talks about laws that  
20          are applicable to the Indians in the province, it  
21          doesn't say their lands and resources. And so that's  
22          always been exempt.

23                        So it would be just incumbent -- I think  
24                        it's just good business sense to put in place a  
25                        dispute resolution for those First Nations that are  
26                        still under the *Indian Act*.

1 THE CHAIRPERSON: So would it be -- or is it your  
2 submission then that regardless of whether a band has  
3 a *Land Management Act* or not, the treatment or the  
4 non-treatment -- the non-regulation would be the same?  
5 In other words, it shouldn't be regulated by the BCUC  
6 regardless of whether there's a land management --  
7 sorry, regardless of whether the *Land Management Act*  
8 applies or not?

9 MS. SAYERS: That's correct.

10 THE CHAIRPERSON: Thanks.

11 COMMISSION LOCKHART: Or, sorry, by extension, in order  
12 to have a First Nations utility that First Nations  
13 must have a land management code? Or must have  
14 subscribed or adhered to?

15 MR. SLAYERS: Those that are under the *First Nations*  
16 *Land Management Act* must do that. So, yeah, a land  
17 code -- you know, First Nations who don't have land  
18 codes often have comprehensive community plans on  
19 reserve land use plans for the territory. And so, and  
20 then of course we have the treaty nations and in case  
21 of the Nuu-chah-nulth Tribal Council we have five  
22 First nations that have them on a Treaty. And so they  
23 have requirements for dispute resolutions in all of  
24 the things that they do. I don't know the exact  
25 sections. But they would be able to put their own  
26 utility in pursuant to their treaty.

1 COMMISSION LOCKHART: I see, okay. Thank you.

2 MR. AUSTIN: I would like to add to that from a  
3 practical perspective --

4 THE CHAIRPERSON: Mr. Austin.

5 COMMISSIONER BREWER: Just for clarification then, so I  
6 guess what you're saying is, and correct me if I'm  
7 wrong, section 88 would apply, but if the First  
8 Nations, two *Indian Act* Bands that are still operating  
9 under the *Indian Act* without a First Nations land code  
10 or without a treaty or self-government agreement, but  
11 if they did not have -- if they had not taken any  
12 steps to enact regulatory functions with respect to  
13 their lands or utilities on their lands, then BCUC  
14 would still apply in the doctrine of paramountcy. Is  
15 that correct?

16 MS. SAYERS: Well, you know, I think our position is,  
17 is that under the *Indian Act* -- and so this comes down  
18 to that whole questions of jurisdiction, who actually  
19 had jurisdiction over the lands and the resources.  
20 And I would say First Nations. We become -- and so I  
21 think it's up to the First Nations to be putting in  
22 place those kind of regulatory bodies themselves.

23 **Proceeding Time 10:24 a.m. T18**

24 And which is also consistent with UNDRIP, because  
25 we're entitled to do that under that as well.

26 So, you know, I just think it's good

1 business sense that we know that First Nations are  
2 going to do that anyway. I don't think we can make  
3 the assumption that they're not going to.

4 COMMISSIONER BREWER: I guess that wasn't really what I  
5 was asking, it was more the idea that if they -- I  
6 don't know how many First Nations do have these kinds  
7 of bodies in place. But if they don't, then I assume  
8 that section 88 says that the laws of general  
9 application would apply, which would be BCUC in this  
10 case.

11 MS. SAYERS: As long as it's not regulated land and  
12 resources or other federal acts.

13 MR. AUSTIN: The point that we're trying to make is at  
14 least in relation to where you have a land code, the  
15 field is occupied and the doctrine of paramountcy  
16 applies. If that isn't the case, then it's still an  
17 open question if you look at the law and, say in  
18 relation to Sechelt, whether the laws of -- what laws  
19 of general application apply. From a practical  
20 perspective First Nations would be well advised to  
21 pass land codes if for no other reason so that they  
22 can secure financing for Indigenous utilities on  
23 reserve land.

24 THE CHAIRPERSON: Mr. Austin, I'm wondering if you  
25 could help me further understand what is related to  
26 land and what isn't related to land. I don't know

1           what the name of the Act is. The Highway Traffic Act,  
2           for example, which tells me I can't go more than 60  
3           kilometres an hour down this street. Is that related  
4           to land? I'm driving across a piece of land, so is  
5           that – *Motor Vehicle Act*, I think it's called – is  
6           that related to land?

7 MR. AUSTIN:       I don't think it would be related. My  
8           view is from a common sense perspective, no, that  
9           wouldn't be related to land. And so that would be a  
10          law of general application the province would apply.

11 THE CHAIRPERSON:    Okay. And so who's the arbiter then  
12          of whether something relates to lands or not?

13 MR. AUSTIN:        The courts.

14 THE CHAIRPERSON:    The courts, okay. And have there  
15          been any court decisions on whether *Utilities*  
16          *Commission Act* or something similar to that relates to  
17          land?

18 MR. AUSTIN:        Not that we could find.

19 THE CHAIRPERSON:    Okay, thank you.

20 MR. AUSTIN:        We did find the reference case of the  
21          Newfoundland Court of Appeal and that's as close as  
22          we've been able to come. And --

23 MS. SAYERS:        And the *Traffic Act* would apply on  
24          provincial roads going through a reserve. But if it's  
25          their own First Nations' road it wouldn't apply. And  
26          there's an ability under the *Indian Act* to pass

1 regulations about traffic on reserve. So, it just  
2 depends on -- like, it's a bit more complicated.

3 THE CHAIRPERSON: And that's not part of the *Land*  
4 *Management Act*, that's just part of the *Indian Act*?

5 MS. SAYERS: No, that's just part of the *Indian Act*.

6 THE CHAIRPERSON: All right, okay. Thank you.

7 MS. SAYERS: But the *Land Management Act* would allow  
8 them to have their own traffic laws on their own  
9 roads.

10 THE CHAIRPERSON: Right, okay. Thank you.

11 MR. AUSTIN: And I want to go back to the point I made  
12 previously, is the development of lands or the  
13 operation and management of lands requires electricity  
14 at this point in time. It also requires sewer and  
15 water services as well. So, that's the Collective  
16 First Nations' view in relation to the connection  
17 between electricity and land.

18 THE CHAIRPERSON: Okay. Mr. Austin, I don't want to  
19 interrupt your cadence here, but let me know when it's  
20 a good time for a break, please.

21 MR. AUSTIN: Right now would be a good time for a  
22 break.

23 THE CHAIRPERSON: Okay.

24 MR. AUSTIN: Because I'm sure people are feeling the  
25 need for one.

26 THE CHAIRPERSON: Okay. So we'll come back at 20 to?

1           Thanks.

2           **(PROCEEDINGS ADJOURNED AT 10:28 A.M.)**

3           **(PROCEEDINGS RESUMED AT 10:40 A.M.)**

**T19/20**

4           THE CHAIRPERSON:       Please be seated. Thank you.

5                               Please go ahead, continue, Mr. Austin.

6           Thank you.

7           MR. AUSTIN:        I'd like to draw the panel's attention to  
8           section 18 of the *First Nations Land Management Act*.

9           And 18(1) says:

10                           "A First Nation has, after the coming into  
11                           force of its land code and subject to the  
12                           Framework Agreement and this Act, the power  
13                           to manage First Nation land..."

14           So it's got the power to manage the land.

15                           And then if we move over to section 20(1),  
16           it says:

17                           "The council of a First Nation has, in  
18                           accordance with its land code, the power to  
19                           enact laws respecting..."

20           paragraph (b),

21                           "...the development, conservation, protection,  
22                           management, use and possession of First  
23                           Nation land..."

24                           So in relation to development, it's the  
25           Collective First Nations' position that that  
26           development includes the provisions of services, such  
          as sewer, water, electricity, and I haven't mentioned

1 it, but also central heating and cooling.

2 If we move to section 20(1)(e), it says:

3 "...any matter arising out of or ancillary to  
4 the exercise of the power to enact laws  
5 under paragraphs (a) to (d)."

6 So not only is it specific in relation to the  
7 development, use and possession of First Nation land,  
8 this also has the power to pass laws that are  
9 incidental to those more general powers.

10 And then, when we get to section 20(2), is  
11 says:

12 "Without restricting the generality of  
13 subsection (1), First Nation laws may  
14 include laws respecting..."

15 and then subparagraph (d),

16 "...the provision of local services in relation  
17 to First Nation land..."

18 and the Collective First Nations' view is that local  
19 services includes electricity and central heating and  
20 cooling,

21 "...and the imposition of equitable user charges  
22 for those services..."

23 So not only does it say that they provide them, that  
24 there has to be equitable user charges.

25 THE CHAIRPERSON: Mr. Austin, just I wonder if you  
26 could just clarify for me, please, would you draw a  
distinction between, for example, you know, building

1           some sort of a generation plant, like a windfarm or a  
2           run-of-river plant, and selling that electricity to  
3           residents or people that are living on the land that's  
4           covered by this Act? Would you draw a distinction  
5           between that and purchasing electricity from, say,  
6           BC Hydro and reselling it on the land?

7                           And the basis of my questions is, in the  
8           former example the generation of the energy, at least  
9           to me, seems to have a stronger connection with the  
10          land than does the purchase of electricity from BC  
11          Hydro.

12   MR. AUSTIN:           The answer to that is no.

13   THE CHAIRPERSON:       Okay.

14   MR. AUSTIN:           And I think that Judith Sayers answered  
15          that in part because we've got the concept of, say,  
16          for example, generation facilitates that could be on  
17          reserve. Say, for example, solar panels. So where  
18          the electricity comes from is not really going to make  
19          any difference as to whether it's connected to the  
20          land or not. The Collective First Nations' view is,  
21          without electricity on the land I really can't  
22          develop, I really can't manage it, it's just going to  
23          be a raw piece of land. So it's this idea of under  
24          the Land Code being able to develop, conserve,  
25          protect, manage, use -- use and possess First Nations  
26          lands that brings in the concept of the provision of

1 the ancillary service.

2 **Proceeding Time 10:44 a.m. T21**

3 THE CHAIRPERSON: It's not the generation of the  
4 electricity itself then?

5 MR. AUSTIN: No.

6 THE CHAIRPERSON: Thank you.

7 MR. AUSTIN: A question that might be asked if your  
8 generation wasn't on reserve, how would that -- would  
9 the laws of general application of the province apply  
10 to that? And the answer is, yes, they would.

11 THE CHAIRPERSON: So can you help me understand what  
12 you said there. So if a First Nations utility was  
13 generating it off reserve and selling it on reserve,  
14 are you drawing a distinction between that then?

15 MR. AUSTIN: Insofar as that generation was within or  
16 without the traditional territory of the First Nation.  
17 What we've been doing is carefully going through the  
18 *First Nations Land Management Act* in relation to the  
19 reserve. But we haven't in any way said that First  
20 Nations utilities shouldn't be regulated off reserve  
21 -- the First Nations utilities should be regulated by  
22 the Utilities Commission off reserve. Clearly our  
23 view is that the *First Nations Land Management Act*  
24 makes it very clear what happens on reserve.

25 THE CHAIRPERSON: Thank you.

26 MR. AUSTIN: But we will argue that in terms of

1 traditional territory or treaty lands, in particular  
2 treaty lands, that the *Utilities Commission Act*  
3 doesn't apply.

4 And just as an aside, if we go to section  
5 25(1), it's interesting to note that the provincial  
6 title system doesn't apply to First Nations reserve  
7 lands. There's a whole separate system for that. So  
8 that's an example where the laws of general  
9 application in the province don't apply. The land  
10 title system simply does not apply to a First Nations  
11 reserve.

12 COMMISSIONER BREWER: Can I ask you, does that not  
13 relate more to -- I suppose in that situation you're  
14 -- it's the regulation of the land, is it not?

15 MR. AUSTIN: Well, it's not so much the regulation of  
16 the land because we have to go back to section 21(5).  
17 So the first -- Council of First Nations has, in  
18 accordance with it's land code, the power to enact  
19 laws respecting the development, conservation,  
20 protection, management, use and possession of First  
21 Nations land. So it's a broad spectrum of powers.

22 So this concept of land, yes, it is  
23 important, but it's the development, conservation,  
24 protection, management, use and possession of the land  
25 that requires ancillary services, or as the Act calls  
26 it local services.

1 COMMISSIONER BREWER: Okay, but if there were -- I'm  
2 just trying to think. So let's say you had a diesel  
3 plant on your reserve, that was your source of power.  
4 And you're hauling diesel into the reserve. Would  
5 that then be something that would fall within the  
6 sphere of regulation that you're discussing?

7 MS. SAYERS: Well, if we're bring diesel in from a  
8 diesel plant, anywhere from there into the reserve  
9 lands, it's going to be regulated by laws outside.

10 COMMISSIONER BREWER: The general application?

11 MS. SAYERS: Yes.

12 COMMISSIONER BREWER: Okay, so it doesn't fall within  
13 FNLMA?

14 MS. SAYERS: Not at this present time. I think that  
15 would be something that we would have to, you know,  
16 negotiate in a treaty or, you know, that we would have  
17 that jurisdiction. But no, we don't have that  
18 jurisdiction from the source of where the diesel is  
19 picked up to -- and that's part of the worry with some  
20 of our First Nations that are diesel dependant because  
21 they're taking it through four or five communities,  
22 over the ocean, and rivers and that sort of stuff.  
23 That's why we need to get into other forms of  
24 electricity.

25 THE CHAIRPERSON: Mr. Austin, I'm going to switch gears  
26 just briefly here and ask you kind of an overarching

1 question. I appreciate you stepping us through this  
2 Act and it is very helpful to the panel. But in doing  
3 so I think what you're doing is you're trying to show  
4 us the way the world is right now, as opposed to  
5 making an argument about the way it should be or could  
6 be if laws were changed. Is that a fair statement?

7 MR. AUSTIN: I agree, but we wanted to -- in showing  
8 you what it is, we just wanted to emphasis that this  
9 has been thought about.

10 THE CHAIRPERSON: I understand. But nonetheless, there  
11 are some ambiguities, at least in my mind there are  
12 some ambiguities, like the discussion about whether  
13 the *Utilities Commission Act* relates to land or not.  
14 And I think as you indicated, it's something that a  
15 court could or would weigh in on but hasn't really  
16 done that yet.

17 So, my question then is, are you -- is it  
18 your expectation that as part of the inquiry the panel  
19 would weigh in on matters like this? And make a  
20 finding that would wrap all of this up and say, you  
21 know, "Yes, the *Land Management Act* applies here and  
22 this is the way it is or --

23 **Proceeding Time: 10:51 a.m. T22**

24 MR. AUSTIN: The answer to that is no.

25 THE CHAIRPERSON: Okay.

26 MR. AUSTIN: But the reason I'm walking through this in

1 detail is to give you support for the idea that First  
2 Nations utilities ought not to be regulated by the  
3 B.C. Utilities Commission.

4 THE CHAIRPERSON: Thank you.

5 MR. AUSTIN: And it's the certainty that's required.  
6 The Collective First Nations don't want to have to go  
7 to the Supreme Court of Canada to sort this out. They  
8 want to get some certainty, and that also relates to  
9 the concept of the treatment of municipalities under  
10 the *Utilities Commission Act* and what's the difference  
11 in relation to First Nations. But that's been  
12 somewhat clouded by the fact that you're having an  
13 inquiry into municipal utilities. So --

14 THE CHAIRPERSON: Just for the record, it's into  
15 municipal corporations. It's not an inquiry into the  
16 municipal exemption per se, but -- yeah.

17 MR. AUSTIN: That's very helpful and that's very  
18 comforting, because it just seemed like it was a bit  
19 of a moving target. But the reason for stepping  
20 through this is not for the Utilities Commission to  
21 decide, here's what the *Land Management Act* covers or  
22 doesn't cover, but it's to buttress support for an  
23 exemption for regulation of First Nations utilities.

24 THE CHAIRPERSON: On *Indian Act* land?

25 MR. AUSTIN: On reserve land and traditional territory  
26 land.

1 THE CHAIRPERSON: But your argument here is that the  
2 exemption already exists.

3 MR. AUSTIN: Oh, we are using this because it's the  
4 clearest example we have.

5 THE CHAIRPERSON: But your argument here is that  
6 essentially that exemption already exists, or at least  
7 the Act isn't applicable. So if it's not applicable,  
8 why would it need an exemption?

9 MR. AUSTIN: From a practical perspective. Because  
10 again, say for example in the case of *Beecher Bay*, you  
11 couldn't interconnect a Beecher Bay distribution  
12 system to the BC Hydro distribution unless you  
13 convince BC Hydro that they were an exempt utility.  
14 Otherwise where was your material from the B.C.  
15 Utilities Commission saying you are regulated.

16 So it boils down to a practical approach to  
17 all this, which is there is certain things you can or  
18 can't do without clear -- without clear -- not so much  
19 -- clear authority to say that you're not regulated.

20 THE CHAIRPERSON: Could I restate that and say that I  
21 think what you're asking is that until some of these  
22 issues under the *Land Management Act* are clarified,  
23 you would recommend that the panel recommends an  
24 exemption under the *Utilities Commission Act*. Is that  
25 a --

26 MR. AUSTIN: Or an amendment to the *Utilities*

1           *Commission Act* saying that Indigenous utilities are  
2           not regulated by the Utilities Commission.

3   COMMISSIONER FUNG:     But you realize, Mr. Austin, by  
4           saying that, you are accepting as a premise that the  
5           legislation actually applies to First Nations and  
6           First Nations lands, because otherwise, why do you  
7           need an exemption?

8   MR. AUSTIN:            Because the alternative is to go to the  
9           Supreme Court of Canada.

10   COMMISSIONER FUNG:    Right.

11   MR. AUSTIN:            And that's not what First Nations want to  
12           do. They just want to get on with building the  
13           business as opposed to using valuable capital to go  
14           through the court process. And we're not accepting  
15           that the legislation applies, we're saying that we  
16           want it made clear that although we think the  
17           legislation doesn't apply, or are convinced that the  
18           legislation applies, it doesn't apply.

19   THE CHAIRPERSON:     But for the panel to make a  
20           recommendation of an exemption, we would have to find  
21           the legislation applies.

22   COMMISSIONER FUNG:    That's right.

23   MR. AUSTIN:            I'm not convinced of that. Because that  
24           was something that was brought up in Beecher Bay,  
25           which is there's no need to do that because it's the  
26           government who is going to make the decision in terms

1 of the exemption, not the Utilities Commission. So  
2 that decision is not resting with you, it's resting  
3 with the government. That's the difference. That's  
4 the distinction I have in my mind, especially after  
5 looking at the *Beecher Bay* decision.

6 This inquiry is in relation to  
7 recommendations, not issuing an order under the  
8 *Utilities Commission Act*.

9 THE CHAIRPERSON: We don't usually make recommendations  
10 that are beyond our jurisdiction though, and it would  
11 be beyond our jurisdiction if the Act doesn't apply.

12 MR. AUSTIN: Well, if I'm not mistaken, the Utilities  
13 Commission doesn't have any jurisdiction with respect  
14 to Constitutional matters.

15 COMMISSIONER FUNG: Correct.

16 MR. AUSTIN: Which clearly this is, but you still can  
17 make a recommendation to government to clarify matters  
18 in this area. "Here's what we suggest you do," and  
19 the Constitutional matter is left up to the province.

20 I would agree if you were making an order,  
21 but there's a big difference between an order and a  
22 recommendation.

23 **Proceeding Time 10:56 a.m. T23**

24 THE CHAIRPERSON: Fair enough, okay.

25 MR. AUSTIN: And the final part of the walkthrough the  
26 *First Nations Land Management Act*, is section 36(1),

1 (2) and (3). Because when you look at 36(2) it says:  
2 "No order shall be made, process entered or  
3 proceedings taken in any court, whether by  
4 way of injunction..."  
5 and then it goes through the various reliefs, with  
6 respect to a decision made by,  
7 "...an officer or arbitrator or any action under the  
8 Framework Agreement by a neutral evaluator."  
9 And then you say, I guess there's no recourse to the  
10 courts. Until you get to section 36(3) where it says:  
11 "Despite subsections (1) and (2), the  
12 Attorney General...or anyone directly affected  
13 by the matter in respect of which relief is  
14 sought may make an application under the  
15 *Federal Courts Act* on any of the grounds  
16 referred to in... 18.1(4)(a) or (b) of that  
17 Act..."

18 And what that does is it allows  
19 applications to the Federal Court with respect to  
20 virtually all the reliefs -- or that's probably not  
21 the proper way of saying it, but just in relation to  
22 all the matters set out in (2).

23 So essentially what the Act does is it  
24 says, if you're going to -- if there's going to be any  
25 appeal, it's to the Federal Court of Appeal. So there  
26 is a full suite of remedies available if someone is  
not in agreement with a decision of an arbitrator,

1           verifier or a ratification officer. So that's very  
2           important that section 18.4(a) and (b) [*sic*] of the  
3           *Federal Courts Act* are reviewed so that you understand  
4           that there is right of appeal.

5                       And in relation to the Collective First  
6           Nations, that was one of the heads of what we're  
7           calling the common law. And the other head is  
8           *Chastain vs. BC Hydro*, which is relation to regulation  
9           monopolies, where there is no laws under something  
10          like the *Land Management Act* in relation to regulation  
11          of monopolies.

12                      I'd like to move back to the questions,  
13          unless there's any questions on that question?

14   THE CHAIRPERSON:       No, we're good.

15   MR. AUSTIN:            And the next question is 3:

16                      "If the regulation of Indigenous utilities  
17                      were undertaken by an entity other than the  
18                      BCUC, should the BCUC retain its  
19                      jurisdiction over system safety and  
20                      reliability issues?"

21                      And we're in agreement that the Utilities  
22           Commission should retain its jurisdiction over  
23           reliability issues. It's a North American wide  
24           problem or matter to regulate. And the Collective  
25           First Nations can't see how British Columbia could  
26           still be interconnected to the North American grid

1 without somebody maintaining responsibility for  
2 reliability.

3 The next matter in relation to safety, the  
4 Collective First Nations don't have a problem with the  
5 Utilities Commission retaining its jurisdiction over  
6 safety, if somebody could please explain what that  
7 jurisdiction relates to.

8 **Proceeding Time 11:01 a.m. T24**

9 Because when you look at sections 25 and 38 of the  
10 *Utilities Commission Act*, and this matter was  
11 canvassed in part in the B.C. Utilities Commission's  
12 inquiry into EV charging, all they say is that in  
13 relation to section 25, unsafe, and in relation to  
14 section 38, safe. And those are very subjective  
15 standards.

16 From a practical perspective any First  
17 Nation utility is interconnected to BC Hydro is going  
18 to have to comply with BC Hydro's interconnection  
19 requirements. And they are very, very detailed and  
20 very, very safety oriented. And as an example I'd  
21 like to draw the panel's attention to the requirements  
22 for customer owned primary service supplied at 4 kV to  
23 35 kV primary guide issued March 7<sup>th</sup>, 2018, effective  
24 date July the 1<sup>st</sup> 2018. And in our final argument I  
25 will put in the link, but if you look at that and look  
26 at what you have to do to be able to interconnect to

1 the BC Hydro system, you will see that there is a  
2 very, very high level of safety required.

3 I'm more familiar with the generation  
4 interconnection standards that BC Hydro has, which is  
5 approved by the BCUC in terms of tariff. And again,  
6 there's a very, very high level of safety and  
7 reliability required.

8 So, I'm not sure, and the Collective  
9 Nations are not sure what sections 25 and 38 of the  
10 *Utilities Commission Act* add to safety that's not  
11 already covered off in relation to interconnection  
12 requirements.

13 Question 4,

14 "If Indigenous utilities are not to be regulated  
15 under the *Utilities Commission Act*, should there  
16 also be different regulatory treatment for non-  
17 Indigenous utilities that provide services on  
18 reserve or in the absence of specific treaty  
19 positions on treaty lands, for example BC Hydro  
20 Utility services in a integrated area? Why or why  
21 not?"

22 And Judith Sayers has answered that a  
23 question, which is this should just be regulated as  
24 they currently are. There should be no  
25 differentiation.

26 MS. SAYERS: I think part of that question is in

1 relation to a company wants to come operate on reserve  
2 they should have the pre-planned informed consent of  
3 the First Nation. And if they are particular  
4 regulations or conditions that they want them to  
5 operate under, then that should be imposed upon them.  
6 And so I think that that's important to note, that  
7 there is a role for First Nations to play on other  
8 utilities operating on a reserve.

9 So right now BC Hydro has put their lines  
10 everywhere, and we have no control over that, and they  
11 go through very sensitive areas, they go through --  
12 and I think so I think there needs to be an  
13 opportunity for First Nations to be able to consent  
14 and direct and set environmental conditions for those  
15 lines.

16 MR. AUSTIN: So they wouldn't be regulated as utility,  
17 they would be -- it's just --

18 THE CHAIRPERSON: Environmental regulations.

19 MR. AUSTIN: Environmental regulation, or in a sense  
20 incidental land use regulation. Collective First  
21 Nations are not looking to regulate BC Hydro say from,  
22 for example, from a financial perspective.

23 THE CHAIRPERSON: Sorry, just to be clear though, I  
24 don't think the question is whether the First Nation  
25 in question should regulate BC Hydro generally. I  
26 think the intent of the question, at least, is that



1 time.

2 Question number 6:

3 "If there were to be a recommendation to  
4 establish an Indigenous Utilities Commission  
5 or similar body to regulate Indigenous  
6 utilities, do interveners have a view  
7 whether such a body could or should have  
8 some degree of authority over all Indigenous  
9 utilities, or should the jurisdiction of  
10 such a body be limited to some extent (e.g.,  
11 confined to specific territorial limits)?  
12 Why or why not?"

13 Underlying this question is the assumption  
14 that an Indigenous utilities commission could be  
15 structured to represent the interest of all First  
16 Nations that might want to own or operate utilities in  
17 British Columbia. No such assumption should be made.  
18 For example, the interests of rural and urban First  
19 Nations can be very different. And the idea of  
20 creating an Indigenous utilities commission before  
21 First Nations utilities even have an opportunity to  
22 establish themselves is premature.

23 Initially First Nations utilities are  
24 probably going to be local enterprises with local  
25 concerns and objectives. They should be regulated  
26 locally by First Nations so they at least have an  
opportunity to establish themselves. In other words,

1 let's not get too far ahead of ourselves in terms of  
2 the degree of regulation required. At this point in  
3 time it should be kept local and that local regulation  
4 should be by First Nations in that area. There be may  
5 some point in time in the future that a broader First  
6 Nations, for lack of a better word, "Indigenous  
7 utilities commission", might be appropriate, but it's  
8 not now.

9 Having worked with First Nations in  
10 relation to economic development, they really have to  
11 work to find capital for their projects. And a  
12 tremendous amount of effort has to go into that and a  
13 tremendous number -- amount of time and resources has  
14 to go into that, and that's one of the reasons why  
15 Collective First Nation are saying let us regulate  
16 ourselves. We've got a lot to do, and what we don't  
17 really need at this point in time, in the formative  
18 years of creation of utilities, is an additional third  
19 party to deal with, and that third party being, for  
20 example, the Utilities Commission or something like  
21 and Indigenous utilities commission.

22 Maybe Judith could elaborate on my comments  
23 about how difficult it is for First Nations to raise  
24 capital for projects.

25 MS. SAYERS: Yeah, thank you. And we didn't say at the  
26 very beginning, although I think we did put our

1 materials, we're talking First Nations because we  
2 represent First Nations. Indigenous means, of course,  
3 First Nations, Métis, and Inuit, and we have no -- we  
4 don't have any representation of that, and so, we're  
5 specifically talking about First Nations and the law  
6 that applies to us.

7 But definitely finding capital for projects  
8 has been very difficult, especially equity. And so,  
9 we did create two equity funds, and one just fell by  
10 the wayside because no one was applying to it because  
11 there was no opportunity. But finding the capital we  
12 need is difficult.

13 If you've got a project with an EPA, you  
14 have to show the bank, so your financial institutions,  
15 that you've got experience. So usually you partner  
16 with someone who has that experience, so you can  
17 convince the financial institutions to actually be  
18 agreeing with you.

19 **Proceeding Time: 11:11 a.m. T26**

20 And when you're on reserve lands, of  
21 course, there can be no seizures and taking of things  
22 because they're protected under Section 89 of the  
23 *Indian Act*. And so oftentimes that that's an issue,  
24 is just finding enough capital for your project and  
25 having the confidence of the bank. And I think as  
26 years have gone by, and I think at the beginning it

1 was also hard because the banks didn't really  
2 understand renewable energy projects. But they know  
3 there was a lot of risk, especially in construction.  
4 So it becomes a real issue.

5 So I think being able to be your own  
6 utility and putting your own transmission grid in is  
7 challenging, but I think it's possible, and we have a  
8 lot more investors that really want to get involved in  
9 energy in British Columbia. But at this point now  
10 we've said to them, well, we have no opportunities to  
11 be doing that, other than community-led projects  
12 within community.

13 COMMISSIONER LOCKHART: Does the presence of a third  
14 party regulator as it were, either Utilities  
15 Commission or a First Nations Utilities Commission,  
16 provide some comfort though, to a perspective lender?

17 MS. SAYERS: I would think so, but I think what we are  
18 saying really is that putting an Indigenous utility  
19 oversight body, we're not ready for that yet. We need  
20 to be able to do it and start getting involved in it,  
21 and, you know, and I think we get enough utilities  
22 then I think a regulatory body would probably be in  
23 order. But I think, you know, we're trying to take  
24 this step by step.

25 But I agree with you, I think that it does  
26 give some comfort if there is that regulation, but I

1           also think it gives people comfort if the First  
2           Nations themselves have the regulations in place and  
3           the dispute resolution body, and just showing their  
4           ability to enter into business.

5                        I know after we did our first project, we  
6           had people offering us money because they knew we had  
7           been able to do it, and we had started a second  
8           project, but we ran into fish issues and then I didn't  
9           get back in as Chief, so we didn't finish the ten  
10          projects that we had wanted to do.

11   COMMISSIONER LOCKHART:        Thank you.

12   MR. AUSTIN:           Those are our responses to the questions.  
13           If there's any questions arising out of those  
14           responses, then perhaps you could ask them now before  
15           I just move on to a number of other areas which I will  
16           cover in very short order, because we've covered the  
17           main one already, which was the law, for lack of a  
18           better word.

19   THE CHAIRPERSON:        Just in terms of time planning here,  
20           if the panel were to ask no questions, how much more  
21           time would you need, do you think?

22   MR. AUSTIN:           Five or ten minutes.

23   THE CHAIRPERSON:        Okay, good. Thank you.

24   MR. AUSTIN:           One of the issues that came up through the  
25           information requests was the concept of stranded  
26           assets, and the Collective First Nations were very

1           puzzled about the concept about anybody would think  
2           that the creation of Indigenous utilities or First  
3           Nations utilities regulated by First Nations would  
4           result in a stranded asset problem. In terms of the  
5           major utilities in this province, the potential for  
6           stranded assets because of, say for example, the  
7           decision to proceed with Site C or the need to reduce  
8           greenhouse gas emissions in relation to the  
9           distribution of natural gas, would have the potential  
10          to create far more in the way of stranded assets than  
11          anything that could be even thought of in relation to  
12          the creation of a First Nations utility regulated by  
13          First Nations. We just wanted to make that  
14          observation.

15                           Then there was the concept of  
16          municipalities and the ability to vote in municipal  
17          elections. The ability to vote in municipal elections  
18          really should not have any bearing on whether  
19          municipalities are exempt from regulation under the  
20          *Utilities Commission Act*, because as was pointed out  
21          by the collective First Nations, commercial customers  
22          of municipal utilities don't have a vote, and  
23          industrial customers of municipal utilities don't have  
24          a vote. So in terms of ability to vote, whether it's  
25          a band council election or a municipal election or  
26          provincial election, should have no bearing on whether

1 First Nations should be -- First Nation utilities  
2 should be regulated by First Nations regulators.

3 **Proceeding Time 11:16 a.m. T27**

4 And then finally, with the permission of  
5 the Collective First Nations and the Taku River  
6 Tlingit, I just wanted to bring to the Commission's  
7 attention a potential problem. The Taku River Tlingit  
8 are pursuing a project to sell electricity to the  
9 Yukon Energy Corporation. A transmission line needs  
10 to be built. And the Ministry of Transportation and  
11 Infrastructure won't allow the placement of any  
12 transmission infrastructure within its right of way  
13 unless the owner of the transmission infrastructure is  
14 regulated by the B.C. Utilities Commission.

15 So if a recommendation is made to  
16 government that First Nations utilities should be able  
17 to regulated by First Nations, then the unintended  
18 consequence might be if the Taku River Tlingit project  
19 was, by operation of law, something that was  
20 undertaken by a municipal utility -- excuse me, by a  
21 First Nations utility, the Taku River Tlingit wouldn't  
22 be able to put their transmission line down the  
23 existing highway right of way.

24 THE CHAIRPERSON: Is this on First Nation's land we're  
25 talking about here?

26 MR. AUSTIN: No. It's -- the project itself is on

1 Crown lawn.

2 THE CHAIRPERSON: It's not -- and it's --

3 MR. AUSTIN: No, but the recommendation was that the  
4 First Nation's utilities, even if they're on -- within  
5 their traditional territories shouldn't be regulated.  
6 The traditional territory of the Taku River Tlingit  
7 would cover the generation zone.

8 THE CHAIRPERSON: Sorry, you said they shouldn't be  
9 regulated on their traditional territory. Is that  
10 what you just said now?

11 MR. AUSTIN: No. I'm just saying that if the  
12 recommendation is that First Nations utilities should  
13 be regulated by First Nations on reserve land and on  
14 traditional territory, the unintended consequence  
15 might be that the Taku River Tlingit couldn't put  
16 their transmission line down the highway right of way.

17 THE CHAIRPERSON: But is it your submission that First  
18 Nations in this -- let's just talk about this  
19 instance. Is it your submission in this instance that  
20 on that particular land that the First Nations utility  
21 should or shouldn't be regulated by the BCUC? What is  
22 it your submission, regardless of the Ministry of  
23 Transport --

24 MR. AUSTIN: Well, what I'm submitting is nothing in  
25 relation to the regulation of this particular project.  
26 All I'm saying is if there's changes to the *Utilities*

1           *Commission Act*, we have to look at some of the  
2           unintended consequences and this would be one of them.  
3           Because if they can't put the transmission line down  
4           the highway because the Ministry of Transport and  
5           Infrastructure won't allow any such infrastructure  
6           unless it's regulated by the BC Utilities Commission,  
7           then the additional costs and expense of running the  
8           transmission line some place else would probably mean  
9           the project wouldn't proceed. So it's just a -- it's  
10          an unintended consequence that I want to bring to the  
11          Utility Commission's attention.

12       THE CHAIRPERSON:       Thank you.

13       MR. AUSTIN:            Because normally what would happen in  
14          terms of this project; first of all it's -- the  
15          electricity would go to the Yukon. The existing  
16          exemption for independent power producers wouldn't  
17          apply because the buyer is not BC Hydro, Powerex or  
18          Fortis. So, the Taku River Tlingit would have to  
19          apply for an exemption.

20       THE CHAIRPERSON:       The buyer would be out of the  
21          province, so it wouldn't be covered under the  
22          *Utilities Commission Act*. The buyer has to be in the  
23          province before the *Utilities Commission Act* applies.

24       MR. AUSTIN:            Well, if that's the case, then the  
25          department of Ministry of Transport and Infrastructure  
26          is saying, "Sorry, you can't put your transmission

1 line down our right of way."

2 THE CHAIRPERSON: It's my understanding, and Mr.  
3 Bussoli, maybe you can correct me, it's my  
4 understanding that as long as none of the energy along  
5 that transmission corridor is sold in British  
6 Columbia, it would not be under our jurisdiction.

7 MR. AUSTIN: Well, it's also a bit of a difficult  
8 situation because it would be an expansion of an  
9 existing project. An existing project has electricity  
10 sold to BC Hydro. So then you'd be in a question of,  
11 well, what electricity is going where?

12 THE CHAIRPERSON: Yeah, fair enough.

13 MR. AUSTIN: And those are our submissions. Unless  
14 there are any questions. And we, again, want to  
15 repeat how appreciative the Collective First Nations  
16 are of the Utilities Commission's effort to engage  
17 First Nations in this review.

18 **Proceeding Time: 11:22 a.m. T28**

19 MS. SAYERS: Yes, it's refreshing. Things that were left  
20 out of a lot of consultations and so I do really  
21 appreciate the opportunity that the Collective First  
22 Nations have been, because as I said, this is such an  
23 important industry to First Nations and we feel like  
24 our voice has been left out. So we're feeling  
25 included in this one, thank you.

26 THE CHAIRPERSON: Well, I'm very happy to hear that,

1           and thank you for that. And on behalf of the panel I  
2           would also like to thank both of you for your  
3           participation in the inquiry generally and  
4           particularly for attending today, putting up with the  
5           panel's questions. We appreciate that. Thank you,  
6           it's been very helpful.

7                           And I would also like to remind you that we  
8           are planning, once we have the draft put together,  
9           planning to go out and workshop the draft at various  
10          community sessions and you're more than welcome to  
11          find one that's convenient geographically and time  
12          wise and participate in that exercise too.

13 THE CHAIRPERSON:        Thank you. Mr. Thompson.

14 MR. THOMPSON:        Commissioner Morton.

15 THE CHAIRPERSON:        How are you doing?

16 MR. THOMPSON:        I'm doing very well. Yourselves?

17 THE CHAIRPERSON:        Well, thanks. Looking at the clock  
18          and trying to plan timing and lunch breaks and so on,  
19          again assuming the panel asks more questions --

20 MR. THOMPSON:        I'll be done before lunch, no problem.

21 THE CHAIRPERSON:        Oh, okay. Very good. Thank you.

22 **ARGUMENT BY MR. THOMPSON:**

23 MR. THOMPSON:        It's like speaking at 4:00 on Friday. I  
24          guess the protocol, introduce myself. My name is Tim  
25          Thompson. I'm a director in Kitselas Geothermal Inc.  
26          I'm really here before you today at the behest of our

1 First Nations partner, the Kitselas First Nation, and  
2 that's a difficult place to be for me, because I'm not  
3 particularly well-versed in either First Nations  
4 culture. I'm a scientist, not a lawyer, and I think I  
5 just botched a master class in giving testimony. So  
6 we'll do our best.

7 I'd like to open with a couple of things.  
8 The Kitselas First Nation would like to thank the  
9 Squamish, the Tsleil-Waututh and the Musquem First  
10 Nations for allowing their representative into their  
11 traditional territories for today's oral submissions.  
12 And the second thing is, from the other side of the  
13 cultural divide, is I'm a big fan of Lewis Carroll.  
14 I don't know if you folks are. There's a particular  
15 point in Alice in Wonderland where the Queen of Hearts  
16 is speaking to Alice and she says, "There's no use  
17 trying," she said, "one can't believe impossible  
18 things." And when I come before this inquiry, it's  
19 very interesting insofar as you seem to be asking some  
20 of the impossible things. And it's something we  
21 aspire to see. And I think that ultimately you're  
22 going to have to make recommendations to government,  
23 and some of them may feel a little impossible. But we  
24 hope you leap out there.

25 And the other parallel for us is that as an  
26 energy developer in the province of British Columbia



1 bit of bravery, but we're a prospective Indigenous  
2 utility, you know, and we find this discussion both  
3 important and timely.

4 We're a First Nations led geothermal energy  
5 developer and we think we're within, you know,  
6 distance to the end. So we see generation projects  
7 nearing fruition. And so we felt at some point in  
8 time we were going to be before you. We didn't really  
9 know how or under what auspices or even really what  
10 legislative framework. Geotherm is a little bit new  
11 for everybody. But being allowed to be here in this  
12 hearing has really allowed us I think to comprehend  
13 where we stand within the regulatory framework a lot  
14 better than we did about five months ago. And  
15 genuinely, like, we need to thank you for that.

16 Then the second thing, I remember being  
17 before you in Williams Lake and you folks were open to  
18 what I would call the broader topic. I mean, when we  
19 -- when I went into the room I asked you, you know,  
20 what's the remit of this thing? And -- because we  
21 weren't sure. We thought it began as sort of an  
22 exemption dispute, right? There's this Beecher Bay  
23 group and it didn't get what they wanted, but they  
24 were pretty sure that they were right and, you know,  
25 this could have be just a small little turf war over  
26 one project and it's evolved really, I think, to a

1 more existential discussion about what limitations  
2 exist on the BCUC's ability to regulate, what's right,  
3 what's fair, and how should IUs operate within B.C.'s  
4 existing energy markets. I think we've just heard  
5 some very cogent points that are far better than what  
6 we're bringing, but, you know, it takes some bravery  
7 to take that on.

8 Then, you know, it's not just that you're  
9 allowing the conversation to take place, it's the way  
10 you've done it. I mean you've done efforts to change  
11 what I call your procedural norms, right, and in a  
12 very inclusive way and that is not lost at all on the  
13 Kitselas and I think -- I won't speak for others,  
14 they've spoken for themselves.

15 But in addition to doing it differently,  
16 you know, when you change your norms you kind of open  
17 up the discussion to a bunch of new participants. And  
18 many like us are really new to the BCUC. You know,  
19 I've never read -- I still haven't read the UC, I  
20 don't have time. I've got a day job, right? But I'd  
21 say you've shown some level of patience and grace, you  
22 know, when dealing with those like us in terms of we  
23 don't know -- we kind of know what we want to say, but  
24 we sometimes don't know how to say it to make it work  
25 for you. And I think there's sort of this input  
26 screen that we still have to figure out on how we get

1           what we're trying to transmit to you in a way that  
2           it's useful so that you can make recommendations. But  
3           we do appreciate that you're bending over backwards,  
4           to paraphrase.

5                         And the other thing is, you know, you're  
6           letting us learn. I mean KGI, we're a small joint  
7           venture. We've got 12 people. That's First Nations  
8           side, Borealis side, together. And there's not a one  
9           of us that's a regulatory expert, let alone  
10          knowledgeable about the BCUC, and we're learning as we  
11          go. And to some degree we've had to make choices  
12          where we say, well, it would be nice to know that, but  
13          I just can't do it, I don't have time. We'll just  
14          have to wing it, right? Because we do have other  
15          obligations with regards to advancing projects. And  
16          you heard from Judith that that can sometimes be a  
17          difficult thing, this enterprise, and it takes a lot  
18          of time.

19                        But I think what we've done is you've given  
20          us the opportunity to figure out how to ask better  
21          questions. I wish we could have -- you don't, but we  
22          wish we could do IR version 2.0, because having seen  
23          the responses we're kind of thinking, okay, knowing  
24          that I now know how I would ask the question to get  
25          the response. And we may actually -- if you'll permit  
26          it, we may throw some questions into our written

1 testimony and say, well, this is what we thought we  
2 should've asked and maybe, you know, you can  
3 internalize what you think the answers might have been  
4 in terms of the response.

5 So but in a very important way this  
6 conversation's been capacity building, both for us and  
7 the Kitselas, and we've tried to meet that by being as  
8 engaged as we can.

9 **Proceeding Time: 11:31 a.m. T30**

10 Some would say overly so. There's an  
11 interesting letter from BC Hydro saying you're  
12 spending too much time and money on this. We think  
13 it's so important, we can't spend enough time.  
14 Right? So we are receptive there, but I think the  
15 promise is when we come to you with -- and I think we  
16 may have to, with one or two geothermal projects,  
17 we'll be much better informed and much more capable in  
18 terms of how we present ourselves and try to make that  
19 subsequent interaction, I think, a little more  
20 efficient.

21 And in some -- you know, while it's a big  
22 thing to you, I think you've taken the right approach,  
23 because I sat down and obviously had conversations  
24 about this, and I called this courteous and  
25 considerate procedural stuff. All the things that  
26 you've done really make a difference because there's a

1 lot of sensitivity wrapped around this hearing, and  
2 it's really got to do with history, right? And it  
3 wouldn't be a problem if the history was great, but  
4 the history is not, and that creates this issue that  
5 we're getting.

6 I know. I'm going to beat lunch, no  
7 problem. But I'd just like to sort of encapsulate  
8 that in three simple statements, all right? And they  
9 may not be entirely accurate but they're meant to be,  
10 you know, if you will, read with a charitable view.  
11 The first is that the First Nations, as I understand,  
12 have been broadly excluded from participating in  
13 B.C.'s energy markets where that foundational  
14 infrastructure for those markets was unfairly acquired  
15 and most notably from those First Nations. And I  
16 think you've heard a lot of views, some cogent, some  
17 less so, but all very pointed about that history.

18 Then there's a second point, and I have to  
19 say this. It's not pejorative, I don't think. I  
20 don't want it to be. But to me, the existing  
21 regulatory framework to this point in time kind of  
22 reflects this exclusion. You know, you guys deal with  
23 certain parties in certain ways and a very limited  
24 number of parties and it all works well. But once you  
25 start including new folks, this is going to change a  
26 little. And that's sort of our third point, which is

1       that, you know, treaty settlements with First Nations,  
2       we feel will fragment the control of many regulatory  
3       bodies, not just yourselves, right? This is going to  
4       be a problem generally.

5               And you know, in our case, in this context  
6       of the fragmentation of control, we're advancing the  
7       idea of Indigenous utilities, and to me we get back to  
8       sort of one of those points that how do they interact?  
9       How does a utility for the Squamish interact with, you  
10      know, things off their traditional territory. It's  
11      those boundary conditions that we feel are really  
12      important. But we don't think it's going to get any  
13      easier right now.

14             I went on some website here and we found  
15      that there's 17 First Nations, of which the Kitselas  
16      are one, that are at stage 5 or 6 of the treaty  
17      process. So we think that it's important broadly  
18      speaking, or writ large, that you're addressing this  
19      now, because it's just going to keep coming, right?  
20      And where do these exemptions exist, where should they  
21      not exist and why. Because you're going to get a lot  
22      of different folks popping up with a lot of different  
23      views. And I did make the point, but it was well made  
24      prior, that First Nations are really interested in  
25      clean energy. They want to be part of this market.  
26      So I just see what you are doing is essential.

1                   Again, if you remember our partner, Edison  
2 Bolton who spoke before you, he really wanted it to be  
3 understood that the Kitselas First Nation wants to  
4 work collaboratively to a market solution, and their  
5 view is that they think that there is an opportunity  
6 that works both for creating viable Indigenous  
7 utilities but also meeting what they would call – it's  
8 kind of a funny expression – the traditional BCUC  
9 responsibilities to the ratepayers. So they see that  
10 there's a win/win here, that that's a possible  
11 outcome. And I'll get back this thinking impossible  
12 things.

13                   But they also believe that with  
14 reconciliation comes accommodation, and accommodation  
15 is change and there's no getting away from the change.  
16 And it was a funny thing. You know, when we sat back  
17 and we all sort of sat around the table and spread out  
18 all the IRs and we tried to figure out what we were  
19 doing, and we started reading the answer -- or answers  
20 I should say.

21                   **Proceeding Time 11:36 a.m. T31**

22                   And we felt that the conversation that we're trying to  
23 -- thread that we're trying to put together had gone  
24 very well. But there was one big challenge, and so  
25 far we felt that it was a key player missing, and it's  
26 the government. We didn't realize it, I don't think,

1 before we wrote our IRs, but I think we put,  
2 unintentionally, BC Hydro a bit on the dime by asking  
3 them some mandate questions that really are better  
4 addressed to the government. And it sort of in  
5 retrospect -- I don't know if you can do this, but if  
6 you could force someone to be an intervener to bring  
7 them into the process, right? And this is, you know  
8 -- it felt like we're throwing things into the void, a  
9 little. And we genuinely are just trying to get a  
10 sense of going on. So the absence of the government I  
11 think was felt.

12 And I could have come in any numbers of  
13 way, elected officials, it could have been MEFR [sic]  
14 or BC Hydro, you know, taking an active, more active  
15 roll rather than sitting back and saying, "well, ask  
16 us and we might answer you" right? And we found that  
17 concerning. And what really concerned us -- and we  
18 spoke with Patrick about what do we do if someone kind  
19 of doesn't answer our question?

20 COMMISSIONER LOCKHART: Sorry, Patrick, you mean Mr.  
21 Wruck?

22 MR. THOMPSON: Yes, sorry, Patrick Wruck, yeah, my  
23 apologies.

24 And while BC Hydro, if you will notionally  
25 answer all our interrogatories, we would say in most  
26 cases they broadly failed to address the questions

1 posed. They either assumed them to be a different  
2 question and answered that, or they made assumptions  
3 that were clearly not what we were contemplating, and  
4 then answered the question. And in some cases it was  
5 our fault, right, we may have asked them something  
6 that was beyond their remit and the politically  
7 declined to respond --- or politely, I should say.

8 But we would ask, you know, at some point  
9 some of these answers I think do need to come forward  
10 and we're not sure what do to, because they're the big  
11 monopoly in the room. You know, are they on our side  
12 or not on our side? Right. How do we work this  
13 through? And, you know, so the Kitselas in  
14 particular, but also KGI, is of the view that as part  
15 of this process, you know, we would want to invite the  
16 government of B.C. and BC Hydro to have a substantive  
17 conversation and maybe this is one of your  
18 recommendations, about the future of Indigenous  
19 utilities. I mean as was mentioned by, I'm sorry I've  
20 forgotten your name?

21 COMMISSIONER FUNG: Mr. Austin.

22 MR. THOMPSON: Mr. Austin, thank you. Steve Austin,  
23 right? No, I know it's David.

24 But the point is that there are some  
25 constitutional questions kind of trapped and there is  
26 a lot of land and treaty questions in what seems to be

1 a fairly simple regulatory problem, but I think it's  
2 horrifically complex.

3 So we feel that if we could all get  
4 together there would be a lot of mutual benefit,  
5 because we see negative scenarios being put forward.  
6 You know, there's risk. Well, can you unpack that?  
7 And there's not clear answers to why. But any time  
8 someone mentions risk people get worried. Stranded  
9 assets. I disbelieve that assets will be stranded.  
10 No one is going to suggest that we're going to build  
11 another line, distribution line on the other side of  
12 the road and somehow, you know, strand assets.

13 One of the advantages I think of not  
14 knowing anything is that all things are possible and  
15 as soon as we ask the question of our -- as lawyers in  
16 the province has, for instance, as part of settlement  
17 Crown assets, have they been transferred. Forget just  
18 land, we're looking for the whole enchilada, I think..  
19 That would scare BC Hydro to death. But, you know,  
20 there may be a transfer as part of this and that may  
21 make sense. And it could be financially motivated for  
22 the First Nations, acquire capital to take over  
23 certain assets within their regions.

24 But the duplication of assets I don't think  
25 was ever been advanced. And it's so much disingenuous  
26 to sort of put it there.

1                   So, we believe a lot of things are  
2 possible, and when we turn to sort of the questions  
3 posed, again sitting around the table, someone popped  
4 out with the thought that, you know, hey the BCUC  
5 respectfully is asking the wrong questions of the  
6 right people.

7   **Proceeding Time: 11:40 a.m. T32**

8                   So today in the oral hearing we don't  
9 really want to answer your six questions, we would  
10 rather advance some thoughts. But it's in the light  
11 again where you guys asked us, you know, "We're  
12 looking for solutions. Don't hide in the weeds and  
13 critique us and then give us nothing to work with."  
14 You know, ultimately you have to make a  
15 recommendation, so constructive thoughts going  
16 forward.

17                   You know, we feel that there's sort of four  
18 points. One, you need to recognize IUs. Again, it's  
19 not about that that recognition confers any particular  
20 status. The First Nations, I hear, sitting around the  
21 table, feel that they exist today, they have the  
22 rights, and were very clear about their position. For  
23 those that don't exist today, they will come into  
24 being, but it's more about -- you know, we thought of  
25 the idea that -- you know, it's not important that's  
26 it's our idea, it's just an idea, that Indigenous

1       utilities are effectively Crown corporations because  
2       they represent not only an area of land but a  
3       government and may act not wholly in an economic way.  
4       And some ways enact -- you know, try to be agents of  
5       the policy of the region they were in, which is what's  
6       going to make it difficult to cobble them altogether,  
7       because they just have different interests in some  
8       cases.

9                But in the same way that, you know, you've  
10       modified this hearing, you know, I think the  
11       procedural norms around interaction are also going to  
12       have to subtly adjust to reflect the idea that you've  
13       got a number of, now, different entities in the room.  
14       Before where it was very simple, I think it's going to  
15       get complex.

16               The second point is that, you know,  
17       becoming an IU is not an end in itself. It's a bit of  
18       a "who cares" unless it works. Right? It needs to be  
19       viable. It needs to be making a profit. Or at least  
20       not losing money. Let's maybe just put that at the  
21       bottom. But to do that, you know, there's the simple  
22       idea of economic scale within a proven generation  
23       technology or a set of distribution facilities. So  
24       there's a minimum viable size, and in almost every  
25       instance that minimum viable size is larger than the  
26       First Nations footprint. It certainly is for the

1            Kitselas.

2                            And so we've been trying to advance the  
3            idea that both from a fairness point of view and  
4            there's some reconciliation blended in with that, that  
5            we need some form of market access, and BC Hydro I  
6            think came back to us -- I don't know if you read  
7            their response about, "Well, the markets are open, Mr.  
8            Thompson. You can access any market. As long as it's  
9            not in B.C. it doesn't affect any one of our  
10           customers." And I thought, well, that sort of  
11           stretches the definition of "open" from our point of  
12           view. You know, if we're located up near Terrace, how  
13           the heck am I going to get power to Washington State?  
14           And if I can't sell to someone who's already a BC  
15           Hydro customer, I'm out. Right?

16                           So that when we say market access, we  
17           interpret it a little more strongly than perhaps the  
18           First Nations Collective. We're suggesting about  
19           entering into BC Hydro's or Fortis's or whomever  
20           else's existing markets.

21                           Now, on the flip side, how material we will  
22           be? We're a drop in the bucket, you know. I think  
23           you could summarize, if I was to do some rough justice  
24           math that say all the three billion dollars that was  
25           alluded to earlier were deployed into assets, and they  
26           all succeeded, I think that you'd find if you ran some

1 quick capital numbers that you're probably talking  
2 about less than ten percent of the total market. So  
3 there may be an issue with assets at the end of the  
4 day in terms of intrusion, but I think it *de minimis*.  
5 It's not going to be very large. That assumes  
6 everything happens at once, immediately, and there's  
7 no progression at the time.

8 I think that when you, you know, open up  
9 the market it's not going to be a floodgate situation.  
10 You open the market to a deafening round of silence as  
11 we all struggle to sort of finish developing our  
12 projects and one by one to slowly come in. But in  
13 terms of a rate impact or an asset abandonment issue,  
14 I just can't buy it. It's a non-starter.

15 Then there's the idea that we will advance  
16 -- it's not -- and I don't know how to square the  
17 circle with the idea that, you know, if Indigenous  
18 utilities are not regulated by the Commission, how  
19 could they possibly enjoy some form of protection  
20 granted or conferred by the Commission?

21 **Proceeding Time: 11:45 a.m. T33**

22 And I think there is a point to that. And there maybe  
23 be, and sort of in an immature state, a need for some  
24 protections, and I can think of a couple as just sort  
25 of examples.

26 I mean Beecher Bay, in their testimony I

1 read sort of were it not for – for lack of a better  
2 word – intransigence of their neighbour, could have  
3 run wires in from BC Hydro and powered up their  
4 community that way. You know, there was sort of, if  
5 you will, an ecological barrier that was going to  
6 prevent them from doing that, so they had to kind of  
7 go it on their own.

8 Now, everything I know about the economics  
9 of power generation and distribution and along with  
10 gas will suggest that they can create their community,  
11 but their costs to service are going to be much, much  
12 higher than grid connect energy. But now there's an  
13 economic incentive, right? Now someone could come in  
14 and say, you know, "I'll hook up to BC Hydro. I'll  
15 pay off the guy in the middle." And all of a sudden  
16 I'm in Beecher Bay with much cheaper power.

17 And that would be, I think, a really  
18 negative outcome. But how do you stop it? Right? So  
19 there's a case to be made, I think, from an Indigenous  
20 utility where they go to all that effort, you'd like  
21 to see them rewarded, right? Rather than someone say,  
22 "You've done all this to build the market and we're  
23 just going to step through the problem that you have  
24 and clobber you and just take it from you in a  
25 competitive way."

26 And that will happen. If someone say, you

1 know, look you can get the same electricity from me  
2 but just cheaper. No change in service, no change in  
3 reliability, no change in safety. That's a very  
4 powerful proposition.

5 But then there's another side to this and  
6 we were kicking this around again, sort of. You've  
7 got to picture 12 people with a couple beers and pizza  
8 and all the IRs spread out. I mean it's a very real  
9 moment, you know? But we've always felt that the Site  
10 C thing -- and that's just us -- was manifestly unfair.  
11 You know, it sort of got exempted from your oversight  
12 on the way into the process, but then on the back end,  
13 you know, enjoys your protection. Right? So who  
14 would -- you know, and it's kind of on the way shut  
15 down the standing offer program, which I can tell you  
16 the Kiteslas were in the queue, they're pretty  
17 interested about -- and it's made things difficult  
18 with that cancelation or what is it -- not  
19 cancelation, indefinite suspension, I think, is  
20 probably the right language.

21 But to me if you got exempted on the way in  
22 it's not an asset that enjoys your protection, I'd  
23 say. Too bad, BC Hydro. That whole Site C thing,  
24 it's over here. It's off to the side. It's your job  
25 to get that asset full. But no, you can't use it to  
26 compete with, especially given it's high capital cost.

1           We could argue how high. But a very low marginal cost  
2           asset in terms of operation.

3                     It's a great tool to stop people from  
4           getting into the market and if you believe the  
5           stranded asset argument, I'm prepared to buy that for  
6           some things but they had to come through with some  
7           level of legitimacy in getting it in the game.

8                     But those are, to me, two example where I'm  
9           trying to thing of -- I'd like, if you will,  
10          independence from you, but oddly I might need your  
11          help, right? So if you would just consider that, I  
12          think, as part of your deliberations because sometimes  
13          being exempt means you are completely at the whim of  
14          competitive forces that you now have no way to stop,  
15          impede, control and it can be very deleterious if  
16          you're trying to oddly do something positive, right?  
17          At the end of the day.

18                    But I will -- our fourth point is just that  
19          over regulation needs to be avoided. You know, 12  
20          people with the beer around the table eating the pizza  
21          and we'd start to read some of these IRs and we'd just  
22          -- and we would read them twice and three times and we  
23          didn't understand what was being said, right? It  
24          wasn't plain language.

25                    You know, we've engaged a lot in this  
26          hearing. We can't do this again. If we do this again

1 we're going to go out of business. We need to get  
2 back to the job at hand and, you know, a lot of these  
3 IUs are going to be relatively small. And to me, we  
4 would argue that there must be some version of right-  
5 sized regulation, you know?

6 We have some other concerns too about  
7 billings and we had a funny chat with Fortis. We  
8 didn't understand, for instance, why Fortis was being  
9 billed more than BC Hydro.

10 **Proceeding Time 11:50 a.m. T34**

11 But as it turns out, the natural gas side of the  
12 business, I guess, distributes a lot of gigajoules.  
13 And as a result, if you use that as your balancing act  
14 then you're going to get billed. But the funny thing  
15 is geothermal heat delivers a hell of a lot of  
16 gigajoules, right? But all of a sudden if we actually  
17 do that we're going to get a bill from you guys  
18 that'll kill us.

19 So we're not sure, we may have to sort of  
20 revisit some -- if we did some math, we may have to  
21 revisit some of this. This idea that it's pro rata  
22 based on energy. But it goes back to the idea of  
23 what's the right level of interaction for a small  
24 entity with a body such as yours. And, you know, how  
25 do we pay our fair share, which we're prepared to do,  
26 but how do we not make it onerous? You know, we may

1 have shot ourselves in the foot with our submission.  
2 So we've got to sort of rethink how we do that. But I  
3 just ask you to think about that.

4 Sorry, my computer's shooting at me.

5 You know, so those were our four points.  
6 Anytime you want interrupt, it's fine. But our  
7 conclusion is that we want to provide you with  
8 something constructive, right? We're going to try to  
9 layout a number of thought points that say, here's  
10 what we'd like to see out of regulation. And it's  
11 meant to be done with an eye to creating actionable  
12 solutions where an Indigenous utility can work within  
13 the existing, not just framework, but with the  
14 existing players, right? I don't know that everyone's  
15 going to love it, but I think it can work -- or we  
16 think it can work. I should get rid of the "I".

17 And we see ourselves sort of as a partner  
18 in that process, and it is a conversation. So we  
19 really like what you've done in terms of allowing us  
20 to come here. And we want to give you -- in some ways  
21 we were hoping you'd ask more questions of us because  
22 we really don't know how to give you the support you  
23 might need to make recommendations. And so we're open  
24 to that kind of thinking with the caveat now, we're  
25 not lawyers. I wouldn't know how to draft a piece of  
26 legislation if it fell on me. Big mistake for me to

1 take a shot at it or anyone on our team. So we're  
2 just going to say, like, here are some goals and he's  
3 how we see it working. But, you know, we can't get in  
4 -- I don't even know if we're supposed to submit,  
5 like, here's the text we'd like.

6 THE CHAIRPERSON: No.

7 MR. THOMPSON: I mean, that's how I -- okay good.  
8 Because we can't.

9 THE CHAIRPERSON: Just high level suggestions. And we  
10 won't be submitting -- in the report, we won't be  
11 submitting text of proposed legislation or decision  
12 changes. It's at a high level, what regulations  
13 should look like or shouldn't look like or should be  
14 or not be.

15 MR. THOMPSON: Perfect. That really simplifies it.  
16 And with that, thank you very much for your time. So,  
17 much appreciated.

18 THE CHAIRPERSON: Okay, thank you.

19 COMMISSIONER LOCKHART: Mr. Thompson, at the beginning  
20 you mentioned you had three key points. First Nations  
21 have been excluded, or largely excluded, from  
22 development; existing regulatory framework reflects  
23 this exclusion. And then I'm sorry, I didn't catch  
24 the third point.

25 MR. THOMPSON: It's that treaty settlements are  
26 fragmenting control.

1 COMMISSIONER LOCKHART: I see, okay. Thank you, that  
2 was my question.

3 THE CHAIRPERSON: So, Mr. Thompson, hopefully that  
4 provides a bit of guidance on your final submission.

5 MR THOMPSON: It does, thank you.

6 THE CHAIRPERSON: And we do appreciate your  
7 participation in this and it's been a pleasure listing  
8 to you at the community input sessions and here. And  
9 don't -- you know, don't stress over your final  
10 submission. As long as you can lay out your thoughts  
11 clearly as you did today, we don't need legalese. In  
12 fact, personally, I'm not a lawyer. I would prefer  
13 you do it in plain language. I'm surrounded by  
14 lawyers though, so what can I say. They may not agree  
15 with me.

16 MR. THOMPSON: They all smiled, you didn't see it.  
17 Okay, well look, thank you again.

18 THE CHAIRPERSON: Okay, thank you very much.  
19 Appreciate it.

20 COMMISSIONER FUNG: Thank you.

21 THE CHAIRPERSON: So, unless there's anything else, Mr.  
22 --

23 MR. BUSSOLI: Not to my knowledge, and there are no  
24 other intervenors hoping to submit today, so.

25 THE CHAIRPERSON: I'm sorry, say that again?

26 MR. BUSSOLI: There are no other intervenors present

1           who would want to submit at this point.

2 THE CHAIRPERSON:       Okay. So, again, thank you to all  
3           and we're adjourned. And I hope everyone has safe  
4           travels home and a good weekend. Thank you.

5 **(PROCEEDINGS ADJOURNED AT 11:55 A.M.)**

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I HEREBY CERTIFY THAT THE FORGOING  
is a true and accurate transcript  
of the proceedings herein, to the  
best of my skill and ability.

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A.B. Lanigan,       Court Reporter

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September 26<sup>th</sup>, 2019

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