



bcuc
British Columbia
Utilities Commission

Patrick Wruck
Commission Secretary

Commission.Secretary@bcuc.com
bcuc.com

Suite 410, 900 Howe Street
Vancouver, BC Canada V6Z 2N3
P: 604.660.4700
TF: 1.800.663.1385
F: 604.660.1102

April 30, 2020

Sent via email/efile

The Honorable Bruce Ralston
Minister of Energy, Mines and Petroleum Resources
PO Box 9380 Stn Prov Govt
Victoria, BC V8W 9M6
EMPR.Minister@gov.bc.ca

**Re: British Columbia Utilities Commission – Indigenous Utilities Regulation Inquiry – Project No. 1598998
Final Report**

Dear Minister:

In accordance with Order in Council No. 108 and No. 559, approved and ordered March 11, 2019 and October 31, 2019 respectively, please find enclosed the British Columbia Utilities Commission Indigenous Utilities Regulation Inquiry Final Report.

Sincerely,

Original signed by:

Patrick Wruck
Commission Secretary



bcuc
British Columbia
Utilities Commission

Suite 410, 900 Howe Street
Vancouver, BC Canada V6Z 2N3
bcuc.com

P: 604.660.4700
TF: 1.800.663.1385
F: 604.660.1102

British Columbia Utilities Commission
Indigenous Utilities Regulation Inquiry

Final Report

April 30, 2020

Before:

D. M. Morton, Panel Chair
C. Brewer, Commissioner
A. K. Fung, QC, Commissioner
E. B. Lockhart, Commissioner

TABLE OF CONTENTS

Page no.

Summary of Recommendations	i
1.0 Introduction	1
1.1 What is the Indigenous Utilities Regulation Inquiry?.....	1
1.2 Process and Public Consultation	2
1.3 Policy Developments Since the Draft Report	3
1.4 Terminology.....	4
2.0 Overview of First Nations in BC	4
2.1 Description of First Nations in BC.....	4
2.2 Status of First Nations Lands	6
3.0 Overview of the BCUC, the UCA and the BCUC’s Involvement with Indigenous Peoples	8
3.1 History of the BCUC.....	8
3.2 Overview of the UCA, the <i>Clean Energy Act</i> and the BCUC’s Involvement with Indigenous Peoples	8
3.3 Spirit Bay Utilities Application - First Nations Utilities Not Included in Municipal Exception	10
3.4 BCUC Proceedings Impacting Indigenous Peoples	11
4.0 Discussion and Recommendations	11
4.1 Reconciliation	12
4.1.1 Draft Reconciliation Principles that Guide the Province’s Relationship with Indigenous Peoples.....	14
4.1.2 The DRIPA	15
4.1.3 Impacts of the Reconciliation Principles and the DRIPA on BCUC Mandate.....	15
4.2 Economic Participation and Public Utility Regulation	16
4.2.1 What is Public Utility Regulation?	18
4.2.2 Potential Challenges of Establishing a Public Utility.....	19
4.2.3 History of Public Utility Regulation in BC.....	22
4.2.4 Examples of Indigenous Utilities.....	23

4.2.5	UNDRIP, Self-Determination and Participation in the Economy	27
4.2.6	Evaluation Framework for the Report Recommendations.....	29
4.3	Regulation of Monopolies	30
4.3.1	Who Should Regulate?	31
4.3.2	What Protection for Ratepayers?	32
4.4	Definition of Indigenous Utility	33
4.4.1	Operation of an Indigenous Utility as a Defining Characteristic	35
4.4.2	Degree of Control Required for an Indigenous Utility.....	36
4.4.3	The Types of Services Provided by Indigenous Utilities	38
4.4.4	Persons to Whom Services are Provided by Indigenous Utilities.....	38
4.4.5	The Geographic Areas Served by Indigenous Utilities.....	38
4.4.6	Ceasing to be an Indigenous utility.....	38
4.5	Regulation of Indigenous Utilities On-Reserve	39
4.5.1	Applicability of the <i>UCA</i> on Reserve Land	40
4.5.2	Complaint and Dispute Resolution Process.....	42
4.5.3	The BCUC’s Role in Indigenous Utilities Operating on Reserve Land.....	45
4.5.4	Municipal Exception in the <i>UCA</i>	46
4.6	Treaty Lands	46
4.6.1	Nisga’a Nation.....	46
4.6.2	Modern Treaty Nations	48
4.6.3	Historic Treaties.....	52
4.7	First Nations with Self-Governing Agreements.....	54
4.7.1	Westbank First Nation	55
4.7.2	Sechelt Indian Band (Shíshálh First Nation).....	56
4.8	Regulation of Standards, Safety and Reliability	57
4.8.1	Regulation of Mandatory Reliability Standards.....	57
4.8.2	Safety and General Service Reliability	59
4.9	Retail Energy Sales.....	62
4.9.1	Existing Utility Service Areas.....	62
4.9.2	Other Utilities Operating in an Incumbent Utility’s Service Area.....	64
4.9.3	Retail Sales On-Reserve or on Treaty Lands	65

4.9.4	Traditional Territory.....	67
4.10	Wholesale Energy Sales.....	73
4.11	Wheeling Electricity over BC Hydro’s System	76
4.11.1	Direction 8	76
4.11.2	Potential Impact of Direction 8 on Indigenous Economic Development	79
4.12	Electricity Purchase Agreements.....	79
4.13	Indigenous Utilities Commission	81
4.14	Next steps.....	82

APPENDIX A Glossary and Acronyms

APPENDIX B BCUC Engagement

APPENDIX C Order in Council No. 108

APPENDIX D Order in Council No. 559

Summary of Recommendations

In this final report for the Indigenous Utilities Regulation Inquiry, the Panel makes the following Final Recommendations:

General

An Indigenous utility be regulated by a competent arm's length regulator.

The regulator of an Indigenous utility follow best practices of ratepayer protection for all ratepayers.

Definition of an Indigenous Utility

An Indigenous utility be defined as a public utility for which, as the owner or operator, an Indigenous Nation has *de facto* or *de jure* control.

Therefore, the definition of "Indigenous utility":

- Is not limited to the types of services to be provided;
- Includes the provision of public utility services to persons in its service area.

Ceasing to be an Indigenous Utility

When a First Nation no longer controls an Indigenous utility, the utility will at that point become a public utility as that term is defined in the *Utilities Commission Act* and regulated by the BCUC.

A First Nation notify the BCUC when it enters into any agreement that results in a change of control of an Indigenous utility, such that the utility is no longer an Indigenous utility.

Who Regulates Indigenous Utilities on Reserve Land

A First Nation determine the means of regulation of an Indigenous utility providing services on that First Nation's reserve land. Any BCUC oversight ceases when that First Nation notifies the BCUC that it no longer requires BCUC regulation and demonstrates, as further described in the Complaints and Appeals recommendations, that there is an arm's length complaint and dispute resolution process to protect all ratepayers.

Complaints & Appeals

A panel or body composed of Indigenous people and others with specialized knowledge, such as First Nations governance, assess a First Nation's complaint and dispute resolution process in the context of public utility regulation as it is practiced in Canada and also within the specific context of that First Nation, prior to that First Nation's Indigenous utility law coming into force.

First Nations collectively develop a province-wide appeal body that can be available to customers of Indigenous utilities who are unable to resolve their utility complaints.

The BCUC serve as an appeal body until such time as a First Nation operated body can be established and operational. We further recommend that the BCUC provide any assistance that the First Nation operated body may request in order to become fully operational.

BCUC Regulation

The BCUC include Indigenous representatives with expertise in such matters as First Nations governance, on BCUC panels where applications of Indigenous utilities are being considered.

The BCUC modify its regulatory policies and procedures to better reflect the objectives of reconciliation in its proceedings.

The BCUC ensure that it includes Indigenous people, in both staff and Commissioner roles, especially for matters that directly affect First Nations.

Nisga'a & Tsawwassen First Nations

The UCA be amended to exclude from the definition of public utility, any utility recognized under Nisga'a law as a Nisga'a utility insofar as its services relate to the Nisga'a Lands or a Nisga'a Village within Nisga'a Lands.

The UCA be amended to exclude from the definition of public utility, any Indigenous utility providing services within Tsawwassen treaty lands.

Other Modern Treaty Nations

A modern treaty First Nation, other than Tsawwassen First Nation and Nisga'a Nation, determine the means of regulation of an Indigenous utility providing services on that First Nation's former reserve lands. Any BCUC oversight ceases when that First Nation notifies the BCUC that it no longer requires BCUC regulation.

Future modern treaties include explicit provisions with respect to the First Nation's authority to regulate Indigenous utilities providing services within treaty settlement lands.

Historic Treaty Nations

An historic treaty First Nation determine the means of regulation of an Indigenous utility providing services on that First Nation's reserve lands. Any BCUC oversight ceases when the First Nation notifies the BCUC that it no longer requires BCUC regulation and demonstrates, as further described in the Complaints and Appeals recommendations, that it has an arm's length complaint and dispute resolution process to protect all ratepayers.

Westbank & Sechelt First Nations

Westbank First Nation determine the means of regulation of an Indigenous utility providing services on Westbank Lands. Any BCUC oversight ceases when Westbank First Nation notifies the BCUC that it no longer requires BCUC regulation and demonstrates, as further described in the Complaints and Appeals recommendations, that it has an arm's length complaint and dispute resolution process to protect all ratepayers.

The Sechelt Indian Band determine the means of regulation of an Indigenous utility providing services on Sechelt lands. Any BCUC oversight ceases when the Sechelt Indian Band notifies the BCUC that it no longer requires BCUC regulation and demonstrates, as further described in the Complaints and Appeals recommendations, that it has an arm's length complaint and dispute resolution process to protect all ratepayers.

Mandatory Reliability Standards (MRS)

The BCUC retain jurisdiction with respect to approval, compliance and enforcement of Mandatory Reliability Standards (MRS) applicable to any entity that may impact the Bulk Electric System in the province, regardless of who owns or operates the infrastructure.

Safety

A First Nation determine the means of regulation of safety with respect to an Indigenous utility. If the First Nation delegates authority to the BCUC to regulate safety, the applicable portions of the UCA governing safety will remain in force for that First Nation

Retail Access

Direction 8 be reviewed to reflect the intention regarding the prohibition on retail access, namely, whether that prohibition is limited to only customers of BC Hydro or to customers of any public utility. We also recommend that the BCUC review transmission and distribution tariffs to reflect Direction 8 and/or any amendments to Direction 8.

The Provincial Government review and revise any policies that, in restricting an Indigenous utility's access to BC Hydro's transmission system, may result in an undue barrier to the First Nation's pursuit of economic self determination.

Incumbent Public Utilities

If an incumbent utility acquires energy from an Indigenous utility, when setting rates for that incumbent utility on that First Nation's reserve, modern treaty First Nation's former reserve land, Nisga'a or Tsawwassen lands, the UCA be amended to require the BCUC to consider the cost of that energy, even if the resulting rate differs from the rate that would otherwise be set.

The Province consider mechanisms to encourage the development of further economic partnerships between incumbent utilities and First Nations.

Traditional Territory

As the modern treaty process is the accepted means of clarifying Indigenous rights on Traditional Territories the modern treaty process should address the issue of utilities regulation and the rights of both incumbent utilities and Indigenous utilities to operate in those territories.

We recommend as an incremental approach to the entry of Indigenous utility operation on Traditional Territory, the UCA be amended to require the BCUC to consider UNDRIP and the economic development needs of a First Nation applying for a CPCN to operate an Indigenous utility on Traditional Territory.

Wholesale Energy Sales

The Provincial government reconsider the SOP program along with the cap for that program and any other provision that places undue economic barriers on potential participants. If the program is restructured and reintroduced, we further recommend it should be based on market electricity prices, so that Indigenous utilities are provided meaningful competitive economic opportunities while ensuring that all BC Hydro ratepayers are not harmed.

Assistance be provided to Indigenous utilities seeking to export energy to customers outside the province.

Strategy for Capacity Building

The BCUC develop, in collaboration with Indigenous representatives, a strategy to build First Nations' capacity in Indigenous utility regulation and a strategy to reduce barriers to the recruitment and placement of Indigenous people in advisory, staff and Commissioner roles in the BCUC.

We recommend, where necessary for the implementation of these recommendations, the Province consider making funding available to First Nations.

Changes to the UCA

The UCA be amended to enable the BCUC to determine, in a public proceeding, fair compensation for an incumbent utility, if the operations of an Indigenous utility materially impact that incumbent utility.

The UCA be amended to provide the BCUC jurisdiction to consider regulatory principles enacted by the First Nation when the BCUC adjudicates Indigenous utility complaints and disputes.

Section 52 of the UCA be amended to require the BCUC to consider UNDRIP and the economic development needs of a First Nation seeking to acquire public utility assets.

The UCA be amended to require the BCUC to consider the principles of UNDRIP when considering the CEA energy objective to “foster the development of first nation... communities...”.

1.0 Introduction

The British Columbia Utilities Commission (BCUC) is the independent regulator for British Columbia’s electric, natural gas, and thermal energy “public utilities”, and auto-insurance. Regulation is generally needed when customers have limited or no choice in utility providers (such as natural gas or electricity). The BCUC is an independent agency of the government of the Province of British Columbia and its role is to ensure that British Columbians receive safe, reliable energy services at a fair price, while allowing utilities the opportunity to earn a fair return on their investments. The main legislation governing the BCUC is the *Utilities Commission Act* (UCA or “the Act”) which sets out the roles and responsibilities for the BCUC and the framework that regulated energy utilities must follow.

In accordance with Orders in Council (OIC) No. 108 and 559, the BCUC is submitting this Final Report for the Indigenous Utilities Regulation Inquiry to the Minister Responsible for the *Hydro and Power Authority Act*.

1.1 What is the Indigenous Utilities Regulation Inquiry?

The BCUC holds inquiries, whether on its own initiative or by request from the Provincial Government, on matters that may have broad impact on persons or groups in BC. Inquiries are open and transparent processes where the public can participate and give their views to the BCUC. On March 11, 2019 the Lieutenant Governor in Council (LGIC) directed the BCUC to conduct an Inquiry respecting the Regulation of Indigenous Utilities (Inquiry).

This Inquiry was instigated after the BCUC decision on the 2016 application from Beecher Bay First Nation (Beecher Bay) seeking an exemption from Part 3 of the UCA. In its decision, which is discussed further in Section 3 of this Final Report, the BCUC found that Beecher Bay did not meet the definition of a municipality and was also not eligible for the exemption, nor was the jurisdiction of the BCUC excluded by the *First Nations Land Management Act* (FNLMA). The decision raised questions as to whether First Nation utilities ought to be regulated differently under the UCA, and if special provisions may be needed.

Order in Council No. 108/2019¹ (OIC 108) established the Inquiry and outlined the terms of reference for the Inquiry, and is included as Appendix C to this Final Report. The terms of reference set out several key questions the BCUC needs to address:

1. the commission must advise on the appropriate nature and scope, if any, of the regulation of Indigenous utilities²;
2. without limiting paragraph (a), the commission must provide response to the following questions:
 - i. What are the defining characteristics of Indigenous utilities, having regard to:
 - a. the nature of the ownership and operation of Indigenous utilities,
 - b. the types of services provided by Indigenous utilities,
 - c. the persons to whom services are provided by Indigenous utilities, and

¹ Order in Council (OIC) No. 108, dated March 11, 2019.

² OIC 108 defines an “Indigenous utility” as a public utility owned in whole or in part by an Indigenous Nation. “Indigenous Nation” is also defined in the OIC.

- d. the geographic areas served by Indigenous utilities.
- ii. Should Indigenous utilities be regulated under the [Utilities Commission] Act or under another mechanism, or be unregulated?
- iii. If it is appropriate to regulate Indigenous utilities under the Act, is there any matter under the Act in respect of which Indigenous utilities should be regulated differently from other public utilities, and, if so, how should that matter be regulated?
- iv. If it is not appropriate to regulate Indigenous utilities under the Act but it is appropriate to regulate Indigenous utilities in some manner, how should Indigenous utilities be regulated?
- v. If an Indigenous utility is not regulated under the Act, would the utility become subject to the Act on ceasing to be an Indigenous utility, and, if not, what transitional and other mechanisms are required to ensure that the utility is subject to the Act on ceasing to be an Indigenous utility?

OIC 108 also established the deadlines for the submission of interim and final reports to the LGIC. On October 31, 2019, OIC 559 amended OIC 108 by granting the BCUC an extension to the deadline for the final report to April 30, 2020.³ A copy of that OIC is attached as Appendix D to this Report.

Following the establishment of the Inquiry, the BCUC invited submissions from Indigenous groups, government, utility owners and operators, and the public. The engagement process is discussed further in the next section. The BCUC issued a draft report containing its draft recommendations on November 1, 2019 (Draft Report), and submitted an interim report detailing the BCUC's progress to the LGIC on December 31, 2019.

After reviewing the BCUC's Final Report, the Provincial Government will consider the BCUC's recommendations and may use them to inform future changes to legislation or policy.

1.2 Process and Public Consultation

The BCUC approach to this Inquiry was to promote an open and welcoming environment for those with an interest on the topics explored to provide their views. To ensure this, the BCUC took a responsive and flexible approach to consultation and adapted a number of its usual processes to align with participants' feedback. The BCUC undertook two main phases of engagement, as described below.

To begin the first phase of engagement, in June and July 2019 the BCUC held a series of transcribed community input sessions throughout British Columbia to hear comments on the issues raised in the inquiry. These public sessions provided an opportunity for the public to speak directly to the Inquiry Panel and for the Panel to effectively gather public input and feedback for consideration and to ask questions of speakers. The BCUC also invited registered interveners to submit written evidence, which was subject to information requests from the BCUC and other interveners. Oral and written final submissions were provided in September and October 2019. Presenters at the community input sessions and registered interveners are listed in Appendix B. A summary of what we heard can be found in Section 4 of the Draft report.

Some of the feedback heard during the initial engagement period was that more time was needed for participants to consider and discuss the issues being addressed in the Inquiry. In response to these concerns, on

³ OIC 559/2019 http://www.bclaws.ca/civix/document/id/oic/OIC_CUR/0559_2019

November 1, 2019 the BCUC published a Draft Report with 14 draft recommendations and established a second phase of engagement to receive feedback on this draft report from interested parties and individuals.

The second phase of engagement included eight workshops around BC to gather feedback from participants. The BCUC responded to participant feedback and adapted the format of the draft report workshops to be more informal and conversational. At each workshop the Panel presented a summary of the draft report, and participants then worked in small groups to discuss the report and collect feedback, which were presented back to the Panel and transcribed.⁴ Following the workshops, the BCUC invited written comments and reply comments from participants until March 31, 2020. A summary of what we heard in the second phase of engagement is included in the Panel's discussion and recommendations in Section 4 of this report.⁵ For clarity, the Panel has reviewed and considered all evidence and submissions received prior to and after the issuance of the draft report as it deliberated its Final Recommendations.

The BCUC has sought to raise awareness about participating in the Inquiry and broaden its engagement approach by a number of means. This included invitations to all BC First Nations and follow up phone calls; print, radio, digital and social media advertising; communications sent via the BC Assembly of First Nations (AFN); hosting booths at industry events; word of mouth through the BCUC's retained Indigenous relations consultancy; and producing fact sheets. The Panel also presented updates on the Inquiry at the following Indigenous gatherings:

- BC AFN 16th Annual General Assembly in September, 2019;
- the BC First Nations Summit Meeting in February, 2020; and
- the BC AFN 16th Special Chiefs Assembly in March, 2020.

In this Inquiry, the BCUC has had a broad range of participation including First Nations and Indigenous groups, existing utilities, special interest groups, private companies, and individuals. We heard from representatives of more than 50 First Nations presenting at community input sessions or participating in workshops, by letter of comment or as part of an intervener group.

The BCUC thanks all those who contributed to this Inquiry and acknowledges those who travelled to attend the community input sessions and draft report workshops. We appreciate the time and thoughtful input from participants, which is reflected in the quality of the submissions received. The Panel has considered all of their comments and submissions in making the findings and recommendations as set out in this Final Report.

1.3 Policy Developments Since the Draft Report

Since the release of the Draft Report, the BC Provincial Government has enacted the *Declaration on the Rights of Indigenous Peoples Act*⁶ (DRIPA) confirming the application of the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP) to new and existing laws in BC.

⁴ See Transcript Volumes 12 to 20, and Exhibits A2-3 to A2-8

⁵ In recognition of the collaborative discussions that took place at the workshop and comment sessions, we have generally not attributed submissions to specific individuals or groups.

⁶ S.B.C. 2019, c.44.

The DRIPA sets out a process to align BC’s laws with UNDRIP, including the development of an action plan to achieve this alignment over time with regular reporting to the Legislature to monitor progress.⁷ Although this action plan is still in development, the BCUC expects there will be consideration of existing relevant legislation such as the *Utilities Commission Act* and its alignment with the principles of UNDRIP in due course. The Panel is cognizant that the policy intent signalled by the DRIPA has an impact on many of the issues raised during this Inquiry, and that while more time is needed to fully understand the implications of the DRIPA, the passage of that legislation has changed the backdrop of this Inquiry compared to when it began. This has been reflected in the submissions of many participants in the second phase of the Inquiry.

1.4 Terminology

In this Final Report the term “Indigenous Nation” should generally be interpreted to have the same meaning as the definition in OIC 108. This report may also refer to “First Nation”, “Nation”, or “Indigenous peoples” or “Band”, where this reflects the language used by a participant in the Inquiry or depending on context.

When we refer to “participants” in the Inquiry, this may collectively refer to interveners, presenters at Community Input Sessions, attendees at Draft Report workshops and/or parties providing letters of comment.

We recognize that there are other Indigenous Nations and peoples who have not participated in this Inquiry who may hold different views and perspectives from those who have participated in this Inquiry. However, this Final Report can only reflect what we have heard or seen from participants in this Inquiry. Therefore, when we refer to the views of “many” or “most” participants, this should be taken to reflect the consensus or majority view of participants on matters which are before us in this Inquiry.

Appendix A sets out a glossary of some acronyms and technical terms used in this report.

2.0 Overview of First Nations in BC

2.1 Description of First Nations in BC

British Columbia is home to 196 Indigenous Nations.⁸⁹ Dispersed throughout various regions in the province, each has its own unique history and a distinct relationship with the provincial and federal governments.

Not only are Indigenous Nations throughout BC culturally diverse, there is great variety in the populations, economic opportunities, and access to goods and services of Indigenous Nations throughout the province. They include various forms of government, as is perhaps best reflected in those presentations that reference the traditional governance systems that exist in parallel to elected band councils under the *Indian Act*. The

⁷ <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples>

⁸ British Columbia Welcome BC, B.C. First Nations & Indigenous People, retrieved from <https://www.welcomebc.ca/Choose-B-C/Explore-British-Columbia/B-C-First-Nations-Indigenous-People>. This coincides with the number of bands recognized under the *Indian Act*, which may differ from those recognized by the British Columbia Assembly of First Nations (BCAFN). The BCAFN acknowledges 203 First Nations in BC.

⁹ British Columbia Assembly of First Nations Community Profiles (2019), retrieved from <https://bcafn.ca/community-profiles/>.

complexity of traditional and non-traditional government is illustrated in the submission of Chief Campbell who introduces himself to the Panel in this way:

I stand and I speak for the tribe, number one. Our tribe, Kispiox tribe, Eagle Crest...Secondly, I will speak on behalf of the nine tribes Lax Kw'alaams. I am not involved in the politics area.¹⁰

The distinction between band councils and traditional government systems was further illuminated in the presentation of Crystal Tolmie who explains:

I am... [in Vancouver]... attending the BCAFN annual general assembly on behalf of my Gitanmaax Band Council, but I always find myself in a really unique scenario where I feel like I wear many hats on a continues [sic] basis, because aside from being the Deputy Chief for my Gitanmaax Band Council, I am a Hereditary Chief in my Kitsclucla area and I have a land base, and I've also worked in the corporate world.¹¹

Aside from the traditional government systems and the handful of Indigenous Nations that have negotiated self-government arrangements either by way of modern treaty or self-government-specific legislation, the majority of Indigenous Nations in BC, including those in Treaty 8 territory, administer their internal affairs through band councils elected pursuant to the *Indian Act*.

Unlike the early pre-confederation Peace and Friendship Treaties or the numbered treaties that do not detail governance, First Nations that have negotiated modern treaty and self-government arrangements, such as the Nisga'a¹², have authority to enact laws over a broad range of matters. These treaties or arrangements are negotiated to minimize the potential for conflicts among First Nation, federal, and provincial laws. They generally set out how the First Nations' governance interacts with other governments within the Canadian Constitution and specify that the Charter of Rights and Freedoms will apply to First Nations' governments, in the same manner as they do to all other governments in Canada.¹³ Other First Nations have assumed control over specific matters under what could be termed sectoral self-government arrangements that address taxation,¹⁴ land,¹⁵ education,¹⁶ or services.¹⁷ These may involve federal and/or provincial subject-specific legislation and/or agreements with either or both of the federal and provincial governments.

In addition to band councils, most BC Indigenous Nations are affiliated with tribal councils, treaty groupings and other non-governmental organizations, sometimes based on cultural ties or alternatively joined by common values or similar aspirations. Most also have some degree of involvement in broader organizations such as the BC AFN, the First Nations Summit, or the Union of BC Indian Chiefs, which come together as the First Nations Leadership Council (FNLC).¹⁸ Several such affiliations have made submissions to this Inquiry, including the FNLC,

¹⁰ Transcript Vol. 5, Chief Campbell, pp. 222–223

¹¹ Transcript Vol. 11, Tolmie, p. 551.

¹² *Nisga'a Final Agreement Act*, SBC 1999, c. 11.

¹³ BC Treaty Commission, *Aboriginal Rights – Self-Government* (Oct 2019), retrieved from <http://www.bctreaty.ca/self-government>.

¹⁴ *First Nation Fiscal Management Act*, S.C 2005, c.9.

¹⁵ *First Nation Land Management Act*, S.C. 1999, c.24.

¹⁶ *First Nations Jurisdiction over Education in British Columbia Act*, S.C. 2006, c. 10.

¹⁷ *British Columbia Tripartite Framework Agreement on First Nations Health Governance* (2011), retrieved from: https://www.canada.ca/content/dam/hc-sc/migration/hc-sc/fniah-spnia/alt_formats/pdf/pubs/services/tripartite/framework-accord-cadre-eng.pdf.

¹⁸ *Ibid* p.1.

the Nuu-chah-nulth Tribal Council, Cowichan Tribes, Gitanyow First Nation, Homalco First Nation and BC First Nations Clean Energy Working Group (the Collective First Nations), the First Nations Major Project Coalition (FNMPC), and the Coastal First Nations – Great Bear Initiative (CFN-GBI).

2.2 Status of First Nations Lands

Reserves

As is the case throughout Canada, Indigenous Nations in BC that are recognized as bands were specifically allocated reserves under the *Indian Act*. The legal title to reserve lands is vested in Her Majesty the Queen in the Right of Canada, which set the lands apart for the use and benefit of a band. Reserves are almost always situated within the Indigenous Nations' territories, and although they vary in size throughout the province, most are significantly smaller than the territories historically used and occupied by the Indigenous Nation (Traditional Territories). Some bands have numerous reserves scattered throughout their territories, while others may have only one.

As will be discussed in more detail later, in accordance with section 88 of the *Indian Act*, laws of general application in the province apply on reserve land.¹⁹

A specific category of reserve land and an example of what can be termed “sectoral self-government” is reserve land that is governed by a First Nation under the *First Nations Land Management Act* (FNLMA). Under the FNLMA, First Nations that meet specific criteria can, through a formal process, be added to the Schedule of the Act which identifies those that have assumed responsibility for management of their reserve land. First Nations that have signed the Framework Agreement enact a land code which must address specific matters listed in the FNLMA, including identifying the reserve lands to which the code applies, general rules and procedures for dealing with that land, and laws relating to the land, as well as amendment and dispute resolution processes. While these lands are not subject to the provisions of the *Indian Act* for most purposes, they remain reserves within federal jurisdiction under section 91(24) of the *Constitution Act*.

Treaty Lands

Unlike much of the rest of Canada, which is for the most part covered by First Nation/Crown treaties, very few First Nations in British Columbia have entered into treaties. Aside from those party to Treaty 8 and a limited number of pre-Confederation treaties,²⁰ only the Nisga'a and a handful of BC First Nations, namely Maa-nulth First Nations [Huu-ay-aht, Ka:'yu:'k't'h/Che:k'tles7et'h', Toquaht, Uchucklesaht, Ucluelet], Tla'amin Nation and Tsawwassen First Nation have modern treaties. 58 First Nations are at some stage of modern treaty negotiations, most lands in BC remain subject to Aboriginal title claims. Of those Indigenous Nations in a modern treaty relationship, the Nisga'a has the largest land base, which encompasses 200,000 hectares (20,000 square kilometres) of land, while the treaties with the Maa-nulth, Tla'amin and Tsawwassen First Nations cover comparatively much smaller land bases. Other First Nations in the latter stages of the negotiation process have identified specific lands for their use that will be protected by treaty, and over which they will have specific

¹⁹ Indian Act, RSC s.88

²⁰ British Columbia Treaty Commission, Aboriginal Rights, retrieved from: <http://www.bctreaty.ca/aboriginal-rights>: “When BC joined Confederation in 1871, only 14 treaties on Vancouver Island had been signed, and aboriginal title to the rest of the province was left unresolved.”

negotiated authority. In a number of instances, these include common use areas, which are shared with other First Nations.

Pursuant to section 35 of the *Constitution Act, 1982*,²¹ treaties, including modern treaties, are constitutionally protected. Accordingly, lands that are subject to modern treaty are governed according to modern treaty provisions, which generally establish rules of paramountcy.

Traditional Territories and Use of Aboriginal Title Land by Public Utilities

Prior to the colonization of British Columbia, Indigenous Nations had full use and occupation of the land and resources, each controlling distinct territories. Because so few treaties have been concluded, much of the province remains subject to Aboriginal title claims. Referencing Brian Slattery, the FNLC likens Aboriginal title to “an interest in land that resembles provincial more than municipal jurisdiction.”²²

The concepts of Aboriginal rights and title are well established in modern Canadian jurisprudence, primarily focussing on the rights of Indigenous Nations to consultation and accommodation regarding new developments on their territories. As is evident in the submissions before this Inquiry, BC First Nations have been persistent in asserting rights within their territories.

Indigenous Nations have repeatedly pointed out the legacy of damage to their territories. In the words of the FNMPC:

In the past, governments and companies enjoyed near complete domination of key aspects of project development on Indigenous lands. They held privileged access to land, capital, natural resources, and information needed to develop projects. In short, project proponents and their partners enjoyed freedom to dictate how projects would be developed in Indigenous homelands. Indigenous people and their interests were minimized, or in many cases, ignored by companies and governments.²³

This sentiment is reflected in the submission of many Indigenous Nation representatives, including the Collective First Nations, who pointed out that a good portion of the British Columbia Hydro and Power Authority’s (BC Hydro) large hydroelectric projects and the core of Fortis Gas (which was, at the time, owned by BC Hydro) were not regulated until the early 1980s, so the combined utility had the advantage of being able to build its business in an unregulated environment.²⁴

In relation to the distribution of electricity throughout British Columbia, First Nations fall within the definition of “customers” in the general terms and conditions of service for public utilities. While most BC First Nations have access to electricity services from the power grid, some remote communities are not integrated into the public utilities’ hydroelectricity systems. In such cases, the incumbent public utility provides services to these First Nations by way of dedicated diesel generators.²⁵

²¹ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c.11.

²² Exhibit C16-2, p. 14. Please note that the Draft Report incorrectly attributed this reference to Kent McNeil.

²³ Exhibit C3-3, First Nation Major Projects Coalition, p.7.

²⁴ Transcript Vol. 12, p. 591.

²⁵ Transcript Vol. 9, p. 410-411.

Although grateful for access to electricity, First Nation presenters expressed concern about the conflicts in use of traditional lands without corresponding benefits,²⁶ and non-integrated communities expressed serious reservations about their continued dependence on fossil fuels for electricity.

3.0 Overview of the BCUC, the UCA and the BCUC's Involvement with Indigenous Peoples

3.1 History of the BCUC

In British Columbia, the Public Utilities Commission was established in 1938 by the *Public Utilities Act*²⁷ (PUA) to regulate provincial public utilities including natural gas and electricity utilities. The PUA was eventually repealed and replaced in 1973 by the *Energy Act*,²⁸ which established the Energy Commission, in part, to regulate energy utilities within the Province. In 1980, the legislature repealed the *Energy Act* and passed the *Utilities Commission Act* (UCA),²⁹ thereby creating the BCUC. Since its enactment in 1980, the UCA has been amended a number of times; however, there is no evidence that there was any First Nations consultation regarding the enactment of the UCA or its amendments.

Similarly, the BCUC does not have specific processes or procedures for evaluating applications from Indigenous utilities. They are evaluated under the same criteria as all other applications from public utilities. In 2010, as a result of the *Carrier Sekani* and *Kwikwetlem First Nation* British Columbia Court of Appeal decisions,³⁰ the BCUC developed First Nations Filing Guidelines for Crown Utilities after a 60-day comment period where regulated utilities, the public, and two First Nations provided comments.³¹

Today, the BCUC has approximately 60 staff and 10 commissioners, with skillsets primarily in accounting, finance, engineering, economics, and law. While they come from diverse backgrounds, until recently there was no way of knowing whether this included employees or commissioners who identify as Indigenous or are First Nation members.

3.2 Overview of the UCA, the *Clean Energy Act* and the BCUC's Involvement with Indigenous Peoples

Entities that provide energy services and products for compensation in British Columbia are defined as “public utilities” under the UCA, and are therefore subject to regulation by the BCUC in accordance with the provisions of the Act. Regulated utilities must follow a number of requirements, such as: receiving approval for the construction of new projects, providing information to the BCUC when requested, not discriminating between customers, and receiving approval for rates charged to customers. There are some exceptions from the definition of a public utility, including municipalities or regional districts that provide services within their own boundaries, and a person who provides services to employees or tenants.

²⁶ Transcript Vol. 11, p 537.

²⁷ *Public Utilities Act*, S.B.C. 1938, c.47.

²⁸ *Energy Act* S.B.C. 1973, c.29.

²⁹ *Utilities Commission Act* S.B.C. 1980, c. 60 revised by R.S.B.C. 1996, c. 473.

³⁰ *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67; *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68.

³¹ BCUC 2010 First Nations Information Filing Guidelines for Crown Utilities, p.2, retrieved from:

https://www.bcuc.com/Documents/Guidelines/2010/DOC_25327_G-51-10_2010-First-Nations-Information-Filing-Guidelines.pdf.

Notably missing from the UCA, though, is the notion of a monopoly utility – likely because at the time the UCA was enacted, a monopoly was the default for natural gas and electric utilities. However, over the past 20 years, the landscape has changed substantially, and some utilities now operate in markets with a significant amount of competition. Examples include the provision of thermal energy services for in-building heat and hot water, and electric vehicle charging infrastructure.

Triggered in large part by the proliferation of thermal energy services, in 2012 the BCUC conducted an Inquiry that resulted in the Report on the Inquiry into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives (AES Inquiry Report). As noted in that report, in general, a provider of services which meets the definition of a “public utility” in the UCA should be subject to regulation where natural monopoly characteristics are present and consumers require protection.³² The objective of the BCUC is the “protection of the public interest by regulating public utilities to ensure that they provide safe and reliable service at reasonable prices” to “customers, who are often captive.”³³ The AES Inquiry Report also states that if monopolistic elements are not present, economic regulation is not required.

Given the focus of the UCA on setting rates that are just, reasonable and not unduly discriminatory or preferential, and the need to make public interest determinations, the BCUC is focused primarily on economic regulation. The economic aspect of regulation ensures that the “regulatory compact” is maintained. The premise of the regulatory compact is that ratepayers pay no more than is required to provide them with service and that utilities have an opportunity to earn a return on invested capital. Beyond economic regulation, however, the BCUC also has a role in ensuring that service is safe and reliable.

In 2010, BC enacted the *Clean Energy Act* (CEA).³⁴ The CEA, among other things, lays out the Province’s 16 energy objectives that the BCUC is required to consider when assessing energy supply contracts,³⁵ long-term resource management plans,³⁶ expenditure schedules,³⁷ and infrastructure projects.³⁸ One of these objectives is “to foster the development of first nation and rural communities through the use and development of clean or renewable resources.”³⁹ When considering these energy objectives, the BCUC must balance the cost of contracts and projects against the requirement that rates be just and reasonable. The CEA also establishes a First Nations Clean Energy Business Fund. The fund provides capacity and equity funding as well as revenue sharing opportunities between the BC Government and eligible First Nations.⁴⁰

More generally, the BCUC is bound by court decisions affecting utility regulation in BC, and more broadly in Canada, particularly in respect of First Nation consultation for utility infrastructure projects.

³² BCUC, FortisBC Energy Inc. Alternative Energy Solutions and Other New Initiatives (AES) Inquiry Report (Dec 2017), p.15, retrieved from: https://www.bcuc.com/Documents/Decisions/2012/DOC_33023_G-201-12_FEI-AES-Inquiry-Report_WEB.pdf.

³³ SSL-Sustainable Services Ltd. Status as a Public Utility under the UCA, Final Order G-104-18 dated June 5, 2018, p.9.

³⁴ *Clean Energy Act*, S.B.C. 2010, c. 22.

³⁵ *Utilities Commission Act* (UCA), RSBC 1996, c.473, s.71.

³⁶ UCA, RSBC 1996, c.473, s.44.1(8)(a).

³⁷ UCA, RSBC 1996, c.473, s.44.2(5) and (5.1).

³⁸ UCA, RSBC 1996, c.473, s.46(3.1) and (3.3).

³⁹ *Clean Energy Act*, s.(2)(l).

⁴⁰ Government of British Columbia, First Nations Clean Energy Business Fund (Oct 2019), retrieved from:

<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-clean-energy-business-fund>.

In Section 3.3 below, the Panel discusses the BCUC decision that became the impetus for this Inquiry.

3.3 Spirit Bay Utilities Application - First Nations Utilities Not Included in Municipal Exception

On June 1, 2016, Spirit Bay Utilities sought to exempt, pursuant to section 88(3) of the UCA, their ocean thermal energy, gaseous propane and electricity generation and distribution systems from the application of Part 3 of the UCA, Regulation of Public Utilities. The exemption request excluded section 42 of the UCA, the duty to obey orders, in relation to any safety orders made by the BCUC.

As an alternative request to the section 88(3) exemption, Spirit Bay Utilities requested the BCUC to direct, pursuant to section 72 of the UCA, that Beecher Bay First Nation is a municipality or regional district for the purposes of the UCA. This would except the First Nation from the provisions of the UCA solely applicable to public utilities.

Spirit Bay Utilities explained that Spirit Bay Developments Limited Partnership (LP), which is 51% owned by the Beecher Bay First Nation and 49% owned by a family-controlled entity, was created to facilitate the development. Pursuant to its Land Code enacted under the FNLMA, the Beecher Bay First Nation created zoning, land registry, property taxation laws, and amended its Land Code to allow for 99-year leases. Spirit Bay Utilities stated it would be initially majority owned by the Beecher Bay First Nation which would ultimately, over time, wholly own it. The partnership would oversee the acquisition of the utility assets from the LP and the ongoing operation, maintenance and administration of the utility.

The Beecher Bay First Nation was planning to develop a residential community (“Spirit Bay Community”) on part of this reserve by making land available for development under long-term leases. These lands would not be surrendered as that term is defined under the *Indian Act*. They would remain under the control and governance of the Beecher Bay First Nation in accordance with its comprehensive Land Code.

In terms of the provision of utility services, Spirit Bay argued that the Land Code does two things:

1. gives the Beecher Bay First Nation the powers of a government; and
2. provides the Beecher Bay First Nation with jurisdiction over the provision of utility services including providing them. The Beecher Bay First Nation established the Spirit Bay utility to provide the utility services to the Spirit Bay Community. Without these services its development would not proceed.

Spirit Bay Utilities argued that under this Land Code, the Beecher Bay First Nation, through its council, has very broad power to make laws. Further, Spirit Bay Utilities stated that section 38 of the Land Code provides for an optional dispute resolution mechanism in relation to First Nation land that is in addition to all other civil remedies. The Beecher Bay First Nation claimed that it had at least comparable law-making authority to that of a municipality or regional district and would be exercising this authority with respect to the Spirit Bay Utilities by enacting the Beecher Bay Spirit Bay Utilities Law.⁴¹

⁴¹ Spirit Bay Utilities Ltd., Application for an Exemption Pursuant to Section 88(3) of the UCA or Declaration Pursuant to Section 72(Spirit Bay Utilities Exemption Application), pp. 1–3.

The BCUC found that the municipal exception from the definition of a public utility under the UCA did not apply:

The BCUC found that if Spirit Bay Utilities provided energy to the Spirit Bay community for compensation, it would be a public utility within the UCA. It further found that section 88 of the *Indian Act* continued to apply to Beecher Bay, despite the Land Code enacted pursuant to the *First Nations Land Management Act (FNLMA)*. The UCA, which is a provincial law of general application, had not been displaced by the FNLMA or the Land Code, and as such, it applied to the proposed utility. On the basis that the First Nation fell outside the definition of municipality as defined by the *Interpretation Act*, which refers to municipal corporations or regional districts defined in the *Local Government Act*. Neither the Spirit Bay Utilities corporation nor the partnership fell within this definition, and therefore the municipal exclusion did not apply.⁴²

In its decision, the BCUC also denied the utility's alternative request for an exemption, finding that it did not meet the test set out in the decision on the Canal Plant Agreement Exemption application which allows an exemption, "...with the advance approval of the LGIC, when such exemption serves the objects and purposes of the [UCA] and it is in the public interest to do so."⁴³ Further, since the proposed utility was a monopoly and there was no alternative regulatory body, an exemption as set out in the AES Inquiry Report was not warranted.

The BCUC decision raised questions as to whether First Nation utilities ought to be regulated differently under the UCA, and whether special provisions may be needed.

3.4 BCUC Proceedings Impacting Indigenous Peoples

In Section 3 of its Draft Report, the BCUC provided an outline of the main processes by which it has historically engaged with First Nations. This includes:

- The assessment of the adequacy of a public utility's consultation with Indigenous peoples, for example, in infrastructure construction projects;
- Approval of energy supply agreements involving First Nations Independent Power Producers (IPPs); and
- Other proceedings with significant First Nations impact or involvement.

4.0 Discussion and Recommendations

In this section, we review the evidence and comments we received and provide our discussion, comments, findings, and Final Recommendations.

We first review DRIPA and Reconciliation. Then we consider the regulatory and economic context, relating to Indigenous issues generally and utility regulation specifically. Then we lay out the evaluation framework that will guide our considerations and Final Recommendations.

In the sections that follow we consider the questions posed in the OIC. First we consider the regulation of monopolies and the definition of an Indigenous utility. We then consider the status of the land on which an

⁴² *ibid.*, pp. 1–3.

⁴³ In the Matter of An Application by FortisBC Inc. for an Exemption from the Act regarding the Canal Plant Agreement Subagreement, Order G-41-06, Appendix A, p. 6.

Indigenous utility potentially operates and the First Nations governance structure on that land. In doing so we consider the current jurisdiction of the UCA in those circumstances and provide Final Recommendations regarding the regulation of Indigenous utilities on that land.

We also address issues that arose in the Inquiry process concerning how existing regulations affect Indigenous utilities' access to markets.

4.1 Reconciliation

Since the issuance of the Draft Report, the Government of British Columbia enacted the DRIPA. In its guidance for final submissions, the BCUC asked participants to consider how the implementation of the DRIPA should impact, if at all, the BCUC's recommendations. On a related matter, the BCUC also asked if it should include the facilitation of economic opportunities for First Nations in its recommendations.

Throughout the workshops, various participants pressed the Panel to ensure that its recommendations reflect reconciliation and the DRIPA. Beecher Bay and Adams Lake urged the Panel to consider reconciliation as its first task and seriously seek to incorporate Indigenous peoples' perspective.⁴⁴ In addition to suggesting that the recommendations be reframed to affirm the rights of Indigenous people to self-determination and self-government, their submission proposed a collaborative process to develop substantive regulatory/legislative changes beyond this Inquiry. They further proposed an incremental approach to recognition of jurisdiction, beginning with an exemption for certain utility activities on certain Indigenous lands and suggesting an opt-in approach that enables Indigenous Nations that wish to use the BCUC's existing regulatory structures to do so.⁴⁵ They further suggested that the BCUC should work with First Nations to develop capacity to regulate utilities.⁴⁶

While acknowledging the need for the Panel to consider the protection of ratepayers and impacts on incumbent utility providers, Beecher Bay and Adams Lake submit that:

...the primary goal of this Inquiry should be to determine ways to support Indigenous Nations as they continue to reclaim their capacity for regulation of their lands and resources, which may include providing capacity building support to certain Indigenous governments who request assistance in developing best practices related to taxpayers.⁴⁷

Some participants, such as the Collective First Nations and CFN-GBI, refer to the *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples (Reconciliation Principles)*.⁴⁸ They state that the mandate for this Inquiry includes the enhancement of First Nations' participation in the energy sector through such things as self-regulation on traditional territory and lifting restrictions on wheeling electricity,⁴⁹ would assist the Province's implementation of UNDRIP.⁵⁰ The Collective First Nations state that:

⁴⁴ Beecher Bay and Adams Lake Comments on Draft Report, pp. 1, 5. CFN-GBI Comments on Draft Report, p. 2.

⁴⁵ Beecher Bay and Adams Lake Comments on Draft Report, pp. 1 – 2. FortisBC Comments on Draft Report, p. 16. Exhibit E-10, CERG, p. 8.

⁴⁶ Beecher Bay and Adams Lake Comments on Draft Report, p. 3.

⁴⁷ Beecher Bay and Adams Lake Comments on Draft Report, p. 5.

⁴⁸ <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/about-the-ten-principles>

⁴⁹ "Wheeling" electricity refers to the transportation of electricity across transmission lines.

⁵⁰ CFN-GBI Comments on Draft Report, p. 2. Leq'á:me I Comments on Draft Report, p. 9. Collective First Nations Comments on Draft

Reconciliation means working with First Nations to develop resources in their territories by their own standards and laws. It means First Nations pursuing their economic development so they ... no longer have the highest unemployment, are the lowest revenue generators and are dependent on the Federal Government.⁵¹

They further submit that since BC Hydro has committed to voluntarily comply with UNDRIP and the Calls to Action of the Truth and Reconciliation Committee, the BCUC does not need to concern itself with the impact its recommendations may have on BC Hydro.⁵²

CFN-GBI refers to the purpose of the Inquiry to “provide meaningful policy recommendations to Government,” stating that “...to be meaningful, these recommendations must recognize the full policy context into which these recommendations will land. Recent legislation that precisely deals with one of the core elements of this inquiry – reconciliation – must surely meet the test of being a relevant part of that context.”⁵³

Leq’á:mel First Nation feels that the Inquiry provides a platform for a meaningful Input from Indigenous groups as to the oversight of the development of future Indigenous utilities, and that the BCUC’s Final Report should contain an outline for moving forward on an “action plan” set out under Article 4 of UNDRIP.⁵⁴

BC Hydro expresses an alternative view. It asserts that aside from the BC Energy Objectives “to foster the development of first nation and rural communities through the use and development of clean or renewable resources,”⁵⁵ the BCUC is not empowered or required to do anything more than what it is currently under the UCA until the Province has undertaken its process to amend the UCA to align with the DRIPA.⁵⁶

FortisBC states that while more work is needed on reconciliation and the DRIPA, the proposed recommendations in the Draft Report have the potential to be implemented over a relatively short time horizon.⁵⁷

In the Draft Report, the BCUC summarized the Articles of UNDRIP that participants considered were relevant to the issues in this Inquiry.⁵⁸ Westbank First Nation submits that the BCUC should also consider Article 25⁵⁹ :

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

West Moberly highlights that Article 37(1) supports the full recognition of historic treaties, stating:

Report, pp. 7 – 8. Exhibit E-10, CERG, p. 21. Collective First Nations Reply Comments on Draft Report, p. 4.

⁵¹ Collective First Nations Final Argument, p. 6.

⁵² Collective First Nations Comments on Draft Report, pp. 2 – 4.

⁵³ CFN/GBI Comments on Draft Report, p 2.

⁵⁴ Comments on Draft Report, pp. 5, 7 and 8.

⁵⁵ *Clean Energy Act, section 2(l)*

⁵⁶ BC Hydro Comments on Draft Report, p. 2.

⁵⁷ Fortis BC Comments on Draft Report, p. 16.

⁵⁸ Namely, Articles 3, 4, 5, 18, 19, 20, 23, 26 and 32.

⁵⁹ Westbank First Nation Comments on Draft Report, pp. 1 – 2.

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.⁶⁰

The BCUC wishes to correct an inadvertent error in Section 4 of the Draft Report. As noted by Westbank First Nation,⁶¹ the reference to UNDRIP Article 26.2 on page 33 was incomplete, and should have read:

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

In the Draft Report, we acknowledged that participants in this Inquiry have raised two issues which affect any potential framework for regulation of Indigenous utilities: the jurisdiction of Indigenous Nations to enact laws on their lands; and reconciliation. At the time of the writing of our Draft Report, we considered both issues to be beyond the BCUC's jurisdiction as an economic regulator and not specifically addressed in the OIC. Despite that, we considered these issues to be fundamental in setting the context for consideration of the items in the OIC's terms of reference, and the later discussion around our draft recommendations. As we will discuss later in this Final Report, the issue of jurisdiction is dependent on the specific land context applicable to different First Nations. Before turning to the issue of jurisdiction, however, we consider the issue of reconciliation as it is incorporated into the Province's mandate.

4.1.1 Draft Reconciliation Principles that Guide the Province's Relationship with Indigenous Peoples

As referenced by some participants,⁶² the Government of British Columbia introduced a set of draft principles to guide the Province's relationship with Indigenous Peoples (Reconciliation Principles).⁶³ These principles describe the government's responsibility in several areas:

- changes in operating practices and processes to recognize self-determination and self-government;
- the conduct expected of government employees dealing with Indigenous peoples;
- the need for treaties, agreements and other constructive arrangements to be based on recognition of inherent rights and respect; and
- collaborative and constructive approaches to achieving free, prior and informed consent to actions by the provincial government that affect Indigenous people and Indigenous right and other principles.

These principles guide the BC Public Service in its work to adopt and implement the UNDRIP and the calls to action described by the Truth and Reconciliation Commission.

⁶⁰ West Moberly Reply Comments on Draft Report, p. 3

⁶¹ Westbank First Nation Comments on Draft Report, pp. 1 – 2.

⁶² Collective First Nation Comments on Draft Report, p. 3

⁶³ Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples.

https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf

4.1.2 The DRIPA

On November 28, 2019, the British Columbia legislature unanimously passed the DRIPA⁶⁴. The DRIPA affirms the application of UNDRIP to the laws of British Columbia, contributes to its implementation and supports the affirmation of and development of relationships with Indigenous governing bodies.⁶⁵ This piece of legislation aims to make BC laws consistent with UNDRIP through the preparation and implementation of an action plan made in consultation and cooperation with the Indigenous peoples of BC.⁶⁶ The DRIPA also authorizes members of the Executive Council to enter into agreements relating to the joint exercise of statutory decision-making power with Indigenous governing bodies, and/or agreements respecting prior consent of the Indigenous governing body before the exercise of a statutory power of decision.

4.1.3 Impacts of the Reconciliation Principles and the DRIPA on BCUC Mandate

Although the BCUC is independent of the provincial government in the exercise of its authority, it is guided by the broad policy directions of government. While the exercise to ensure the laws of BC are consistent with UNDRIP is not yet complete, the Panel has been persuaded to incorporate the policies and the principles reflected in the DRIPA into the Final Report recommendations. The BCUC is not empowered to unilaterally undertake significant changes outside of its legislated mandate, but as an independent regulatory agency, the BCUC considers all applicable government policy and legislative directives, including both the Reconciliation Principles and the DRIPA, in carrying out its mandate.

In its comments on the Draft Report, FortisBC points out that the aims set out in the DRIPA will take time to implement.⁶⁷ The Panel agrees. The Panel is aware that the DRIPA mandate is complicated and fraught with issues created by over a century of colonization. These are complex matters that have heightened importance when dealing with traditional lands beyond the reserve. This does not mean that the Panel has not considered potential reconciliation measures in relation to these lands as argued by many Indigenous participants. The Panel considers it important to put forth meaningful recommendations that could be implemented in the short term to enhance the aims of reconciliation with Indigenous peoples so that the broader aims of reconciliation and the DRIPA can be achieved. These will address possible changes internal to BCUC, legislative changes, as well as recommendations that require cooperation and participation of the incumbent utilities in the province.

As the Executive Council works on the implementation of the DRIPA mandates regarding agreements relating to the joint exercise of statutory decision-making power with Indigenous governing bodies, the Panel believes that the BCUC can and should be undertaking activities through various means to enhance this objective. For example, the Panel recognizes that Indigenous peoples may not see themselves reflected in the structure and make-up of BCUC. Similarly, it is unlikely that Indigenous participation was considered in the formulation of BCUC's policies and procedures. The Panel agrees that this must be rectified through mechanisms to ensure the inclusion of Indigenous peoples at all levels within the BCUC, as well as a review and, where necessary, revision of the BCUC's current policies and processes.

⁶⁴ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

⁶⁵ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, s. 2.

⁶⁶ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 s. 3 and 4.

⁶⁷ Fortis BC Comments on Draft Report, p. 16.

The concept of reconciliation implies the development of meaningful relationships with Indigenous peoples and the creation of common goals. The Panel notes the words of the Truth and Reconciliation Commission as set out in the Summary of the Final Report, “[T]he Commission defines reconciliation as an ongoing process of establishing and maintaining respectful relationships. A critical part of this process involves repairing damaged trust...and following through with concrete actions that demonstrate real societal change.”⁶⁸ The Royal Commission on Aboriginal People put forward an Agenda for Change that spoke to new structures of governance, new strategies for economic development and lasting change.⁶⁹

Acknowledging that reconciliation is a process of change through building a lasting relationship, the Panel recognizes that it will take more than merely revising policies or processes. It requires on-going engagement and change to develop, in collaboration with Indigenous representatives, a strategy to go forward.

4.2 Economic Participation and Public Utility Regulation

We heard in this Inquiry that owning a utility is important to many First Nations as a means to promote economic development on their land through various avenues:

- There are natural resources on First Nations lands that can be harnessed for the generation of energy – e.g. geothermal, wind, solar, hydro. Biomass can be converted to electricity, thermal energy or potentially renewable gas. However, to benefit from these resources, the Indigenous utility must have a customer.
- Historically, many projects sell electricity to BC Hydro, either through a Clean Power Call or through the Standing Offer Program.⁷⁰ However, the closure of the Standing Offer Program, BC Hydro forecasting a surplus and the recent drop in electricity prices have combined to significantly reduce those economic opportunities.
- Energy produced on First Nation land could be sold to residents of that particular territory. However, typically there is insufficient population to support an economically viable utility.
- First Nations in or close to urban areas have pursued a somewhat different model through land development initiatives with ancillary utility services. As they develop their land for commercial and residential customers, they also provide utility services. The nature of the service provided is varied – for example, the distribution of electricity and natural gas purchased at a bulk rate from a nearby utility, or the provision of thermal energy generated from ground or air-source heat pumps.
- A utility generates local employment opportunities and attracts commercial enterprises to communities.
- Utility revenues can support other community objectives.
- Owning the utility provides the First Nation an opportunity to potentially reduce rate or improve service reliability (generally for remote communities).

⁶⁸ Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, p.16.

⁶⁹ Highlights from the Report of the Royal Commission on Aboriginal Peoples: *People to People, Nation to Nation*, 1996, <https://www.rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018>.

⁷⁰ <https://www.bchydro.com/work-with-us/selling-clean-energy/standing-offer-program.html>

We also heard that BCUC regulation of a First Nation-owned public utility can impede these economic development benefits and runs counter to Indigenous reconciliation and economic and political self-determination.

The fundamental issue that we have been asked to address in this Inquiry is whether Indigenous utilities should be regulated under the UCA or under another mechanism, self-regulated, or unregulated⁷¹. In other words, should Indigenous utilities be subject to regulation? If so, why, how and to what extent should they be regulated?

In order to address this issue, we must answer the following questions:

- Why is regulation necessary at all?
- More specifically, why is regulation of public utility services necessary?
- If regulation of public utilities is necessary, is there something different or unique in the case of Indigenous utilities that warrants different treatment? If so, what should that treatment look like? If not, why not?

We begin by observing that proponents of Indigenous utilities emphasize that they wish to participate in energy projects (whether on their own or in partnership with third parties) in order to achieve specific goals including the following:

- To operate independently of the existing grid due to reliability and affordability concerns or lack of existing connections to the existing grid;
- To promote clean energy initiatives;
- To advance long-term sustainability goals;
- To serve residents in the community at a lower cost; and
- To build capacity and provide greater economic opportunity for their community.

Many parties argue that regulation of Indigenous utilities should support First Nations economic development. In particular, parties have commented on the importance of the following:

- having the flexibility to structure a utility and set rates in a manner that generates benefits to communities;
- extending jurisdiction for Band-owned and operated utilities beyond reserve boundaries onto traditional territory;
- changing the evaluation framework for Electricity Purchase Agreements (EPAs) involving Indigenous utilities; and
- lifting the prohibition on retail access for Indigenous utilities.

⁷¹ Exhibit A-5, BCUC letter dated May 10, 2019, p. 3.

For example, CFN-GBI submits:

the Commission's [draft] recommendations are not responsive to the strong message delivered throughout this inquiry: that as part of the reconciliation process, First Nations are looking for productive ways to enhance their participation in the energy sector, and that achieving that result will require both policy and regulatory changes. We believe that this inquiry has the opportunity to consider how First Nations might seek to participate in the energy business, and to address, in light of those participation objectives and models, how a regulatory regime could be designed that fostered real opportunity.⁷²

In this section of our Final Report, we have noted the importance of the role of public utilities in the economic development of the community they serve. In the ensuing sections, we will review the regulatory regime under which public utilities operate in BC and consider whether that regime promotes or hinders economic development. We then set out an evaluation framework for our response to the Inquiry questions and our Final Recommendations.

4.2.1 What is Public Utility Regulation?

The scope of this Inquiry is broad. The overarching question is:

*The commission must advise on the appropriate nature and scope, if any, of the regulation of Indigenous utilities.*⁷³

Generally, the regulation of public utilities in British Columbia includes not only the *Utilities Commission Act* but also includes:

- Various Government Directions, Special Directions and OICs issued to the BCUC and the regulated public utilities
- The *Clean Energy Act* (CEA)
- The *Gas Utility Act*
- The *Hydro and Power Authority Act*

Beyond those listed above, other regulations governing public utility operation include:

- Environmental permitting – utility projects may be subject to a number of Federal and Provincial approvals depending on the nature of their operations, for example, under the *Fisheries Act*, *Species at Risk Act*, *Environmental Assessment Act*, *Water Sustainability Act*, *Wildlife Act* and *Heritage Conservation Act*.
- Other permits and licenses – where a utility project interfaces with certain land uses, other approvals may be required, for example Ministry of Transportation and Infrastructure permits, railway crossing permits, municipal permits, and Agricultural Land Commission approvals.

⁷² Exhibit C20-6-CFN-GBI-Comments on Draft Report, p. 2.

⁷³ OIC No. 108, dated March 11, 2019

- Gas utilities and some geothermal operations are subject to regulation by the BC Oil and Gas Commission (OGC) as mandated by the *Oil and Gas Activities Act*.⁷⁴ BC OGC is responsible for assessing applications for industry activity, consulting with First Nations, landowners and rights holders, and ensuring industry complies with provincial legislation.
- Safety and standards regulations, for example, as administered by Technical Safety BC, BC OGC and Canadian Standards Association.

In addition, there are a myriad of other regulations that apply to public utilities, as they do to other sectors, for example:

- The *Employment Standards Act*;
- Workers compensation legislation
- The *Human Rights Act*
- The *Freedom of Information and Protection of Privacy Act*

This Inquiry has necessarily focussed on the economic regulation of utilities, which is largely governed by the *UCA* and the *CEA* – these enactments provide much of the legislative framework under which the BCUC operates. We have not inquired into, nor have we received evidence or submissions on, the effect of other enactments. Accordingly, we make no recommendations in these areas. The recommendations made in this report for the most part relate to the *UCA* and the *CEA*. Further, when we use, in this report, terms such as “regulation”, “utility regulation”, or “regulation of utilities”, we mean the economic regulation as practiced by the BCUC in respect of the provision of energy products and services by public utilities in British Columbia.

Public utility regulation, as laid out in statutes such as the *UCA*, *CEA* and various Government Directions is, in addition to providing rights and protections for both ratepayers and utilities, an expression of broader government energy policy. It is therefore sometimes impossible to separate comments and recommendations on public utility regulation from comments and recommendation of that broader government policy. For that reason, this report contains recommendations on such issues as the SOP program, retail transmission system access and unbundling as well as the implementation of some of the articles of UNDRIP.

4.2.2 Potential Challenges of Establishing a Public Utility

We now discuss some of the challenges that prospective utilities may face, regardless of whether they are regulated.

In the case of incumbent public utilities (e.g. BC Hydro and FortisBC), the barriers to entry into the market are high as a result of the large capital investment required to build the utility infrastructure (such as poles and wires, or pipelines) and the desire to avoid duplication of infrastructure within any particular service territory (due to concerns about the size of the infrastructure footprint and potential for stranded costs). These factors generally result in there being only one public utility service provider within the territory serving captive customers. In short, the public utility operates as a monopoly within a specific service area. Given this, it is no

⁷⁴ Additionally, some pressure piping and other equipment typically operated by gas utilities is subject to regulation by Technical Safety BC whenever used to transmit gas at lower pressures (less than 700 kPa).

surprise that there are only very few large public utilities in the province, although there are some very small-scale public utilities that serve areas such as ski resorts or housing developments.

Regulation is, therefore, only one potential barrier to entry. A more significant barrier is the large capital investments required. For instance, although municipalities have been excepted from public utility regulation since 1938,⁷⁵ only five municipalities exercise the right to operate and self-regulate electric utilities (Grand Forks, Nelson, New Westminster, Penticton and the District of Summerland).

The observation about high barriers to entry is not intended to discourage or question the capability of prospective Indigenous (or non-Indigenous) utilities. Rather, the Panel hopes that identifying such challenges can provide a helpful reference point for prospective utilities and highlight potential areas outside of utility regulation that policy makers may need to target to support the growth of Indigenous utilities. Additionally, some participants suggested there may be a role for the BCUC in capacity building in certain areas to assist Indigenous utilities in the early stages.

We acknowledge that a variety of potential public utility models exist, some of which are outlined in the example scenarios in section 5.2.4, and not all of the challenges discussed below are applicable to every model. Nonetheless, the Panel views that it may be helpful to highlight the challenges relating to economic viability, resourcing and rate setting that public utilities will have to successfully overcome in order to operate effectively.

Economic Viability

After addressing to the costs of starting a utility, prospective utilities then face the following challenges:

- **High fixed costs** – most utility models require significant upfront investment, for example, to construct (or acquire) generation and distribution infrastructure that have long lifetimes.
- **Securing financing** – both regulated and non-regulated utilities may face challenges securing financing to cover costs such as upfront investments. Lenders and equity partners will have to assess potential long-term risks associated with the utility. Government funding that is available to First Nations may assist with financing issues.
- **Customer base** – a new utility will need to attract enough customers from whom it will recover utility costs. The utility will either have to serve new customers, compete for customers of existing utilities, and/or acquire infrastructure or the rights to serve customers of existing utilities. Given that the vast majority of the province is already served by incumbent electric and gas utilities, this could present a significant barrier for new entrants.
- **Economies of scale** – establishing a utility of sufficient size to spread out the impact of fixed costs.
- **Cost of connecting to existing transmission or distribution infrastructure** – this can be particularly complex and expensive in remote locations. In this Inquiry, BC Hydro provided a description of the requirements for connecting to the grid, including relevant studies to be completed, and other tariffs that need to be followed.⁷⁶
- **Ensuring a reliable supply** – some forms of electricity generation, such as wind and solar, only provide intermittent power and may need to be combined with other options, such as battery storage, diesel

⁷⁵ *Public Utilities Act*, 1938, 2 Geo.5, c. 47, Statutes of British Columbia

⁷⁶ Exhibit C2-3, BC Hydro Response to BCUC IR 8.1

generation, or connection to an existing public utility service as back-up, to ensure customers receive uninterrupted supply.

- **Competition with self generation** – as technology evolves, there are increasingly affordable small scale “behind the meter” sources of generation that customers can install themselves, such as solar panels on roofs. Self generation reduces the overall demand or load for utilities.
- **Rate Structure Risk** – Will the proposed rate structure and rates recover the costs of operating the utility?

Resourcing

A public utility needs to have enough skilled staff to undertake both the day to day operations of the utility and the general oversight/ management functions, many of which may require highly specialized personnel. For example:

- General operation and maintenance activities, responding to outages;
- Managing the safety and reliability of the utility system;
- Meter reading and billing of customers;
- Dealing with customer complaints;
- Accounting;
- Strategic oversight (e.g. forecasting demand, setting rates, making decisions about capital investments); and
- Other management functions.

Rate Setting

Even for relatively small public utilities, setting the rate charged to customers can be a complex exercise. There are many considerations and trade-offs that can arise, for example:

- What is the total revenue needed each year to cover all fixed costs, operational costs, repayments of debt, etc.?
- What is the balance between a fair price for the customer and ensuring the utility makes enough money to cover its costs?
- How many years should the costs of large investments be spread over?
- What volume of energy sales (demand) is expected in the short and long term? Customer demand can be variable - what if demand is higher or lower than expected?
- As rates either increase or decrease, will customers be incented to use less or more energy as a result? Do customers have a choice to switch to other energy sources if rates are too high?
- Should all customer types be charged the same rates? Does it cost more to provide service to some customer types than others?
- Other than recovery of costs, what other utility objectives might be achieved in the setting of rates, and how might this affect customers? Some examples that we have heard in this Inquiry include: generating revenue to channel into other community initiatives; providing reduced rates for Elders; and attracting commercial or industrial developments in the community.

- How often should rates be reviewed?

As Indigenous utilities develop, they will need to be cognizant of the importance of developing strategies to overcome these challenges.

4.2.3 History of Public Utility Regulation in BC

The common view, at least since September 1980, has been that such public utilities ought to be subject to independent economic regulation by the BCUC pursuant to the UCA.⁷⁷ The rationale for such regulation is the need for an independent arbiter to balance the competing interests of ratepayers with those of the utilities, while taking into account the broader public interest. The UCA gives the BCUC, a third party independent regulatory agency, which has expertise in energy regulation, the mandate to regulate all public utilities in British Columbia. The BCUC ensures that utility rates are not unjust, unreasonable, unduly preferential or unduly discriminatory while at the same time giving utility shareholders an opportunity to earn a reasonable rate of return on their investments. The need for an independent regulator is seen as providing a safeguard against the tendency of monopolies to act in their own self-interest in terms of rate setting and capital investment.

Collective First Nations pointed out that both BC Hydro and the Lower Mainland portion of FortisBC Energy Inc.'s gas distribution system were free of regulation in their formative years. Even after they became regulated pursuant to the UCA, the extent of BCUC regulation has been limited by government directions issued from time to time. Collective First Nations said that in short, it may be a fallacy to assume that an independent regulator is a more effective or better means of regulatory protection for the public than any other form of regulation, such as self-regulation. Collective First Nations argued instead that "First Nations must be allowed to regulate the utilities they own or control."⁷⁸ Furthermore, they argued that this right to regulate:

...is a matter of reconciliation and UNDRIP supported by reference to the Framework Agreement on First Nations Land Management, the First Nations Land Management Act, the historical regulation free period public utilities like BC Hydro and the Lower Mainland portion of FortisBC Energy Inc. gas distribution system enjoyed in their formative years and the exemption municipalities and regional districts enjoy under the UCA. This right to regulate may also flow from the provisions of Treaty settlements.⁷⁹

The Collective First Nations argued that Indigenous utilities ought to be entitled to the same opportunity on the basis of parity.

It is true that BC Hydro (as a combined gas and electric utility owned by the Province) built much of the existing utility infrastructure in this Province (including construction through Indigenous communities) largely free of the constraint of economic regulation. However, it is not possible to conclude that the outcome is better than it would have been if there had been economic regulation. It is possible, for example, that regulation in the early years could have resulted in even lower rates and better outcomes.

⁷⁷ Collective First Nations' Final Argument, p.3.

⁷⁸ Collective First Nations' Final Argument, p.3.

⁷⁹ Collective First Nations' Final Argument, pp.3-4.

We also note that while this build-out of Crown-owned electric utility infrastructure was taking place, investor-owned electric utilities were being granted franchises to operate in other parts of the province and were subject to varying degrees of regulation.

Furthermore, it is no longer the prevalent view that construction of utility infrastructure in the province should proceed in the absence of economic regulation. Section 45 of the UCA states that:

Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

Regulation viewed objectively can be “something that can benefit the community as a whole.”⁸⁰ Implicit in that proposition, though, is the recognition that there must be some trade-offs amongst the different private interests of affected parties, like those specific to small consumers, large industrial customers, shareholders, lenders, competitors, low-income groups, environmentalists and rural residents. In addition, regulation must balance not only competing private interests “but the various components of the public interest – long-term versus short-term needs, affordable rates versus efficient price signals, environmental values versus global competitiveness. That is how regulation serves the public interest.”⁸¹

We are concerned about the potential lack of ratepayer protection for customers, Indigenous or non-Indigenous, in the absence of any regulation. The fact that the Legislature eventually made most public utilities subject to BCUC regulation suggests that from a policy perspective, the absence of any public utility regulation was eventually perceived as something that is undesirable and far from ideal.

We also note that even if Indigenous utilities were free of regulation, they may find it difficult to replicate, and benefit from, the same economic advantage that BC Hydro enjoyed in that regulation-free period. Now there is utility infrastructure in much of the province and economies of scale may no longer be available.

Notwithstanding, we accept that the Province, with jurisdiction over matters relating to electric and gas utilities, has the right to determine the means of regulation of these activities. We also acknowledge that many First Nation interveners are asserting the same right to determine the means of regulation of Indigenous utilities. We accept there are unique considerations arising from the special nature and status of Indigenous Nations which may support a different form of regulation for Indigenous utilities than that which currently exists under the UCA. Further, UNDRIP supports the right of Indigenous peoples to economic and political self-determination.

4.2.4 Examples of Indigenous Utilities

Some participants argued that owning, operating and self-regulating a utility is necessary to the economic development of a First Nation. This allows the First Nation to have control over such factors as:

- The nature of the energy source;
- The size of the utility infrastructure – i.e. aligning the size with the service area and demand; and
- The rates charged by the utility to the customers on its lands.

⁸⁰ Exhibit A-8, Hempling’s Utility Regulation Report, p. 2.

⁸¹ Exhibit A-8, Hempling’s Utility Regulation Report, p. 2.

Before discussing the role of utility regulation in economic development, we believe it is useful to consider some examples of such utilities. These examples are not intended to describe any specific projects, although there may be similarities to real-life examples. The subsequent discussion in this report is, at times, quite technical – the subject matter is complex in a number of dimensions: technically, economically, and regulatory. These scenarios provide concrete examples of the interplay between these dimensions.

The decision to build a utility could be motivated by ready access to a potential energy source – wind, solar, geothermal, run of river – on the First Nation’s land. However, as we have discussed, the population of most First Nations does not create enough critical mass to make a utility economically viable if it only operates on that First Nation’s land. Alternatively, the energy source could be developed by the First Nation and the resulting electricity or natural gas is sold to a retail customer outside of the territory, or wholesaled through an Energy Purchase Agreement (EPA), to a nearby incumbent utility.

As we make our Final Recommendations in the following Sections, we will use examples like these set out in the scenarios below to illustrate the application of our recommendations. These scenarios may also be of further use as a reference point when reviewing our Final Recommendations after the report is issued.

Scenario 1: A remote, off grid, community is served by BC Hydro, which owns the diesel generation and the distribution system. The local First Nation wants to develop a clean energy source as a replacement for the diesel generated electricity and either sell the energy to BC Hydro which would then distribute and sell it to the community or acquire the distribution system from BC Hydro and operate its own utility. In either scenario some of the existing diesel generation may be retained for peak demand and backup. In either scenario, the First Nation would be acting as a “public utility.”

Issues:

- What regulatory scheme should apply? Specifically, the BCUC or another regulatory scheme?
- If the First Nation engages a third party – Indigenous or non-Indigenous - to build and/or own the utility, what regulatory scheme applies?
- What if the distribution system serves customers off reserve – on traditional territory?
- If, as a result of the change, the community loses its Zone II subsidy,⁸² what justification, if any, is there for BC Hydro ratepayers to continue subsidizing the community’s electricity rate? Or should the subsidy be borne by BC taxpayers instead?
- If any of BC Hydro’s generation assets are stranded, who bears the cost?
- Should we recommend that the province develop a policy for a smooth transition of assets that does not unduly harm BC Hydro’s ratepayers?

Scenario 2: A First Nation in an urban area seeks to develop market housing and commercial lots on designated lands within its reserve. The development plans require the development to be zero emission and to meet this in an affordable way, the First Nation plans to build, own and operate a district heating system powered by geo-exchange to provide heat and hot water. As the owner/operator of the geo-exchange system, the First Nation is acting as a public utility as that term is defined in the *UCA*.

⁸² Customers in off-grid communities served by BC Hydro do not pay the full cost of service, but pay a “Zone II” rate that is subsidized by other BC Hydro ratepayers.

Issues:

- What regulatory scheme should apply to the district heating system?
- What if the district heating system serves customers adjacent to but not on reserve land?
- If, instead of the First Nation building, owning and operating the district heating system, it invited a third party to do so. What regulatory scheme should apply in this case? Does the regulatory scheme depend upon any ownership that the First Nation takes in the third party?

Scenario 3: A First Nation with a number of relatively widely dispersed reserves situated in a rural, on-grid area within an incumbent electric utility's service territory (e.g. BC Hydro or FBC), wants to develop, own and operate a geothermal co-generation plant⁸³ in or near its largest community. It intends to generate electricity for distribution to all of its reserves and use the otherwise waste heat to provide heat and hot water to the immediately adjacent community. Both the plant and the community are located on the reserve land.

As all of the First Nation's communities are connected to the incumbent utility's electricity distribution grid, the First Nation does not plan to build any new wires to connect them to the geo-thermal plant. However, it seeks an agreement (a "wheeling agreement") to allow it to transfer electricity through the incumbent utility's existing wires in order to distribute its electricity to all of its communities.

The owner/operator of the co-generation system is a "public utility" as defined in the *UCA*.

Issues:

- What regulatory scheme should apply to the co-generation system?
- Can the First Nation-owned co-generation system sell energy to any customers that are within the incumbent utility's service territory, or would it be subject to restrictions on whom it can serve within the service territory (i.e. only First Nation members or First Nation-owned businesses)?

Scenario 4: Same scenario as Scenario 3, except that in order to wheel electricity to some of the communities, access to the incumbent utility's transmission grid (as distinct from the distribution grid in the previous scenario) is required. The incumbent utility is BC Hydro.

Direction 8 to the BCUC prohibits "direct or indirect provision of unbundled transmission services to retail customers in British Columbia, or to those who supply such customers."

Consider the same issues as set out in Scenario 3 above. Does Direction 8 make any difference to the analysis?

Scenario 5: A First Nation seeks to develop a renewable generation plant (e.g. run of river, wind) on its territory and has identified sites close to transmission service provided by an incumbent utility (e.g. BC Hydro or FBC). It does not intend to use the electricity it generates, but instead seeks an EPA with the incumbent utility. However, it appears that the price that the incumbent utility is willing to pay is not sufficient for the First Nation to recover its costs.

⁸³ A plant that generates electricity from steam and uses waste heat from the production of steam to heat nearby buildings.

Issues:

- What should the incumbent utility consider when establishing a purchase price? Should a Crown-owned utility (e.g. BC Hydro) have a different approach than an investor-owned (i.e. private) utility (e.g. FBC)?
- Should the EPA price be subsidized by the incumbent utility's ratepayers? Or BC taxpayers?

Scenario 6: A First Nation seeks to develop a renewable generation plant (e.g. run of river, wind) on its territory and has identified sites close to transmission service provided by an incumbent utility (e.g. BC Hydro or FBC). It does not intend to use the electricity itself, but instead has a customer in the incumbent utility's service territory several hundred miles away. The electricity can be delivered to that customer by wheeling it across the incumbent utility's transmission system.

When the First Nation utility sells electricity to customers physically located in the service territory of the incumbent utility, the incumbent utility's electricity demand will decrease and, all else equal, costs for the incumbent utility's customers will increase.

Issues:

- Can the resulting rate-increase to existing utility customers be justified? Is this in the public interest? If not, are there other reasons to justify the resulting rate increase?
- If the incumbent utility is BC Hydro, or if delivery to the customer required wheeling across BC Hydro's transmission system, Direction 8 would prohibit the wheeling agreement and effectively prevent the First Nation from carrying out the project.

Scenario 7: A First Nation plans to build and operate a geo-thermal utility to provide heat and hot water to all residents on the reserve, who may or may not be members of the band. The First Nation has received a number of grants that cover construction costs and it can cover the maintenance costs in its annual budget. Therefore, it does not plan to charge its customers.

Under the UCA, if a person engages in "the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation" it is considered a public utility.

Issues:

- Given the definition of "public utility" under the UCA, what, if any, regulatory scheme should apply to the geothermal utility in this example?

Scenario 8: The Indigenous government of a large territory is the owner/operator and regulator of an electric distribution utility in this territory. It subsequently acquires all transmission assets on its territory, including the transmission lines and transformer stations from which its distribution utility takes service.

Issues:

- How should the transmission assets be regulated with respect to compliance with the Mandatory Reliability Standards program requirements?

Scenario 9: A First Nation in an urban area partners with an investor to build, on the First Nation's land, a facility to produce biogas from organic waste. The biogas will be upgraded to pipeline quality natural gas and sold to

FortisBC, who supplies natural gas to the urban area. Under the UCA, approval of an EPA will be required by the BCUC.

Issues:

- Are there any specific issues related to the First Nation involvement that should be considered in the BCUC's review of the EPA? If so, is this consideration dependent on the percentage of First Nation ownership in the facility? If the facility is not located on reserve or treaty land (i.e. it is on fee simple land, owned or leased by the partnership), does that raise different issues?

These examples outline various regulatory issues facing Indigenous utilities. In the coming sections, we review these issues in the context of the DRIPA, which “affirm[s] the application of the [UN] Declaration [on the Rights of Indigenous Peoples] to the laws of British Columbia.”⁸⁴ In the following section, we outline the evaluation framework we will use for our recommendations.

4.2.5 UNDRIP, Self-Determination and Participation in the Economy

In its preamble, UNDRIP states that the Charter of the United Nations affirms the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and *freely pursue their economic, social, and cultural development [emphasis added]*. UNDRIP goes on to specifically lay out rights concerning economic development that apply to Indigenous peoples.

In British Columbia, as in most jurisdictions, the ability of any person to “freely pursue their economic... development” by operating a public utility is limited by various public interest considerations. Prohibitions on the right of a person to freely pursue economic development are not restricted to the utility sector. For example, a person can only operate a retail store where bylaws allow them to do so; there are goods and substances that a person can’t sell to the public; and certain professions require a license in order to practice.

In this report, we consider how to respect the unique rights of Indigenous peoples as recognized by UNDRIP and the Constitution as they relate to the prohibitions that would otherwise apply to public utilities in similar circumstances. If so, an Indigenous utility could, for example, operate in an incumbent utility’s service territory; enter into an EPA under terms and conditions that would not normally be approved; or wheel electricity across BC Hydro’s system for sale to a retail customer anywhere in the province.

In analyzing the special status of Indigenous Nations, the following summary of relevant UNDRIP provisions put forward by Beecher Bay First Nation and Adams Lake First Nation is helpful:⁸⁵

Article	Summary of Indigenous Peoples’ Rights	Application to This Context
3	Affirms the right to self-determination, which includes the right to freely pursue economic, social and cultural development.	This could include pursuing development of infrastructure, like utilities, to support and expand Indigenous community development.

⁸⁴ DRIPA Section 2(a)

⁸⁵ Beecher Bay First Nation and Adams Lake First Nation’s Joint Final Argument, pp. 4-5.

Article	Summary of Indigenous Peoples' Rights	Application to This Context
4	Affirms the right to autonomy and self-government in matters related to internal and local affairs and ways and means for financing autonomous functions	This could include the ability to make decisions respecting and regulate Indigenous utilities or to enter into agreements with other bodies such as the BCUC or another, Indigenous-led commission respecting regulation.
5	Affirms the right to maintain and strengthen distinct political, legal, economic, social and cultural institutions while also participating fully, where they so choose, in the political, economic and social and cultural life of the state.	The BCUC should broadly consider and work collaboratively with First Nations to identify the roles of Indigenous institutions in economic development and their relationship to "mainstream" institutions -such as in regulation of utilities.
20	Affirms the right to maintain and develop political, economic and social systems or institutions, and to be secure in and enjoy freely their traditional and other economic activities.	The BCUC should consider and contrast these rights with the experience of Indigenous peoples in the past (as discussed above) and seek opportunities to remove any existing barriers to fully realizing and recognizing these rights. In particular, the BCUC should consider the state's obligation to recognize and protect these lands with due respect to the traditions of the Indigenous peoples.
26	Affirms the right to traditional lands, territories and resources; the right to own, use, develop and control those lands; and that states shall give legal recognition and protection to these lands, territories and resources (with due respect to the Indigenous peoples' traditions and land tenure).	

Several interveners have urged us to take a broad, generous and liberal view and to adopt an Indigenous lens with respect to our recommendations. We agree with those sentiments, and believe that our analysis, to the extent feasible, should strive to reflect the UNDRIP principles, recognizing nonetheless the following shortcomings in this Inquiry:

- Deviations from the current regulatory framework will require legislative change, which is beyond the BCUC's jurisdiction and control.
- While we have heard from a cross section of Indigenous project proponents and existing utilities in the course of this Inquiry, what has been lacking is participation by individual ratepayers as to how their interests may be directly or indirectly affected. Similarly, there is no Federal government perspective in this Inquiry.
- Intervenors have pointed out that this Inquiry, including its Terms of Reference, was developed in the absence of any consultation with First Nations and did not incorporate Indigenous governance principles

and legal orders.⁸⁶ While we have endeavoured to encourage Indigenous communities to provide their input, there is no scope within the Inquiry for us to examine in a substantive manner the application of UNDRIP principles, principles of reconciliation or recognition of existing Aboriginal Rights and Title.

Although, as we previously noted, the exercise to align BC's laws with the provisions of UNDRIP is not yet complete the DRIPA affirms the application of UNDRIP to the laws of British Columbia. In our view, these specific rights should be considered as we respond to the Inquiry questions and make our Final Recommendations.

4.2.6 Evaluation Framework for the Report Recommendations

FNLC submits:

[u]nder the UCA, Indigenous utilities in BC are regulated as public utilities, which the FNLC asserts is an infringement of Aboriginal Title and Rights and yet another unwanted imposition of Canadian law into our inherent jurisdiction. Practically, it has the effect of discriminating against First Nations by hampering their efforts to attain self-determination. It does this by setting up administrative barriers under Part 3 of the UCA, such as lengthy rate application processes, and by applying a cost-benefit analysis that effectively excludes small utilities. The UCA has been criticized for adopting a narrow, economic-only analysis when considering rate-payer applications. Indigenous utilities may need to charge higher rates initially to reflect their small size and high start-up costs of renewable energy projects that do not benefit from the same subsidies as do the fossil fuel industry, or the economies of scale that large public utilities enjoy.⁸⁷

We agree with FNLC that the *UCA*, along with the related body of common law regarding public utility regulation, generally speaking, requires the BCUC to apply a somewhat narrow economic analysis to its regulation of public utilities. However, there are various sections of the UCA that require a broader public interest test to be applied. In addition, the CEA sets out a number of energy objectives that the BCUC must consider in certain aspects of public utility regulation.

In the following sections of this report, we consider the specific questions posed in this Inquiry. As we answer the questions and provide our Final Recommendations, we will apply the relevant articles of UNDRIP. In particular, we will consider whether the existing regulatory framework should be modified to remove any existing barriers to fully realizing and recognizing the rights articulated in UNDRIP. However, we will also consider other factors, such as the need to ensure protection for all customers of Indigenous utilities and the provision of safe and reliable public utility service for all ratepayers. There are reasons why almost every jurisdiction in the world requires some form of public utility regulation.

The Order-in-Council defines the term "Indigenous Nation." The definition includes First Nations identified in specific legislation, as well as treaties. These documents create distinctions in how the provincial government relates to that First Nation depending on the status of the specific lands in question. The Terms of Reference of OIC 108 poses its questions in that context. Therefore, our recommendations are nuanced and depend on the

⁸⁶ Beecher Bay and Adams Lake Final Argument, p. 3.

⁸⁷ C16-2-FNLC-WrittenEvidence, p. 10.

legal status of the specific Indigenous lands in question and the relationships between the Indigenous Nation and the provincial government in each case.

UNDRIP provides that Indigenous people have a right to self-determine their economic destiny. This right alone does not guarantee a positive outcome. In the previous discussion about the past build-out of utility infrastructure in the province, we noted that, while we can do no more than guess at what might have resulted ~~in~~ from a different regulatory environment, it was within the jurisdiction of the Province to determine how it should proceed. This is of particular note now that the utility infrastructure in the province is considerably more mature than it was at the time of BC Hydro's infrastructure build-out. Similar economies of scale may no longer be available. However, as new opportunities arise due to changing technologies, resource mix and industry structure, public utility regulation should be aligned to provide Indigenous peoples with a meaningful opportunity to self-determine their approach to capitalizing on those opportunities.

In all contexts, including in the case of Traditional Territories, there are incumbent public utilities, with existing assets, that those utilities operate for the benefit of all British Columbians, including Indigenous peoples. Our recommendations must also take into account these public utilities, their assets and their customers customers. We also respect the rights of Indigenous peoples to economic self-determination and self-governance, as laid out in the Articles of UNDRIP we have previously discussed, and seek to reconcile these interests and create mutual benefits for all. This is the evaluation framework that we apply in this report.

Next, we examine the rationale for the need to regulate monopolies.

4.3 Regulation of Monopolies

In our Draft Report, we recommended "That all ratepayers of Indigenous utilities receive the same protection as do ratepayers of non-Indigenous utilities (Draft Recommendation 1)".

We explained in the Draft Report that "Utility regulation provides consumer protection against the potential abuse of power by monopoly suppliers of products and services and applies equally to all monopolies regardless of their underlying ownership."⁸⁸ In the absence of competition, monopolies can abuse their power, for example, by excessive or predatory pricing.

We set out the principles and guidelines that ought to apply to all utilities regardless of ownership or operatorship, for example, using the least amount of regulation needed to protect the ratepayer; and that the benefits of regulation should outweigh the costs of regulation.⁸⁹ Lastly, we considered the minimum safeguards that in our view, any public utility regulatory scheme should have. Since the Draft Report, we have reconsidered those minimum safeguards and will discuss them further below.

Before doing so, however, we believe it would be instructive to highlight the feedback we received on the wording of Draft Recommendation 1 itself. While some participants agreed with the principle of this

⁸⁸ Draft Report, p. 74

⁸⁹ Draft Report, p. 74

recommendation,⁹⁰ a number questioned what we meant or intended by “same protection.”⁹¹ Others highlighted that this recommendation may not recognize the unique needs and governance structures of First Nations and that Indigenous utilities may have different drivers than existing utilities, for instance, using funds from the utility to support community members or to fund further infrastructure investments. In addition, some participants suggested that we re-word the recommendation so it does not imply that Indigenous utilities would offer lower protection.⁹²

Having considered participants’ views on this recommendation, we remain of the view that regulation of any monopoly service provider is required to protect ratepayers and prevent the monopoly from abusing its position of power. The need for regulation arises to prevent the monopoly from exploiting ratepayers. In that regard, the identity and the motive of the monopoly owner are irrelevant. Thus, even if we accept that an Indigenous utility is motivated by more factors than just a return on investment, or that the Indigenous Nation owner has a right of self-determination, the Panel disagrees that regulation is therefore unnecessary.

Even though not everyone agrees with our draft recommendation, we are comforted that no one advocates the opposite, namely that all ratepayers of Indigenous utilities not receive the same protection as ratepayers of non-Indigenous utilities. However, we recognize that the issues to resolve are first, *who should regulate* Indigenous utilities to ensure ratepayers receive that protection and second, *what protection* ratepayers of Indigenous utility should receive. We address each of those issues below in framing our Final Recommendations on these issues.

4.3.1 Who Should Regulate?

To clarify, our recommendation that ratepayers of any utility – Indigenous or non-Indigenous – should receive the same protection does not extend to assuming the BCUC will be that protector. In that regard, we disagree with the interpretation by CFN-GBI that we are conflating ratepayer protection with BCUC oversight. We have no preference as to the regulator of Indigenous utilities and acknowledge that this need not be the BCUC. However, we remain of the view, as expressed in our Draft Report, that:

The regulator should be independent of and at arms length from the utilities and should set out clear and transparent processes for fair and effective adjudication of disputes between the utility and ratepayers.

The rationale for this is clear. There is typically an imbalance between the ratepayer and the utility service provider: there is an inequality of bargaining power, knowledge of complex issues and access to resources. While an Indigenous utility might consider itself to be the champion and protector of its ratepayers, it may also have interests that do not align with its ratepayers such as generating own source revenue through Indigenous business enterprise. We heard from many participants that First Nations governance already incorporates a duty to protect members; however, the Indigenous utility may find itself in a conflict trying to balance its interests and those of its ratepayer. An arm’s length regulator, whether put in place by the Indigenous government or otherwise, is desirable in order to balance these competing interests.

⁹⁰ KGI Comments on Draft Report, p. 5. FortisBC Comments on Draft Report, p. 4. CEC Comments on Draft Report, p. 1. BC Hydro Comments on Draft Report, p. 2.

⁹¹ Transcript Vol. 16, p. 846. Transcript Vol. 19, pp. 1060 – 1061. Transcript Vol. 20, p. 1142. Transcript Vol. 17, p. 918

⁹² FNLC Comments on Draft Report, p. 6. Leq’á:mel Comments on Draft Report, pp. 1 – 2. Beecher Bay and Adams Lake Comments on Draft Report, p. 6. Exhibit A2-7, p. 2. Transcript Vol. 17, p. 918 – 919.

We believe that it is equally important that the arm's length regulator, whomever that might be, should have expertise in public utility regulation because it is a complex area that requires both knowledge and experience, including a deep understanding of fundamental concepts of public utility regulation such as the regulatory compact, cost of service, rate design and cost allocation. We also acknowledge that a regulator of an Indigenous utility also needs to have knowledge and experience of the unique needs of First Nations. Accordingly, on the issue of who should regulate an Indigenous utility:

We recommend that an Indigenous utility be regulated by a competent arm's length regulator (Final Recommendation 1).

4.3.2 What Protection for Ratepayers?

As for what protection should be provided for ratepayers of Indigenous utilities, we had proposed certain minimum safeguards we identified in the Draft Report. Those safeguards are not specific to Indigenous utilities but apply equally to any public utility and they are necessary because the utility is in a monopoly position. Since the issuance of the Draft Report, we have recast those minimum safeguards as follows:

- Ratepayers should be treated fairly, and in a manner that is not unduly discriminatory or unduly preferential in respect of the rates they are charged and the services they receive.
- There should be protection for the interests of ratepayers who are captive to the monopoly provider but unable to effectively influence the decisions of the Indigenous utility. While members of the First Nation that owns the utility have recourse, ratepayers who are not members of the First Nation may not. The potential for individual recourse to the courts is illusory at best given the well-known inaccessibility of that option for many. That is one of the reasons why administrative tribunals were created, namely, to provide a more accessible, speedy, effective and cost-efficient alternative to traditional dispute resolution using the specialized expertise of professionals.
- If the traditional rate setting models (such as cost of service and cost causation) and the regulatory compact are deemed inapplicable or too limiting for Indigenous utilities, the regulator should ensure that ratepayers nonetheless understand the basis for the rates. In short, there needs to be consultation with ratepayers regarding a new regulatory construct that is not largely based on economics, and the implications of such changes for ratepayers.
- Issues of safety, reliability, quality of service and obligation to serve should be fully addressed.
- The regulatory scheme needs to consider how it would interact or engage with other regulators, such as but not limited to the BCUC, if there are any overlaps or conflicting decisions.

These are what we see as essential elements (i.e. best practices) of what is necessary to protect ratepayers. We recognize that Indigenous governments will likely establish their own institutions and processes to protect the ratepayers of Indigenous utilities. Indeed, we also recognize there are likely additional best practices appropriate to individual First Nations that regulators of Indigenous utilities may wish to adopt.

Accordingly, with respect to the issue of what protection ratepayers of an Indigenous utility should receive from a regulator of an Indigenous utility:

We recommend that the regulator of an Indigenous utility follow best practices of ratepayer protection for all ratepayers (Final Recommendation 2).

4.4 Definition of Indigenous Utility

We wrote in the Draft Report that the definition of “Indigenous utility” in OIC 108 as “a public utility that is owned or operated, in full or in part, by an Indigenous Nation” is too broad to be anything other than a useful starting point for determining what should be the defining characteristics of an Indigenous utility.⁹³

While questions in OIC 108 are framed around the definition of “Indigenous utility,” parties generally agreed that an Indigenous utility was one that is owned and governed in some fashion by a First Nation. We understood and interpreted that to mean the same governance structure as exists on the territory where the Indigenous utility principally resides and operates. We wrote in the Draft Report that “[m]ost participants who address this question view that any definition of an Indigenous utility should be based upon some notion of majority control of the utility by Indigenous Nation(s).”⁹⁴ However, further clarity was required on how that could be more specifically defined. We therefore included the following recommendation in the Draft Report:

The definition of Indigenous utility should be further explored during the workshops. We have outlined above recommendations for the regulation of utility services provided by First Nations. The workshop topics further explore different ways that service is provided, thereby defining an Indigenous utility. We also recommend that consideration be given, during the workshop period, to any further context in which the definition of Indigenous utility is required. Our proposed recommendations are intended to provide a starting point for further discussion (Draft Recommendation 14).⁹⁵

We also proposed the following ‘workshop topics’ to further explore how we might define an Indigenous utility:

Should the scope of the proposed exception [“to the definition of public utility for Indigenous utilities providing services within their reserve boundaries”⁹⁶] be expanded to include specific areas/situations such as the following:

- A utility’s assets are owned by a corporation of which the First Nation/ Band Council is a shareholder or the sole shareholder;
- A utility’s assets are owned by a partnership of which the First Nation/ Band Council is a partner, a limited partner or a general partner;
- The utility’s assets are owned by a third party, but the First Nation/Band Council has granted a franchise agreement, a licence, and/or has enacted enabling bylaws to facilitate the construction and/ or operation of the utility;
- The utilities’ assets are owned by a First Nation/Band Council but are operated by a third party; and

⁹³ Draft Report, p. 89.

⁹⁴ Draft Report, p. 37.

⁹⁵ Draft Report, p. 89.

⁹⁶ Draft Report, p. 90.

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

*For the above questions, where appropriate, please consider the minimum level of ownership or control required.*⁹⁷

In the following sections, we discuss the defining characteristics of Indigenous utilities, as listed in OIC 108: the nature of the ownership and operation of Indigenous utilities; the types of services provided by Indigenous utilities, the persons to whom services are provided by Indigenous utilities, and the geographic areas served by Indigenous utilities.⁹⁸

The UCA defines a public utility as “a person ... *who owns or operates* in British Columbia, equipment or facilities for” [*emphasis added*].⁹⁹ Therefore, both ‘ownership’ and ‘operation’ are defining characteristics of an Indigenous utility. Therefore, even though OIC 108 as well as parties’ submissions conflate ownership and operation as one defining characteristic, we deal first with ownership and then with operatorship. We conclude that, in fact, *control* is the more relevant defining characteristic of an Indigenous utility.

Participants generally agree that an Indigenous utility should have Indigenous elements, but that it is not productive to stipulate a specific percentage of Indigenous ownership. Although a number of participants support majority ownership, or 51% or 50% + 1,¹⁰⁰ others point out the economic barrier and infringement on self-determination that such a threshold could create.¹⁰¹ Instead, still others advocate for a pragmatic test: that an Indigenous Nation have a ‘controlling interest’¹⁰² or ‘meaningful Indigenous participation/control’¹⁰³ or is the ‘mind and management’ of a utility.¹⁰⁴

CFN-GBI states that provided the First Nation is the “mind and management” of a utility, whatever the corporate or economic structure, the proposed recommendation of an ‘exempt utility’ should apply. If the First Nation is not the mind and management, however, such as when it is a majority shareholder in name only, or has minimal governance rights, or a corporate structure that gives an appearance of First Nations ownership, then the lack of political accountability means the utility should not be exempt from regulation.¹⁰⁵

Similarly, FortisBC emphasizes that an Indigenous Nation should have a controlling interest in the utility it oversees, because “it is the alignment of the utility ownership and the utility’s customers that provides consumer protection in the absence of active BCUC oversight.”¹⁰⁶ It submits that the definition of Indigenous utility should incorporate criteria regarding governance, operation and management. FortisBC also suggests that ‘Indigenous utility’ be defined such that its operating area not include the entire geographic territory of an

⁹⁷ Draft Report, p. 96.

⁹⁸ OIC 108.

⁹⁹ UCA section 1.

¹⁰⁰ Draft Report, p. 37.

¹⁰¹ Draft Report, p. 37; KGI Comments on Draft Report, p. 5.

¹⁰² FortisBC Comments on Draft Report, p. 11.

¹⁰³¹⁰³ KGI Comments on Draft Report, p. 4.

¹⁰⁴ CFN-GBI Comments on Draft Report, p. 5.

¹⁰⁵ CFN-GBI Comments on Draft Report, p. 5.

¹⁰⁶ FortisBC Comments on Draft Report, p. 11.

historic treaty or traditional territory because that would have detrimental implications.¹⁰⁷ We address this issue further in Section 4.9.4 of this report.

Leq'á:mel First Nation argues that the OIC 108 definition of Indigenous utility is sufficient to describe an Indigenous utility and that it is unnecessary to describe its control or ownership structure.¹⁰⁸ It endorses the statement in the Draft Report that “Generally, participants did not consider that, except for the notion of a controlling interest, there should be constraints upon the structure of an Indigenous utility. A theme expressed by many is that the ownership structure of an Indigenous utility should allow a degree of flexibility to reflect the unique needs and preferences of Indigenous Nations.”¹⁰⁹

In Leq'á:mel's view, “when an Indigenous Utility is formed much thought is carried out by band council and aided by administrators to ensure the determined corporate or partnership structure meets the interest of community members, prospective customers and the requirements of non-member investors and lenders.”¹¹⁰

We heard different views on whether the BCUC or the Indigenous Nation should determine whether a utility meets the definition of an Indigenous utility. One submission suggests that the BCUC determine whether a First Nation meets the standard of meaningful Indigenous participation/control.¹¹¹ FNLC, on the other hand, states that an Indigenous Nation should make that determination and proposes that either majority or minority-ownership by a self-identified Indigenous Nation is sufficient for an Indigenous utility. In FNLC's view, self-identified means that the Nation is not “necessarily a band within the meaning of the *Indian Act* or Nation with a modern treaty or self-government agreement.”¹¹²

In the case of minority ownership by the First Nation, FNLC proposes the following limited role for the BCUC: “If a Nation has less than a 5% ownership share, it and the majority owners should provide a joint submission as to equitable governance, shared benefits, a transition plan for a larger ownership share by the Nation, socioeconomic considerations, and other concerns articulated by the Nation. However, the presumption should be that the utility qualifies as an Indigenous utility.”¹¹³

4.4.1 Operation of an Indigenous Utility as a Defining Characteristic

This section addresses the situation where a First Nation operates an Indigenous utility but does not own it or owns an Indigenous utility but does not operate it.

Consider an example where a First Nation purchases BC Hydro's distribution assets on its land and contracts with BC Hydro to continue to operate the distribution system. Even if the utility is an Indigenous utility through ownership and is, therefore, exempt from regulation, under the UCA, BC Hydro remains subject to BCUC regulation.

¹⁰⁷ FortisBC Comments on Draft Report, p. 11.

¹⁰⁸ Leq'á:mel Comments on Draft Report, p. 3.

¹⁰⁹ *Ibid.*, p. 3.

¹¹⁰ *Ibid.*, p. 3.

¹¹¹ KGI Reply Comments on Draft Report, p. 4.

¹¹² FNLC Comments on Draft Report, p. 5.

¹¹³ FNLC Comments on Draft Report, p. 5.

The degree of participation by an operator in a utility may range from none, in that it has no input into the overall management of the utility, to full, in that it makes all significant decisions including establishing policy, setting rates and planning capital additions.

FortisBC submits that “[o]n one end of the spectrum, a simple services agreement could leave full authority over day-to-day operations in the hands of the First Nation/Band Council owner. A more comprehensive agreement conferring full responsibility for day-to-day utility operations is, in substance, a concession.”¹¹⁴

As FortisBC points out, the activities involved in operating a utility lie along a spectrum. At one end, the operator has no meaningful input into the overall management of the utility – establishing policy, setting rates, planning capital additions. At the other end, the owner places its utility assets into a blind trust and leaves significant decisions to the operator of the utility.

Therefore, while on its face the definition in the UCA of ‘public utility’ suggests *any* operator, as a practical matter, the BCUC’s approach to regulating an operator of a utility system depends upon the specific contractual arrangements between the operator and the owner. In practice, the BCUC examines the contractual arrangements between the operator and the owner to determine whether the operator has a decision-making role in the utility that would warrant more active regulation. In most cases, the operator does not make decisions regarding rates and nor does it provide capital infusions to the utility or plan additions. In these cases, the agreement is something akin to a maintenance agreement. Therefore, any BCUC oversight would be limited to reviewing such an agreement to ensure that the operator has no oversight of the utility that would warrant active regulation.

If the operator is otherwise a regulated public utility, the BCUC will also ensure that the costs accruing to these operations are segregated from its utility operations costs and that appropriate accounting controls are in place to achieve this segregation.

Similarly, we also recognize that because operatorship can range across a spectrum of activities, it does not in itself define an Indigenous utility. There may be situations where an Indigenous Nation does not own the utility but is the operator and therefore should qualify as an Indigenous utility. Alternatively, there may be situations where an Indigenous Nation does not own the utility but acts as its operator completely under the oversight of a third party non-Indigenous owner. In that case, the utility should not qualify as an Indigenous utility.

4.4.2 Degree of Control Required for an Indigenous Utility

We agree that majority ownership cannot be a defining characteristic of an Indigenous utility. Insisting that an Indigenous Nation own 50% of a utility could be economically prohibitive. Further, we also agree that it is important to articulate as broad a definition as possible because of self-determination. On the other hand, some degree of precision is required within the definition to avoid uncertainty and conflict.

Although we are persuaded by the need to respect a First Nation’s right of self-determination, there are other factors to consider. Therefore, in our view, the right to determine what constitutes an Indigenous utility must have some parameters. Unless a First Nation has at least some control of an Indigenous utility, the First Nation’s

¹¹⁴ Exhibit C4-11-FortisBC Comments on Draft Report., p. 20.

members will not have a meaningful say in the governance of the utility. Second, the Terms of Reference of OIC 108 ask us to consider what happens when an Indigenous utility ceases to be an Indigenous utility.¹¹⁵ Again, in the absence of knowing what an Indigenous utility is, no one will know when it ceases to be an Indigenous utility, and should return to or be regulated by the BCUC.

In general, control refers to who has the ability to influence the decisions and actions of a business organization. For example, those that have the power to appoint the majority of a company's directors are deemed to have control of that company. Therefore, control is an important concept in many areas of the law including corporate, tax and securities law.

There are two principal means to establish control. The first is *de jure* control and the second is *de facto* control. *De jure* control refers to legal control of a corporation, in other words, the ability to elect a majority of directors. Control can exist by other means, however. Control in fact, or *de facto* control, is a broader concept that focuses on influence rather than legal control. As a result, determining who has *de facto* control of a corporation requires examining factors other than shareholdings. Tax and securities legislation acknowledge *de facto* control.

The *Income Tax Act* uses the phrase “controlled directly or indirectly in any manner whatever.”¹¹⁶ This is relevant for family or other situations where people are not dealing at arm's length. Securities legislation recognizes that individuals can have significant influence in a corporation, such as an ‘insider’ – a director or officer of a corporation or person with 10% or more of the voting shares of a company, and a ‘control person’ – a person or a combination of persons holding 20% of a company's shares are deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of that company.¹¹⁷

Determining whether *de facto* control exists requires an analysis of the facts. Courts might examine the evidence of control at the shareholder level, such as whether a person or group of persons can influence the composition or the powers of the board of directors. Courts might also examine the evidence of control at an operational level, such as whether a person or group of persons can influence the operations of the corporation. This could include, for example, economic dependence or daily management decisions.

The *Income Tax Act* provides guidance for the determination of whether a taxpayer has *de facto* control of a corporation, and requires consideration of all relevant factors, including whether the taxpayer has a legally enforceable right or the ability to effect a change in the board of directors of the corporation, or its powers, or to exercise influence over the shareholder or shareholders who have that right or ability.¹¹⁸ The Panel considers these tests to be appropriate in this context as well.

With respect to the issue of the definition of an Indigenous utility:

We recommend that an Indigenous utility be defined as a public utility for which, as the owner or operator, an Indigenous Nation has *de facto* or *de jure* control (Final Recommendation 3).

¹¹⁵ OIC 108 - Section 3(1)(b)(iv)

¹¹⁶ Income Tax Act, (R.S.C. 1985, c. 1 (5th Supp)), s. 256(5.1).

¹¹⁷ Securities Act, [RSBC 1996] c.418, s. 1.

¹¹⁸ Income Tax Act, s. 256(5.11)

4.4.3 The Types of Services Provided by Indigenous Utilities

We wrote in the Draft Report that “[t]here are many aspects of an energy utility’s service, including generation or production of energy, transmitting and distributing energy to customers, and the administration of metering and billing. Participants highlight that there may be a place for Indigenous utilities to provide any of these aspects of utility services.”¹¹⁹ No one has suggested during the Inquiry, both prior to the Draft Report and during the workshops, that Indigenous utilities be limited in the scope of services they provide, although our focus is limited to those activities covered by the UCA. Here and elsewhere in this report, we have not considered other services that an Indigenous utility may wish to pursue beyond the scope of the UCA, such as telecommunications, sewer or water, or who should regulate them. We want to make clear that the definition of Indigenous utility we discuss here is in no way speaking to or intending to restrict the ability of a First Nation to regulate or operate other utilities.

Therefore, the definition of Indigenous utility should not limit the types of services to be provided.

4.4.4 Persons to Whom Services are Provided by Indigenous Utilities

We wrote in the Draft Report that “[t]here is general agreement that the customer base of an Indigenous utility is everyone - Indigenous, non-Indigenous, business or individual, residential, commercial and industrial - residing or conducting business in the service area of the utility.”¹²⁰ We did not hear anything during the second phase of engagement to change our view. Service areas are dependent on the geographic area that is served by the utility.

Therefore, the definition of Indigenous utility includes the provision of public utility services to persons in its service area.

4.4.5 The Geographic Areas Served by Indigenous Utilities

In subsequent sections, we discuss the issue of geographic areas served by Indigenous utilities in the context of different lands. Therefore, we make no general recommendation here.

4.4.6 Ceasing to be an Indigenous utility

In our Draft Report, we recommended:

If a utility ceases to meet the definition of an Indigenous utility it becomes subject to regulation under the UCA. (Draft Recommendation 13)

Few participants addressed this draft recommendation. The Panel has set out earlier in this report its recommendations for the defining characteristics of an Indigenous utility, which focus upon the notion of control of the utility by a First Nation. The Panel considers that if a First Nation were to relinquish control of an Indigenous utility to another party, whether by sale, agreement or some other means, the utility would no longer meet the definition of an Indigenous utility. As such, the ability of the First Nation to determine the means of regulation of that utility would cease, unless the First Nation otherwise had the jurisdiction to do so – such as part of a treaty. In that instance, the former Indigenous utility would meet the definition of “public

¹¹⁹ Draft Report, p. 39.

¹²⁰ Draft Report, p. 41.

utility” under the UCA, and would be subject to regulation by the BCUC. If the acquiring party is otherwise a public utility, this transaction would require BCUC approval.

We recommend that when a First Nation no longer controls an Indigenous utility the utility will at that point become a public utility as that term is defined in the *Utilities Commission Act* and regulated by the BCUC (Final Recommendation 4).

We recommend that a First Nation notify the BCUC when it enters into any agreement that results in a change of control of an Indigenous utility, such that the utility is no longer an Indigenous utility (Final Recommendation 5).

When a First Nation enters into an agreement with a utility operator who will have an oversight role in the management of its Indigenous utility such that the utility is no longer an Indigenous utility it should notify the BCUC. For clarity, in areas where the BCUC has jurisdiction, it would continue its normal practice of investigating public utility status when necessary.

4.5 Regulation of Indigenous Utilities On-Reserve

In the Draft Report, we suggested the following draft recommendations regarding Indigenous-owned utilities on reserve land:

- That a First Nation be given the opportunity to self-regulate when it provides utility service on its reserve land, in much the same way municipalities and regional districts do. Subject to recommendations 4 to 6 below, this can be accomplished by enabling a First Nation or Band Council to “opt out” of BCUC regulation by notifying the BCUC of its intention (Draft Recommendation 3).
- That the First Nation should demonstrate that it has an appropriate complaint and dispute handling process in place to protect all ratepayers. In the event it cannot do so the BCUC would retain jurisdiction to handle all complaints (Draft Recommendation 4).
- That the BCUC complaint and dispute handling processes be available to any ratepayer who wishes to appeal a decision arising out of the First Nation utility’s complaint process (Draft Recommendation 5).¹²¹

In this section we make final recommendations on the above.

There was general agreement that Draft Recommendation 3 should acknowledge the right of those First Nations who wish to regulate their own utilities providing service on reserve lands. However, there was a range of views on the breadth and design of this recommendation.

Some participants raised additional objections to Draft Recommendations 4 and 5, which we address in Section 4.5.2 below.

Objections to Draft Recommendation 3 include:

- It is too narrow;
- The wording should be to opt-in, not opt-out;
- The wording “provided the opportunity” is problematic;
- Together, these recommendations are not the same as the municipal exception; and

¹²¹ Exhibit A-43, p. i.

- The *UCA* does not apply on reserve land, therefore, BCUC has no jurisdiction.

Some parties agreed with the tenor of Draft Recommendation 3 provided that other recommendations were also enacted.¹²² Other participants see the recommendation as a positive first step, but that the BCUC needs to go further. In particular, many highlighted that the BCUC should recommend that self-regulation of an Indigenous utility should extend to a First Nation’s Traditional Territory. We address this issue further in Section 4.9.4.

We heard from participants at the Vancouver Workshop that recommendation 3 fell short of the municipal exception, while at the Victoria Workshop we heard that municipalities were not an appropriate comparator for First Nations since the former lacks constitutional status.¹²³ FNLC submits that case-by-case section 88 exemptions from the *UCA* are not a solution for Indigenous utilities on Traditional Territory, observing that difficulty in achieving an exemption is one of the reasons for this Inquiry.¹²⁴

While some noted the importance of Indigenous utilities having a choice of whether to self-regulate or be regulated under the *UCA*, others raised concerns with respect to the panel’s proposed “opt-out” mechanism, whereas an “opt-in” mechanism would be preferable. There were some objections that the premise of First Nations being “given the opportunity” to self-regulate does not recognize First Nations’ jurisdiction. In the view of Beecher Bay and Adams Lake First Nations, opting out suggests a gatekeeping function by the BCUC, and starts from the premise that Indigenous utilities must operate within an “ill-fitting box.” Leq’á:mel First Nation considers that an opt-out process would be costly and burdensome.¹²⁵

4.5.1 Applicability of the *UCA* on Reserve Land

Beecher Bay and Adams Lake First Nations assert that they:

...have the right to operate and regulate an Indigenous Utility system based on our inherent jurisdiction over our lands. We have also referred the Panel to examples of federal legislation that affirm specific rights to govern and regulate matters relating to our reserve lands, such as the *First Nations Land Management Act* and the *Indian Act*. This is difficult to reconcile with the Panel’s recommendations that Indigenous Nations should be ‘given the opportunity to self-regulate’ when it provides services on their own reserve or treaty settlement lands and to ‘opt out’ of BCUC regulation.¹²⁶

The BCUC previously considered the applicability of the *UCA* on reserve land and determined¹²⁷ that the *UCA* applies on reserve land. Until a court decides otherwise, this is the state of the law in British Columbia.

However, regardless of what the status quo may or may not be, the right to regulate a utility that operates on an Indigenous people’s land and that is owned and/or operated by that Indigenous people is laid out in Articles 3 and 20(1) of UNDRIP, which provide that:

¹²² BC Hydro Comments on Draft Report, pp. 3 – 4. FortisBC Comments on Draft Report, p. 5. CEC Comments on Draft Report, pp. 2 – 3.

¹²³ Transcript Vol. 15, p. 777. Transcript Vol. 17, p. 922.

¹²⁴ FNLC Comments on Draft Report, p. 6.

¹²⁵ Leq’á:mel Comments on Draft Report, p. 3. Beecher Bay and Adams Lake Comments on Draft Report, pp. 2 – 3, 7. CFN-GBI Comments on Draft Report, p. 2. Exhibit A2-7, p. 3. Transcript Vol. 20, p. 1142.

¹²⁶ Beecher Bay and Adams Lake Comments on Draft Report p. 2.

¹²⁷ In the Spirit Bay Utilities decision discussed in section 3.

Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 20(1): Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities [*emphasis added*].

We also have a comment on the term “self-regulate.” To be clear, this term does not apply to the utility itself. It applies to the First Nation’s body that controls the utility. This can be more accurately described as the First Nation having the “right to determine the means of regulation” of the utility it controls. We believe the latter wording better aligns with other government bodies’ responsibilities with respect to utilities they own (municipalities and the Provincial Government).

4.5.1.1 Wording of “Providing an Opportunity”

The Panel did not intend its wording “provided the opportunity” in any pejorative way. However, we appreciate the feedback and we have reworded the recommendation to say “*determine the means of regulation when it provides utility service on its reserve land.*” We hope that properly captures the intent of the recommendation.

This recognizes the unique nature of First Nations and our recommendations should not preclude those that wish to remain regulated.

4.5.1.2 Wording of “Opting Out”

Participants raised concerns that the “opt-out” process means that the BCUC would decide whether a First Nation is provided the right to determine the means of regulation. Beecher Bay and Adams Lake First Nation submit that “this opt-out approach suggests that the BCUC will play a gatekeeper function, determining which Indigenous Nations receive an ‘opportunity’ to self-regulate, with the corresponding implication that the Commission will also determine whether to revoke that opportunity.”¹²⁸

The “opt-out” portion of the recommendation wasn’t – and isn’t – intended to make the BCUC a gatekeeper. As we note above, a First Nation has the right to determine the means of regulation, and the opt-out notification is simply for transparency and regulatory certainty. Once a particular First Nation has provided the BCUC with an opt-out notification, the BCUC will take no further action.

4.5.1.3 Regulation of Indigenous utility services on Reserve Land

With respect to the regulation of Indigenous utility services on reserve land:

We recommend that a First Nation determine the means of regulation of an Indigenous utility providing services on that First Nation’s reserve land. Any BCUC oversight ceases when that First Nation notifies the BCUC that it no longer requires BCUC regulation and demonstrates, as further described in Final

¹²⁸ Beecher Bay and Adams Lake Comments on Draft Report, p. 2.

Recommendation 7, that there is an arm’s length complaint and dispute resolution process to protect all ratepayers (Final Recommendation 6).

For further clarity on the above recommendation, existing BCUC oversight of any incumbent non-First Nation owned or operated utility, when operating on reserve land, will continue as-is. That utility will be subject to the UCA.

4.5.2 Complaint and Dispute Resolution Process

In the Draft Report, the BCUC recommended the following:

That the First Nation should demonstrate that it has an appropriate complaint and dispute handling process in place to protect all ratepayers. In the event it cannot do so the BCUC would retain jurisdiction to handle all complaints (Draft Recommendation 4).

That the BCUC complaint and dispute handling processes be available to any ratepayer who wishes to appeal a decision arising out of the First Nation utility’s complaint process (Draft Recommendation 5).

No participants disagreed with the premise of Indigenous utility customers having recourse through a complaint dispute resolution process. However, participants disagreed on the extent of the BCUC’s involvement in this area.

Some participants commented that the criteria or process by which the BCUC would determine that a First Nation’s dispute resolution mechanism was appropriate was not clear. Some view that this recommendation would undermine First Nations’ right to self-determination and self-governance and question the BCUC’s jurisdiction to assess complaints and resolve disputes on reserve lands.¹²⁹

FNLC suggests that First Nations’ unique legal orders and governance structures should be considered by a body that includes Indigenous peoples. At the Fort St. John workshop it was suggested that a joint complaints review by First Nations and the BCUC could be more appropriate. A number of participants recommended that resources should be available to First Nations to develop dispute resolution capacity.¹³⁰ FortisBC submits that Indigenous governance structures are unlikely to provide protection for non-Indigenous customers and recourse mechanisms should be reviewed on a case-by-case basis to preserve flexibility, but Leq’á:mel disagrees, noting that Indigenous utilities should have complaints processes available to all ratepayers, which could be a marketable benefit.¹³¹

Regarding the recommendation that the BCUC retain a role as a complaint appeals body, some parties recognize that this would provide a more accessible means of recourse than the courts. CEC notes the experience of

¹²⁹ Beecher Bay and Adams Lake Comments on Draft Report, pp. 3 – 5. FNLC Comments on Draft Report, pp. 4, 6. Transcript Vol. 15, p. 778. Transcript Vol. 17, p. 922. Transcript Vol. 19, p. 1064.

¹³⁰ FNLC Comments on Draft Report, p. 6. Beecher Bay and Adams Lake Comments on Draft Report, p. 3. Exhibit A2-4, p. 5. Transcript Vol. 20, p. 1142. West Moberly Reply Comments on Draft Report, p. 6.

¹³¹ FortisBC Comments on Draft Report, pp. 7, 17. Leq’á:mel Comments on Draft Report, p. 3.

BCUC's existing complaints function, while BC Hydro supports the BCUC having the ability to compel solutions between utilities due to the risks associated with different and multiple regulatory frameworks.¹³²

Other participants express reservations about the complaint appeal body proposal. CFN-GBI submits that First Nations' regulation should not be any less effective than BCUC regulation, and considers that BCUC regulation of complaints effectively becomes regulation of the entire economic construct of the utility.¹³³ Beecher Bay and Adams Lake First Nations add that having unreasonable rates or inadequate dispute resolution mechanisms does not lend itself to drawing lessees or businesses to an area.¹³⁴ Some participants add that the BCUC does not regulate complaints for municipalities.¹³⁵ FortisBC, however, considers this a shortcoming of the municipal exclusion that should not be repeated, to ensure customer protection.¹³⁶ Clean Energy Research Group (CERG) and Leq'á:mel First Nation note that the BCUC's potential role as an appeals body needs to be better defined, while FNLC considers any role for the BCUC should be only as a transition plan to full jurisdiction for First Nations.¹³⁷ A further option would be for an entity such as an Indigenous Utilities Commission to assume a dispute resolution role, or a joint panel of BCUC and Indigenous representation to do the same.¹³⁸

4.5.2.1 Final Recommendations Regarding Complaints and Dispute Resolution

With regard to Draft Recommendation 4, demonstrating that a dispute resolution mechanism is in place, FNLC submits that "Nations' unique legal orders and governance structures must be considered when assessing their complaint and dispute handling processes, and this must be done by a qualified panel or body including Indigenous people and others with specialized knowledge, such as in Indigenous governance. Further, funding should be made available for the development and capacity-building of these unique structures for interested Nations." It further submits that "[t]he decision-making criteria for this assessment needs to be made transparent and must be developed in collaboration with First Nations."¹³⁹

CFN-GBI submits that this recommendation "is administratively unworkable, as it creates, in effect, two layers of regulation, with a strong likelihood of conflict between them."¹⁴⁰

BC Hydro believes that the following principled approach can be applied appropriately to an Indigenous utility in the circumstances identified by the BCUC in its recommendations:

In certain circumstances an Indigenous utility can have the accountability to, alignment of interests with, customers that would allow those utilities to be exempt from some sections of the UCA and still address public interest concerns. Specifically, BC Hydro supports Indigenous utilities being self-regulated or regulated under an Indigenous Regulator when the Indigenous utility operates in B.C. on reserves or Current Treaty Settlement Lands (lands for which

¹³² CEC Comments on Draft Report, p. 2. BC Hydro Comments on Draft Report, p. 5. FortisBC Comments on Draft Report, pp. 4, 7. Transcript Vol. 20, pp. 1142 – 1143.

¹³³ CFN-GBI Comments on Draft Report, p. 4. Exhibit A2-3, p. 5.

¹³⁴ Beecher Bay and Adams Lake Comments on Draft Report, p. 5.

¹³⁵ FNLC Comments on Draft Report, p. 7. Exhibit A2-3, p. 5. Exhibit A2-4, p. 5. Exhibit A2-5, p. 7.

¹³⁶ FortisBC Comments on Draft Report, p. 7.

¹³⁷ Leq'á:mel Comments on Draft Report, p. 4. FNLC Comments on Draft Report, p. 7. Exhibit E-10, CERG, p. 6.

¹³⁸ Transcript Vol. 16, pp. 848 – 849. Exhibit A2-6, p. 3 Transcript Vol. 15, p. 1065. Transcript Vol. 17, p. 923, 935.

¹³⁹ C16-5-FNLC-Comments-on-DraftReport, pp. 6-7.

¹⁴⁰ Exhibit C20-6-CFN-GBI-Comments-on-DraftReport, p. 2.

ownership has been transferred to the treaty government under an existing modern treaty) and the Indigenous utility: provides similar protections for all its customers as is required of municipal utilities. This can be achieved through the ownership structure of the Indigenous utility, the First Nation's laws and governance processes, and applicable legislation or modern treaty requirements.¹⁴¹

FortisBC submits that:

As indicated previously, an Indigenous utility is no more, and no less, capable of exerting monopoly power than a non-Indigenous utility. Recommendations 4 to 6 provide critical safeguards to consumers taking service from a self-regulating Indigenous utility. They are proportional, such that they mitigate the risk posed by the exercise of monopoly power while leaving the First Nation free to operate without BCUC involvement on a day-to-day basis.¹⁴²

We consider it remains appropriate to recommend that a First Nation should have a robust complaint and dispute resolution process in place. In our view, the absence of an accessible complaint and dispute resolution mechanism leaves ratepayers unprotected. Aside from ensuring that the customer's voice is heard generally, a complaint process ensures that there is accountability in instances where the utility is not providing the service that it should have done. This could include, for example, if there is an error on the customer bill, or if the level of reliability is not acceptable due to a local fault or underinvestment. However, we are also mindful of FNLC's concerns and persuaded by its argument that assessing a complaint and dispute handling processes must be done by a qualified panel or body including Indigenous people and others with specialized knowledge, such as in Indigenous governance. We therefore make the following Final Recommendations:

We recommend that a panel or body composed of Indigenous people and others with specialized knowledge, such as First Nations governance, assess a First Nation's complaint and dispute resolution process in the context of public utility regulation as it is practiced in Canada and also within the specific context of that First Nation, prior to that First Nation's Indigenous utility law coming into force (Final Recommendation 7).

4.5.2.2 Final Recommendation Regarding Complaint Appeal Process.

Regarding Draft Recommendation 5 above, in the Draft Report, we agree with the comments made by David Austin, of Collective First Nations, during oral argument:

...most utilities commissions or like bodies have provisions that allow redress to the courts. And so for the purposes of at least the First Nations Land Management Act there will be a dispute resolution process. And if that doesn't work then there's access to the courts. So that's really no different than most utilities commission or like bodies across the country.¹⁴³

While we agree with his analysis, we also note Mr. Austin's concern that courts are expensive when he urged the BCUC to make certain recommendations in order to avoid the costs of launching a legal challenge:

¹⁴¹ Exhibit C2-7-BCH-Comments-on-Draft-Report, pp. 3 – 4.

¹⁴² Exhibit C4-11-FortisBC-Comments-on-Draft-Report, p. 5.

¹⁴³ T12:604.

.....and that's not what First Nations want to do. They just want to get on with building the business as opposed to using valuable capital to go through the court process.¹⁴⁴

We note that legislation such as the *First Nations Fiscal Management Act* provide for an appeal process for a dispute that cannot be resolved through a First Nation's dispute resolution process. This process is administered by the First Nations Tax Commission, on a national basis. The complaint and dispute resolution process for First Nation-owned utilities would benefit from a similar provincial body, so that complainants do not have to resort to the costly processes of the courts to appeal their decisions.

We recommend that First Nations collectively develop a province-wide appeal body that can be available to customers of Indigenous utilities who are unable to resolve their utility complaints (Final Recommendation 8).

We recommend that the BCUC serve as an appeal body until such time as a First Nation operated body can be established and operational. We further recommend that the BCUC provide any assistance that the First Nation operated body may request in order to become fully operational (Final Recommendation 9).

BCUC's role as an appeal body would only be to review the customer's complaints and disputes against the tariff/regulation/service agreement established by the First Nation, to assess whether the utility had complied with its terms. This does require that the Indigenous utility establish a publicly available tariff or regulation.

The BCUC would not hear any complaints or make any determinations upon the contents of the tariff or regulation themselves.

4.5.3 The BCUC's Role in Indigenous Utilities Operating on Reserve Land

Given the recommendations discussed in this section, there are two circumstances in which the BCUC may have a role in the regulation of an Indigenous utility operating on Reserve land.

One such role is as the interim appeal body recommended in Section 5.2.6. Another role is in circumstances where a First Nation chooses to retain BCUC regulation of its Indigenous utility, the BCUC will provide regulatory oversight.

In the latter case, we are of the view that the BCUC should ensure that its regulatory processes are appropriately scaled and aligned with the needs of the utility and its customers. A key issue in this regard is an appropriate regulatory approach to small utilities. We note that BC Hydro "supports the BCUC's actions to date to mitigate the regulatory burden on small utilities, including Indigenous Utilities, and supports the BCUC's consideration of further approaches to mitigate the regulatory burden while still ensuring the public interest is maintained."¹⁴⁵

We recommend that the BCUC ensure that it includes Indigenous people, in both staff and Commissioner roles, especially for matters that directly affect First Nations (Final Recommendation 10).

¹⁴⁴ T12:628.

¹⁴⁵ Exhibit C2-7-BCH-Comments-on-Draft-Report, p. 3.

We recommend that the UCA be amended to provide the BCUC jurisdiction to consider regulatory principles enacted by a First Nation when the BCUC adjudicates Indigenous utility complaints and disputes (Final Recommendation 11).

4.5.4 Municipal Exception in the UCA

A number of parties raised the issue that, when considering the municipal exception in the *UCA*, there is no requirement for any dispute resolution mechanism. Therefore, they question the need for the recommendations about complaints and dispute resolution mechanisms.

We acknowledge this concern. There are many similarities between a First Nation and a municipality. However, there is a key difference and that is that on reserve land there is a significant possibility there could be a large number of individual customers who are not members of the governing First Nation. Those customers would not even have the minimal recourse that their counterpart customer in a municipality has, i.e. the ability to vote. Further, as we stated above, we consider a robust complaint and dispute regulation process to be a best practice regardless of whether a customer has a vote.

We do not know the rationale for the exception. There is no explanation in the *UCA* of the genesis of the municipal exception. As the municipal exception has been in place since the inception of legislation regarding regulation of public utilities in BC, we are unable to determine the reasons for the exception. We do note that in any municipality, all residential customers of a municipal utility have an opportunity to vote in that municipality's elections.¹⁴⁶ Furthermore, individuals who are commercial and industrial customers are able to vote, provided they own the land on which they operate. If they don't, their landlord can vote provided the landlord is an individual.

This demonstrates some alignment between the utility's customers and the utility owners. These aligned utility customers can exercise power over the owners of the utility – the municipal council - through the voting process. However, we do not consider this a substitute for an independent regulator and a robust complaint and dispute resolution process, although we do note that some municipalities have, of their own accord, implemented an independent regulator. Examples of this include the City of New Westminster which has set up a Utilities Commission to regulate its electric distribution utility with a majority of members independent of City Council) and the City of Vancouver which has a rates panel for the SE False Creek/Olympic Village district energy system.

4.6 Treaty Lands

4.6.1 Nisga'a Nation

In the Draft Report, we recommended:

That the Nisga'a Nation be given the opportunity to self regulate, as do municipalities and regional districts, when it provides utility service on its own lands (Draft Recommendation 7).

¹⁴⁶ Subject to general voting eligibility provisions, including being a resident of B. C. for at least six months before they register to vote; and have either lived or owned property in the jurisdiction in which they intend to vote for at least 30 days before they register to vote.

Notwithstanding the Nisga'a's authority over their own lands, we recommend that the BCUC retain jurisdiction over Mandatory Reliability Standards, because of the interconnected nature of the North American bulk electric system (Draft Recommendation 8).

Draft Recommendation 8 is addressed under Section 4.8.1. Mandatory Reliability Standards. The following discussion considers only Draft Recommendation 7.

Nisga'a Nation is a modern treaty Nation with unique rights and broad jurisdiction, which includes principal law-making authority for Nisga'a Lands under the Nisga'a Final Agreement (Nisga'a Treaty). As noted in their presentation at the Kamloops Workshop, the Nisga'a Treaty came into force on May 11, 2000, and covers approximately 26,000 square kilometres of land, including 2000 square kilometres that is owned by the Nisga'a in fee simple. The Nisga'a Nation asserts that it has authority under the Treaty to enact laws regulating utilities on Nisga'a Lands, and further, that these Nisga'a laws prevail over the UCA to the extent of any inconsistency or conflict.¹⁴⁷ It asserts that although there it is not an explicitly enumerated power, this right to regulate includes regulation of utilities, owned or operated, in whole or in part, by the Nisga'a Nation on Nisga'a Lands (a "Nisga'a utility").¹⁴⁸ Nisga'a Nation agrees with the BCUC analysis in the Draft Report that the Nisga'a Nation has the authority to regulate utilities other than with respect to Mandatory Reliability Standards. In the words of Mansell Griffin:

Our treaty is a complex, detailed and comprehensive agreement addressing all aspects of the continuing relationship between the Nisga'a Nation, Canada, and British Columbia. It sets out the powers of Nisga'a Lisims Government to make laws in relation to matters vital to the Nisga'a Nation, including public works, lands and resources. Importantly, our Treaty sets out specific areas where Nisga'a laws prevail over any inconsistent or conflicting federal or provincial law, and conversely, specific areas where federal or provincial laws will prevail over any conflicting Nisga'a laws.¹⁴⁹

In its initial submission, the Nisga'a Nation proposed an amendment to specifically exclude the Nisga'a from operation of the UCA by including it with the municipal exception in the definition of public utility. Although the Nisga'a Nation does not consider an exclusion from the UCA to be necessary to ensure that relevant Nisga'a laws supersede any conflicting provisions of the UCA, the amendment is proposed for regulatory certainty to minimize the risk that there would be a patchwork of prevailing laws on Nisga'a Land. Since making its initial submission the Nisga'a became aware of the BCUC Municipal Inquiry which it felt could impact on the municipal exception. More importantly, the Nisga'a Nation felt that its unique constitutional status must be taken into account. It therefore proposed that rather than amending paragraph (c) of the definition of "public utility" currently in the UCA a new paragraph (h) be added as below:

(h) the Nisga'a Nation or a Nisga'a Village in respect of services provided by the Nisga'a Nation within Nisga'a Lands or a Nisga'a Village within Nisga'a Village Lands.¹⁵⁰

¹⁴⁷ Nisga'a Nation Final Argument, para 17

¹⁴⁸ Nisga'a Nation Comments on Draft Report, p. 1.

¹⁴⁹ Transcript, IUI Community Input Workshop – Kamloops p. 1080

¹⁵⁰ Nisga'a Nation Comments on Draft Report, p. 8.

Nisga'a Nation submits that the Nisga'a Treaty generally provides that the UCA would apply outside of Nisga'a Lands and the BCUC would have jurisdiction over the utility services provided by a utility services provider outside of Nisga'a Lands.¹⁵¹

The Nisga'a Nation states that it should be excluded from any definition of "Indigenous utility" because of its authority to self-regulate under the Nisga'a Treaty. This would respect the Nisga'a Nation's broad lawmaking authority to regulate a Nisga'a utility, including the ability to determine the structure of, and the services provided by, a Nisga'a utility.¹⁵²

There were no submissions opposing Nisga'a Nations' right to regulate utilities. FortisBC indicated agreement with the proposed recommendation, noting the nature of the modern treaty in place with the Nisga'a Nation.¹⁵³ BC Hydro indicated that it supported Indigenous utilities being self-regulated or regulated under an Indigenous Regulator when the Indigenous utility operates on reserves or on modern treaty lands where the Indigenous utility provides similar protections for all of its customers as is required of municipal utilities.¹⁵⁴ Some workshop participants felt that including the Nisga'a in the municipal exception was inappropriate, given its special constitutional status.

The Panel appreciates the Nisga'a Nation's unique relationship and unique constitutional status within British Columbia and within Canada, and agrees that this sets it apart from municipal governments. The wording of the proposed recommendation was not meant to imply that a provision in the UCA was needed to enable the Nisga'a to exercise authority in relation to the regulation of Nisga'a utilities providing services on Nisga'a Lands. The Panel accepts that a Nisga'a law would likely prevail over any inconsistent or conflicting provision of the UCA within the Nisga'a Lands. However, as was pointed out by Ms. Paulin at the Kamloops workshop, "...right now, because the Nisga'a Nation has not drawn down legislation, the UCA does apply...."¹⁵⁵ Since the UCA will apply on Nisga'a lands until such time, and except to the extent that it is displaced by the drawing down of that regulatory authority, the Panel accepts that, to avoid potential uncertainty, the UCA should be amended to exclude its application in relation to Nisga'a utilities.

We recommend that the UCA be amended to exclude from the definition of public utility any utility recognized under Nisga'a law as a Nisga'a utility insofar as its services relate to Nisga'a Lands or a Nisga'a Village within Nisga'a Lands (Final Recommendation 12).

4.6.2 Modern Treaty Nations

In our Draft Report, we recommended that:

Provided that a modern Treaty contains terms that are substantially similar to those set out in the Nisga'a Treaty, we would recommend, on the basis of parity, that a modern Treaty Nation

¹⁵¹ Nisga'a Nation Comments on Draft Report, p. 11.

¹⁵² Nisga'a Nation Comments on Draft Report, pp. 5 and 6

¹⁵³ Fortis BC Written Comments on Draft Report, Ex. C4-11 p.8

¹⁵⁴ BC Hydro Written Comments on Draft Report, p 4; BC Hydro Final Argument, p. 3

¹⁵⁵ Community Input Workshop – Kamloops, Transcript Vol. 19 p. 1091

be given the opportunity to self-regulate when it provides utility service on its own lands, in the same manner as we have proposed for the Nisga'a (Draft Recommendation 9).

Tsawwassen First Nation supports the recommendation proposed by Nisga'a Nation, and notes that this may involve amending the definition of "public utility" in the *Utilities Commission Act* to also exclude Tsawwassen First Nation when Tsawwassen First Nation provides utility services on Tsawwassen Lands.¹⁵⁶ BC Hydro and FortisBC support this recommendation but note that determining whether an Indigenous utility qualifies for self-regulation should be assessed on a case-by-case basis. FortisBC notes some of the factors the BCUC should consider have already been identified in the Draft Report, including "the particular capacity, resources and robustness of the First Nation."¹⁵⁷ With respect to modern treaties, BC Hydro notes that the BCUC would have to interpret and assess the terms of the modern treaty in the context of other treaty provisions.¹⁵⁸ In Victoria, it was commented that the Nisga'a Treaty shouldn't be used as a baseline comparison for modern treaties, as modern treaties stand on their own.¹⁵⁹

4.6.2.1 Distinction Between Modern and Historic Treaties

There are four modern treaties in British Columbia to which the following First Nations are signatories: the Nisga'a, Tsawwassen First Nation, Tla'amin Nation, Huu-ay-aht First Nations, Ka:'yu:'k't'h'/Chek'tles7et'h' First Nations, Toquaht Nation, Uchucklesaht Tribe, and Yuułu?it?ath. Modern treaties, which are signed by the Province, the federal government and the First Nation(s), bear little resemblance to historic treaties being considerably more comprehensive in scope than the historic treaties. The historic treaties, which include the Douglas Treaties, signed by First Nations on Vancouver Island and Treaty 8 in the northeastern portion of BC, were mechanisms by which the colonial government in the case of the Douglas Treaties, and subsequently Canada in the case of Treaty 8, sought to secure Crown title to the land.

Unlike modern treaties that set out geographical boundaries and government powers in long and detailed written terms, not all of the Douglas Treaties were written down and executed. Those that were, are very brief, and like Treaty 8 which is slightly longer, deal primarily with the release and surrender of rights in land. These treaties include terms that reserve portions of the territory for the exclusive use of the treaty nation and allow for harvesting rights within the entire territories. Treaty 8 includes terms of monetary annuities and other forms of payments, such as tools and schooling. The language of these treaties has led to a history of disputes and legal proceedings, which include findings by the Supreme Court of Canada of a fiduciary relationship between the Crown and the Treaty 8 First Nations that is not unlike non-treaty First Nations with Aboriginal rights.¹⁶⁰ Historic treaty First Nations' reserve lands are administered under the *Indian Act* and their internal government systems are band councils put in place under the *Indian Act*. Modern treaties, on the other hand, attempt to place the Indigenous Nation on an equal footing with the other governments recognized in the constitution, by establishing relationships with both of the federal and provincial governments and including processes for resolving potential disagreements in the interpretation of treaty provisions, thereby minimizing the likelihood of conflicts. The detailed provisions relating to governance establish the foundational institutions of the modern treaty First Nation's government, its jurisdictional authorities, and its relationships with other governments.

¹⁵⁶ Exhibit E-12, p. 1.

¹⁵⁷ FortisBC Comments on Draft Report, p. 8.

¹⁵⁸ BC Hydro Comments on Draft Report, p. 7.

¹⁵⁹ Transcript Vol. 17, p. 926.

¹⁶⁰ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69

4.6.2.2 Modern Treaty Lands

Unlike historic treaties, self-government legislation or the *Indian Act*, modern treaties often recognize multiple categories of land over which the First Nation treaty government has varying rights and powers. These may include:

- former reserve lands over which the First Nation has exclusive use and on which it exercises law-making authority similar in nature to band councils or local governments in British Columbia;
- settlement lands, over which the treaty nation may exercise exclusive or shared jurisdiction;
- shared use territories within which the modern treaty nation members may exercise specific rights, such as harvesting; and
- fee simple lands owned by the First Nation over which the modern treaty nation may not exercise jurisdiction.

Modern treaties also address the rights and obligations of incumbent utilities within the treaty territory, that generally protect the incumbent utility's land use.

4.6.2.3 The Modern Treaty-Making Process

Modern treaties contain provisions addressing representative government for non-members residing on treaty lands. Because there is a rigorous ratification process for each treaty, Indigenous Nations must ensure that those with Aboriginal rights claims within their Nation, including, in most cases, those who lost membership by virtue of the *Indian Act* and those with claims to hereditary leadership positions, are consulted and have the opportunity to provide input into the treaty during the negotiation process. The First Nation membership is generally kept well-informed in advance of being asked to ratify the final settlement agreement. Besides requiring votes to affirm continued support at various stages of the agreement, the ratification usually involves a referendum conducted under the *Indian Act Referendum Regulation*.¹⁶¹ This includes formal notice to First Nation members, information meetings, ballots, including mail-out ballots and often ballots off-site. The potential for internal discord is therefore addressed in the treaty process. As a result, modern treaty governments are better equipped to address conflicts than historic treaty or non-treaty governments that operate under the *Indian Act* and which have not undergone such rigorous processes to rebuild their internal accountability systems.

4.6.2.4 Formalized Government-to-Government Relationships

Modern treaties formalize the government to government relationship between the modern treaty First Nation government and both the federal and provincial governments, creating a distinct form of government that has legislative and constitutional protection. This is unique to modern treaty nations because unlike historic treaties, which are addressed below, they explicitly address such things as intergovernmental relationships.

Because modern treaties are meticulously negotiated, whether a modern treaty nation has the jurisdiction to regulate utilities will depend on whether it is in the text of the treaty or can be read in through the interpretation mechanisms in that treaty. Although it is impossible to capture everything in the treaty text, there is generally wording that enables broad construction that could include the regulation of public utilities;

¹⁶¹ Indian Act Referendum Regulations, C.R.C., c. 957.

however, it would be preferable if the modern treaty nation's authority respecting the regulation of public utilities could be specifically addressed in the terms of upcoming modern treaties.

Even if the modern treaty First Nation's regulations were only applied to Indigenous utilities within the treaty territory, it could lead to a decline in the incumbent utility's customer base within the territory, and ultimately increase the potential for stranded assets. Given that further thought is likely required in relation to how there may or may not be an integration of laws, there would, at a minimum, be a need for transition planning prior to the exercise of a modern treaty nation's law-making authority in relation to utilities. These and other issues would best be addressed through transitional planning and coordination between incumbent utilities, the government and the modern treaty nation. A modern treaty Nation that wants to regulate and operate an Indigenous utility on treaty lands beyond its former reserve lands should therefore engage in government-to-government discussions in advance of doing so. There may also be a role for a third-party facilitator in planning and coordination.

Workshop participants pointed out that treaties are distinct, and that using the Nisga'a treaty as a baseline is thus not appropriate.¹⁶² In its Letter of Comment, the Tsawwassen First Nation, which is a modern treaty signatory and the sole modern treaty nation beside the Nisga'a Nation that made a submission to the Inquiry, agreed with the Nisga'a Nation's submission and expressed support for amending the UCA to exclude the Tsawwassen First Nation from the definition of public utility when it provides utility service on Tsawwassen Lands.¹⁶³

The Panel acknowledges that the terms of one modern treaty differ from those of another and accepts that the Nisga'a Treaty should perhaps not be the baseline for all modern treaties. It is clear that the relationship between modern treaty governments and the provincial and federal governments is much different than that between band councils or historic treaty First Nations and the provincial and federal governments. On the same basis, although modern treaties tend to address the same general subject matters, the terms of each treaty are not necessarily identical. As such, while the Panel considers that most modern treaty nations would likely fall within the criteria that the Panel considers would qualify them for exclusion from the UCA, it finds itself unable to recommend a general exemption for modern treaty nations that have not made submissions on the matter to this Inquiry. At the same time, the Panel recognizes that modern treaty nations have sophisticated governance systems, and will likely be better positioned than historic treaty First Nations and non-treaty First Nations to assume legislative oversight of treaty government public utilities operating its formerly *Indian Act* reserve lands. The Final Recommendations reflect this confidence, as well as the Panel's reluctance to go beyond this without having heard any evidence in this regard.

With respect to modern treaties except for the Nisga'a Treaty:

We recommend that the UCA be amended to exclude from the definition of public utility, any Indigenous utility providing services within Tsawwassen treaty lands (Final Recommendation 13).

We recommend that a modern treaty First Nation, other than Tsawwassen First Nation and Nisga'a Nation, determine the means of regulation of an Indigenous utility providing services on that First Nation's former

¹⁶² Transcript Vol. 17, p 926.

¹⁶³ Ex. E-12, Tsawwassen First Nation, Reply to comments.

reserve lands. Any BCUC oversight ceases when that First Nation notifies the BCUC that it no longer requires BCUC regulation (Final Recommendation 14).

We recommend that future modern treaties include explicit provisions with respect to the First Nation’s authority to regulate Indigenous utilities providing services within treaty settlement lands (Final Recommendation 15).

For clarity, a modern treaty First Nation may request that the BCUC retain jurisdiction to handle all complaints.

4.6.3 Historic Treaties

The BCUC was asked to make recommendations respecting the regulation of utilities in relation to historic treaty First Nations. In its Draft Report, the Panel made the following recommendation:

We are inclined to recommend that First Nations that are parties to Historical Treaties by covered by the recommendations outlined in respect of Reserve Land. However, we welcome comments on this recommendation during the workshop and comment period. (Draft Recommendation 10)

FortisBC supports the proposed BCUC recommendation only if it applies to reserve lands within historic treaty areas rather than the entire territory covered by historic treaties.¹⁶⁴ BC Hydro indicated that it supports exemption of an Indigenous utility under the UCA and self-regulation where:

...the utility operates in B.C. on reserve or on Current Treaty Settlement Lands (lands for which ownership has been transferred to the treaty government under an existing modern treaty and over which the treaty government has appropriate law-making authority. Current Treaty Settlement Lands would not include what is generally understood to be a Nations’[s] traditional territory or the entirety of a Historic Treaty territory).¹⁶⁵

However, some participants express concern that the historic treaty recommendations were ambiguous and based on mischaracterisations. Some suggest that further clarity was needed on what defines “reserve lands” with respect to historic treaties and highlight the fact that Treaty 8 doesn’t refer to “reserve lands.”¹⁶⁶ The BCAFN considered the BCUC to have construed the historic treaties too narrowly. They assert that the First Nations accepted smaller land bases based on the fact that their territorial rights would be much greater.¹⁶⁷ The FNLC asserted that in that the treaties did not need to include enumerated powers of government, the treaties were not a grant of power from the Crown to Indigenous peoples; rather, through the treaties, Indigenous people granted land to the Crown. The indigenous people already had the power.¹⁶⁸ Some workshop participants felt that in treating the historic treaties in the same way as reserves, the Panel was misunderstanding the nature of the treaty relationship. In particular, a participant in Fort St. John explained to the Panel:

¹⁶⁴ FortisBC Comments on Draft Report, p. 9.

¹⁶⁵ BC Hydro Written Comments on Draft Report (Ex. C2-7); p 4.

¹⁶⁶ Transcript Vol. 20, p. 1144, 1149 – 1152. Transcript Vol. 17, p. 926 – 927.

¹⁶⁷ Transcript Vol. 17 (Community Input Workshop – Victoria), p 901.

¹⁶⁸ FNLC Comments on Draft Report, p. 7.

I guess historically, when you go back to the treaty itself, it does not reference "Reserve lands." So what initially is happening here is it is imposing reserve lands into what we feel was a treaty that was signed on traditional grounds.¹⁶⁹

West Moberly First Nations (West Moberly) assert that the Panel's concerns arise from an overly narrow interpretation of the nature of treaty rights. West Moberly adds that oral promises made by the Crown which have the force of law preserve the First Nations' traditional mode of life from forced interference. West Moberly points out that Treaty 8 rights include protections of the right to manage traditional lands and resources. It submits that Treaty 8 First Nations did not relinquish any self-government rights, and stresses that the Crown's obligations should support Treaty 8 First Nations to actively maintain traditional land management processes and economic participation throughout the Treaty territory, including by modernizing British Columbia's utilities regulation so that Treaty 8 First Nations can continue to sustain themselves economically, socially and politically from the provision and self-regulation of utility services.¹⁷⁰

West Moberly proposes two possible utility regulatory models for Treaty 8 Nations. West Moberly supports a territorial model of Indigenous utility regulation that would encourage collaboration between Treaty 8 First Nations, and that may enhance scale and access to financing for Treaty 8 utilities. It also suggests a sub-territorial alternative, so that some governing rights could be exercised by those Treaty 8 First Nations who wish to undertake collaborative decision making over each First Nation's respective traditional territories. It submits that third party dispute resolution mechanisms could be used to resolve disputed territories and establish service areas.¹⁷¹ It views the process of collaboration as being pivotal to genuine reconciliation. Alternatively, West Moberly states the Crown's obligation to protect and support the ability of West Moberly and other Treaty 8 First Nations to actively maintain traditional land management processes and economic participation throughout the Treaty territory.¹⁷²

The Panel acknowledges these concerns respecting Draft Recommendation 10. It is true that the Panel's draft recommendation was primarily based on the lack of precisions in the terms of historic treaties themselves, and the consequential lack of clarity in their interpretation. As was discussed in the Draft Report, unlike the modern treaties, the territorial boundaries and, at times, even the signatories to historic treaties are unclear. Because the federal government is responsible for administration of treaties, processes such as the Treaty Land Entitlement process, have typically been the mechanism used to resolve claims relating to treaties. The Panel notes that Band Councils are the primary governing bodies representing the historic treaties, and that these entities exercise powers under the *Indian Act* which extend only on the reserve. While the Treaty 8 Tribal Association was formed to support the Treaty 8 First Nations, it does not constitute a formal government structure in British Columbia. In many ways, including that they operate through *Indian Act* based governments, historic treaty First Nations resemble *Indian Act* First Nations more than they do modern treaty nations.

A Fort St. John workshop participant acknowledged the complexity of the issue stating:

... a lot of times the provincially regulated boards is where the problem is created, because the treaties were with the Federal Government. Any sort of [government] to [government] should

¹⁶⁹ Transcript Vol. 20, p. 1151.

¹⁷⁰ Ex. D-18-1 (West Moberly First Nations Comments on Draft Report), p. 3.

¹⁷¹ West Moberly Reply Comments on Draft Report, pp. 3 – 5.

¹⁷² West Moberly Reply Comments on Draft Report, p. 3

be with the Federal Government. However, we do respect that these boards are put in place for all of the people that live and reside in British Columbia now. How do you go back and turn that in -- I don't know. Like, I think we as First Nations ... are kind of stuck in the middle of it, so we need your help and the government's help, both provincially and federally, to move forward on this.

Unfortunately, the federal government did not to participate in this Inquiry. The Panel understands this participant's frustration. The government of British Columbia presently exercises legislative authority over the regulation of utilities throughout the province, including on First Nation reserves, and it was in this capacity that the Panel put forward its recommendations.

West Moberly suggests that historic treaty First Nations should:

- be given the opportunity to self-regulate in respect of its provision of utility services of any kind, including utility services located on its reserve lands, on lands it owns in fee simple, and in any other locations within the boundaries of its Treaty territory within British Columbia;
- be encouraged and supported in developing robust dispute resolution processes, not overseen by BCUC;
- be able to acquire, with BCUC oversight, assets from public utilities at reasonable cost to facilitate effective, cost-efficient retail services; and
- be free from an obligation to serve, but encouraged to publish and maintain an extension policy.¹⁷³

The Panel appreciates these suggestions. Although the various unresolved complexities relating to Treaty 8 government and territories make it difficult to recommend that the UCA exempt historic treaty Nations outside of the reserve, we agree that some of the proposals put forward by West Moberly may offer a way forward. In particular, the proposed sub-territorial model could be explored, perhaps through the DRIPA process. We have tried to consider how these proposals can be taken into consideration in our recommendations, particularly in light of reconciliation.

The Panel recommends the following with respect to historic treaty First Nations:

We recommend that an historic treaty First Nation determine the means of regulation of an Indigenous utility providing services on that First Nation's reserve lands. Any BCUC oversight ceases when the First Nation notifies the BCUC that it no longer requires BCUC regulation and demonstrates, as further described in Final Recommendation 7, that it has an arm's length complaint and dispute resolution process to protect all ratepayers (Final Recommendation 16).

4.7 First Nations with Self-Governing Agreements

The BCUC was asked to make recommendations respecting the regulation of utilities in relation to the following First Nations that have self-government legislation - Westbank First Nation, Sechelt Indian Band and the Sechelt Indian Government District - and has therefore considered each separately.

In its Draft Report, the Panel made the following recommendations:

¹⁷³ Ibid, p. 1-2

Provided that the Advisory Council Law applies to resolution of utility complaints, we are inclined to recommend that the Westbank First Nation be given the opportunity to self-regulate when it provides utility service on its own lands, as we have proposed for the Nisga'a. To provide greater clarity, we invite the Westbank First Nation to give us further input as to how this law applies to utility complaint resolution during the workshop and comment period. (Draft Recommendation 11)

It appears uncertain that either the Sechelt Indian Band or the Sechelt Indian Government District qualifies for the current municipal exception under the UCA. Nonetheless, we would recommend that those entities be given the opportunity to self-regulate when they provide utility service on their own lands, as we have proposed for the Nisga'a, provided that the Advisory Council has the power to resolve utility complaints. To assist us in making this recommendation, we invite the Sechelt Indian Band and the Sechelt Indian Government District to give us further insight into their processes during the workshop and comment period. (Draft Recommendation 12).

4.7.1 Westbank First Nation

Westbank First Nation notes its members are part of the Syilx Peoples, and that Westbank First Nation shares in the responsibility to take care of Syilx Territory. Westbank First Nation submits that it is the caretaker of the area depicted as "Westbank Area of Responsibility,"¹⁷⁴ and that if it establishes an Indigenous utility, its jurisdiction should extend to this area. *Westbank First Nation Advisory Council Law 2017* does not apply to the resolution of disputes regarding utilities; should Westbank establish Indigenous utilities, they would enact a separate law and process for the resolution of disputes related to utilities. Westbank First Nation further notes that its Advisory Council is an important example of strong leadership and governance mechanisms, and of the strong protections in place for non-members.¹⁷⁵

Like modern treaty nations, the Westbank First Nation negotiated an agreement for comprehensive self-government, that sets out, among other things, the powers of government, the structures and procedures of government, and membership. Also like modern treaty First Nations, Westbank First Nation went through a rigorous negotiation and ratification process, that included extensive consultation with Westbank members and other interested parties. It also has a detailed implementation plan, is subject to the Charter of Rights and Freedoms. The Act also sets out rules of paramountcy.¹⁷⁶

While the Westbank Self-Government Agreement is explicitly not a treaty, it "reflects a government to government relationship between Canada and Westbank First Nation within the framework of Canada and with the recognition that the inherent right of self-government is an existing aboriginal right within section 35 of the *Constitution Act, 1982*."¹⁷⁷ Unlike the modern treaty First Nations, the agreement applies only on Westbank First Nation reserve lands and was negotiated and executed by the Westbank First Nations and the Government of Canada. The Government of British Columbia is not a party to the agreement. Similarly, unlike modern treaties, the paramountcy provisions speak only to federal and Westbank First Nation Laws. The agreement uses the

¹⁷⁴ Westbank First Nation Comments on Draft Report, p. 3

¹⁷⁵ Westbank First Nation Comments on Draft Report, pp. 1 – 2.

¹⁷⁶ Westbank First Nation, Self-Government Agreement, retrieved from: <https://www.wfn.ca/selfgovernment.htm>.

¹⁷⁷ Westbank First Nation Self-Government Agreement, p. 8

language of section 88 of the *Indian Act* stating that all provincial laws of general application from time to time in force in British Columbia apply to members, except to the extent that they conflict with the agreement, the legislation or any Westbank Law.

Given these differences, the Panel does not believe that Westbank First Nation can be treated in a manner similar to Nisga'a Nation or Tsawwassen First Nation. However, Westbank has a sophisticated governing system within its reserve lands and has systems and institutions in place that, with modification, could provide a basis for the regulation of public utilities.

As is discussed elsewhere in this report, dispute resolution is just one aspect of the typical arms-length regulatory scheme relating to the regulation of public utilities. However, the Panel acknowledges that Westbank First Nation is particularly experienced in Indigenous governance administration.

We make the following recommendations for Westbank First Nation:

We recommend that Westbank First Nation determine the means of regulation of an Indigenous utility providing services on Westbank Lands. Any BCUC oversight ceases when Westbank First Nation notifies the BCUC that it no longer requires BCUC regulation and demonstrates, as further described in Final Recommendation 7, that it has an arm's length complaint and dispute resolution process to protect all ratepayers (Final Recommendation 17).

The Westbank First Nation indicated that the recommendation should allow for the possibility of the jurisdiction extending beyond the reserve boundaries and into its Traditional Territories. It also clarified that if it were to establish Westbank First Nation utilities, it would enact a law and separate processes for related dispute resolution. It pointed to its current Advisory Council system developed to provide non-members living on or having an interest in Westbank Lands with a mechanism to input into law and propose amendments that directly and significantly affect them.

4.7.2 Sechelt Indian Band (Shíshálh First Nation)

In its Draft Report, the Panel discussed in some detail the Sechelt Indian Band and Sechelt Indian Government District, their constituting federal and provincial legislation, governing authorities and unique relationship with the federal and provincial governments. The Panel concluded that on the basis of our analysis, it appears uncertain whether either the Sechelt Indian Band or the Sechelt Indian Government District qualifies for the current municipal exception under the UCA.

In the Draft Report, we commented that despite this uncertainty:

Nonetheless, we would recommend that those entities be accorded the same opportunity as other First Nations to self-regulate the provision of utility services on their reserve lands, provided that the Advisory Council has the power to resolve utility complaints. To assist us in making this recommendation, we invite the Sechelt Indian Band and the Sechelt Indian Government District to give us further insight into their processes during the workshop and comment period.

Despite this invitation, neither the Sechelt Indian Band nor the Sechelt Indian Government District provided any submissions to the Panel. In the absence of such input, the Panel considered not making any recommendation.

Nonetheless, the Panel notes that the Sechelt Indian Band was the first Indian Band in British Columbia to obtain federal legislation replacing many features of the *Indian Act*. Like the Westbank First Nation, the Sechelt Indian Band sought to exercise a form of federally recognized self-government but with a unique feature that creates a Sechelt Indian Government District on the reserve lands. In addition to the *Sechelt Indian Band Self-Government Act*¹⁷⁸, British Columbia enacted a law recognizing the Sechelt Indian Government district and deeming the laws or bylaws of that District to be, for the purposes of that Act, enacted under the authority of British Columbia.¹⁷⁹ The hybrid nature of the Sechelt Indian Government District appears to be intended to create a municipal-style government, such that the Panel felt it might fall into the municipal exception with more ease than most Indigenous Nations. In these circumstances, the Sechelt Indian Government District may be considered a unique form of government with municipal-like powers under provincial legislation and therefore, arguably be included within the municipal exception. At the same time, however, it does not fall exactly into that exception, as the BCUC considers that the municipal exception currently requires 100% ownership of a utility by a municipality or regional district.

On balance, however, given the similarities between the Sechelt Indian Band and the Westbank First Nation, we have concluded that our recommendations for these two self-governing Nations should be similar.

Therefore, we make the following recommendations for Sechelt Indian Band:

We recommend that the Sechelt Indian Band determine the means of regulation of an Indigenous utility providing services on Sechelt lands. Any BCUC oversight ceases when the Sechelt Indian Band notifies the BCUC that it no longer requires BCUC regulation and demonstrates, as further described in Final Recommendation 7, that it has an arm’s length complaint and dispute resolution process to protect all ratepayers (Final Recommendation 18).

4.8 Regulation of Standards, Safety and Reliability

4.8.1 Regulation of Mandatory Reliability Standards

Because our transmission system is part of the much larger, interconnected North American grid, we implement North American reliability standards, called Mandatory Reliability Standards (MRS). These are mandatory and enforceable reliability standards that ensure the integrity of the North American Bulk Electric System (BES). MRS deal with a range of reliability issues from cyber security and vegetation management to system operator training and modelling of the BES.

After massive blackouts in Eastern Canada and United States in 2003, the US National Electricity Regulatory Commission (NERC) developed MRS for the North American grid to mitigate the risk of similar incidents. NERC is an international body that incorporates representation from both Canada and the United States. It is responsible for developing MRS for the BES and overseeing their implementation.

¹⁷⁸ S.C. 1986, c.27

¹⁷⁹ Sechelt Indian Government District Enabling Act [RSBC 1986] chapter 416

BC adopted the NERC MRS in 2008 and appointed the BCUC as the exclusive regulator of MRS following amendments to the UCA. In doing so, the BCUC regulates MRS for all transmission infrastructure in the province. Exclusion of an entity from the definition of a public utility does not exclude the application of reliability standards established under section 125.2 of the UCA.

In the Draft Report, we recommended that the BCUC retain jurisdiction with respect to approval, compliance and enforcement of MRS applicable to all transmission infrastructure in the province, regardless of who owns or operates the infrastructure (Draft Recommendation 2).

In general, BC Hydro supports this proposed recommendation. However, it states that the recommendation should cover more than transmission infrastructure. BC Hydro requests that the BCUC modify this recommendation to include any entity that may impact the BES. It explains that:

MRS are adopted in Canada at a provincial level. The application of MRS in all applicable BES jurisdictions is not limited to public utilities, but also includes any entity that is capable of impacting the BES and meets the criteria of MRS defined functions, which include but are not limited to, Distribution Provider, Transmission Service Provider, Transmission Owner, and Generator Owner.¹⁸⁰

Further, BC Hydro emphasizes that:

The lack of a common regulator may compromise reliability, safety and efficiency and that a common regulator is particularly important in situations where various utilities are interconnected to the BC Hydro system. Due to the interconnected nature of electrical systems, adjoining utilities must work cooperatively to ensure reliability, safety and efficiency. Should there be a disagreement between utilities, a common regulator is required to resolve the disagreement.¹⁸¹

FortisBC also agrees with the recommendation, noting that the safe integration with neighbouring jurisdictions necessitates the consistent application of MRS. FortisBC suggests that, as an alternative to regulating Indigenous utilities' compliance with MRS "the BCUC could effect this same result by regulating the utility to which the Indigenous utility was seeking to connect (e.g. BC Hydro or FBC). The BCUC will continue to oversee the interconnection regardless and could order BC Hydro or FBC to disconnect an Indigenous utility in the event that the Indigenous utility was to act in a manner that placed the interconnected grid at risk. Having said that, directly overseeing an Indigenous utility in respect of its compliance with MRS would help to avoid a circumstance where disconnection becomes necessary."¹⁸² As a practical matter, however, FortisBC notes that most Indigenous utilities would likely fall below the thresholds that trigger the requirement to adhere to MRS.¹⁸³

¹⁸⁰ Exhibit C2-7, p. 3

¹⁸¹ BC Hydro Comments on Draft Report, p. 5

¹⁸² Exhibit C4-11, p. 5

¹⁸³ Exhibit C4-11, p. 5

Flintoff agrees with the recommendation and argues this should not be a jurisdictional issue because MRS are necessary to provide security for the North American Electric Grid.¹⁸⁴

CFN-GBI continues to support the BCUC retaining jurisdiction over MRS, submitting that these are, by definition, uniform and not subject to local variance.¹⁸⁵

In general, participants support our proposed recommendation and agree with the modification BC Hydro proposes. Since MRS are adopted at a provincial level, they remain the same regardless of who owns, operates or regulates a utility in BC. Having a common regulator ensures the application of a consistent framework throughout BC and enhances reliability, safety and efficiency. We agree with the further suggestions of BC Hydro and therefore make the following final recommendation:

We recommend that the BCUC retain jurisdiction with respect to approval, compliance and enforcement of Mandatory Reliability Standards (MRS) applicable to any entity that may impact the Bulk Electric System in the province, regardless of who owns or operates the infrastructure (Final Recommendation 19).

In the Draft Report, we recommended that [n]otwithstanding the Nisga'a's authority over its own lands, we recommend that the BCUC retain jurisdiction over Mandatory Reliability Standards, because of the interconnected nature of the North American bulk electric system (Draft Recommendation 8).

Nisga'a states that this recommendation is unnecessary and should be deleted. In its view, the BCUC's specific and "exclusive" jurisdiction over MRS under the UCA is not related to the BCUC's general jurisdiction over "public utilities," and the BCUC's jurisdiction over MRS is not therefore dependent upon whether an entity is otherwise regulated as a "public utility." As the Nisga'a Nation's proposed exclusion from the definition of "public utility" in the UCA bears no relationship to the issue of the BCUC's jurisdiction over MRS, the Nisga'a Nation is of the view that Draft Recommendation 8 should be deleted.¹⁸⁶

We agree. We further note that the wording of the MRS recommendation is that the BCUC retain jurisdiction over "any entity that may impact the Bulk Electric System in the province." We therefore make no recommendation regarding MRS and the Nisga'a.

4.8.2 Safety and General Service Reliability

British Columbians expect their electricity, gas and supply of thermal energy to be safe and reliable. People expect, for example, minimal service interruptions and outages, that capacity will be sufficient to meet peak demand, and that the energy they purchase will be of an acceptable quality. They also expect that the utility equipment and infrastructure is maintained so that it is safe.

The *UCA* requires a public utility to provide a service that is a service to the public that the BCUC considers is in all respects adequate, safe, efficient, just and reasonable.¹⁸⁷

¹⁸⁴ Exhibit C5-10, p. 7

¹⁸⁵ Exhibit C20-6, p. 4

¹⁸⁶ Exhibit C16-5, p. 5

¹⁸⁷ UCA s.38(a)

In the Draft Report we state that:

[s]afety and reliability (other than MRS) will be the subject of the workshop and comment period. If the Final Report recommends that the BCUC retains jurisdiction over safety and reliability, First Nations would not be able to opt out of those applicable portions of the UCA governing these issues.¹⁸⁸

We heard from participants that frequent outages and unreliable service are not uncommon complaints for rural ratepayers. KGI observed that service reliability in Indigenous communities is relatively substandard.¹⁸⁹

Some parties submit that Indigenous governments should be able to regulate Indigenous utilities to the same standards as other regulatory bodies, for instance where the Indigenous regulator decides that it is prepared to regulate safety and service reliability and understands the liabilities involved with such regulation.¹⁹⁰ However, some parties consider that the BCUC should continue to regulate these areas, with FortisBC submitting that anything less than a uniform approach would result in an undesirable regulatory patchwork.¹⁹¹ Flintoff notes the potential question of Technical Safety BC's (TSBC) jurisdiction over safety if Indigenous utilities are excluded from the UCA definition of "public utility." FortisBC notes that it would be helpful if the BCUC clarified its role in safety and reliability with respect to other regulators holding such responsibility such as TSBC and the BC Oil and Gas Commission.¹⁹²

BC Hydro emphasizes the importance of a common regulator for situations where various utilities are interconnected to the BC Hydro system. Due to the interconnected nature of electrical systems, adjoining utilities must work cooperatively to ensure reliability, safety and efficiency. Should there be a disagreement between utilities, a common regulator is required to resolve the disagreement.¹⁹³

Likewise, FortisBC emphasizes the importance of a unified regulatory approach across British Columbia and that this is in the best interest of consumers by (a) limiting the potential for a patchwork of safety and reliability regulation to cause confusion among stakeholders, not just in respect of the Indigenous utility but also for other non-Indigenous utilities, and (b) promoting efficiency through common safety and reliability standards.¹⁹⁴ It points out that the existing municipal utility exemption already poses a challenge in this regard, and recommends against an even larger regulatory patchwork.¹⁹⁵

Some participants submit that First Nations are fully capable of regulating safety and reliability (or any other issue) to the same standards as any other regulatory agency, municipality, or regional district¹⁹⁶ and that they should have the opportunity to self-regulate on safety and service reliability if they decide they are prepared

¹⁸⁸ Draft Report, p. 80

¹⁸⁹ KGI Final Argument, p. 23

¹⁹⁰ CEC Comments on Draft Report, p. 3. FNLC Comments on Draft Report, p. 9. CFN-GBI Comments on Draft Report, p. 4.

¹⁹¹ FortisBC Comments on Draft Report, pp. 7, 18 – 19. BC Hydro Comments on Draft Report, p. 5. Transcript Vol. 15, p. 787.

¹⁹² Flintoff Comments on Draft Report, p. 6. FortisBC Comments on Draft Report, pp. 18 – 19.

¹⁹³ Exhibit C2-7, p. 5

¹⁹⁴ Exhibit C4-11, p. 7

¹⁹⁵ Exhibit C4-11, p. 18

¹⁹⁶ Exhibit C20-6, p. 4

and understand the liabilities involved.¹⁹⁷ First Nations should be supported to build capacity to handle these issues, or have the option to contract with BCUC to regulate these areas.¹⁹⁸

Some participants were more conditional in their support for First Nations regulating safety and standards on reserves. If the Indigenous utility is on-reserve and not connected to the North American grid then the Indigenous utility should arrange with the BCUC or Technical Safety BC to address safety, service and reliability. If the utility is, however, connected to the North American grid then the BCUC should continue to regulate safety, reliability as well as MRS standards.¹⁹⁹ Provided an Indigenous utility has demonstrated suitable processes and capabilities to manage safety and reliability, the CEC submits, self-regulation is appropriate, but that the BCUC should retain overall jurisdiction to regulate in the event safety and reliability are not adequately managed, which could require some level of standardized reporting to the BCUC.²⁰⁰

Several participants commented on the lack of clarity in the current regulatory system regarding regulation of safety and reliability. For example, FortisBC notes

[T]here appears to be some uncertainty regarding the practical implications of the BCUC retaining jurisdiction over safety and service reliability. Concerns in this regard are understandable given the inherent risk involved in the distribution of electricity and natural gas, and questions about who would be responsible for maintaining or upgrading utility systems if safety and reliability were to be neglected.²⁰¹

As it stands, the regulation of safety and service reliability is a shared responsibility between the BCUC and other regulators (e.g. Technical Safety BC and the BC Oil and Gas Commission). In the event that the BCUC recommends it retain jurisdiction over safety and service reliability, FortisBC respectfully suggests that it would be beneficial for the BCUC to provide clarification with respect to how it sees its role in these regards.²⁰²

In the Panel's view, safety and service reliability are two areas where, like MRS, a common approach throughout BC is helpful. Where an Indigenous utility interconnects with BC Hydro, for example, the utility will likely be required to meet BC Hydro's standards regarding safety and reliability. While consistency of standards is desirable, the Panel agrees that determining the regulator of such standards should be a matter of a First Nation's right of self-determination. Further, the standards themselves should also be a matter of self-determination.

We have recommended that, generally speaking, a First Nation has the right to determine the means of regulation when it provides utility service on its land and in our view, regulation of general service reliability is necessarily part of that regulation. In our view, it would be difficult to parcel out general service reliability to one regulator and the remaining regulation to another regulator.

That said, as difficult as it is to have separate regulators for different aspects of the regulation of a utility, the Panel accepts that this could work for safety regulation. Therefore, to the extent that a First Nation wishes the

¹⁹⁷ FNLC Comments on Draft Report, p. 9

¹⁹⁸ FNLC Comments on Draft Report, pp. 9 and 10

¹⁹⁹ Exhibit C5-10, pp. 13 and 14

²⁰⁰ Exhibit C18-12, p. 3

²⁰¹ ²⁰¹ FortisBC Comments on Draft Report, p. 18

²⁰² Exhibit C4-11, pp. 18 and 19

BCUC to continue to regulate safety, those provisions of the UCA dealing with safety will continue to apply. In any event, subject to any changes to their jurisdiction, other regulators such as Technical Safety BC and the BC Oil and Gas Commission will continue to have jurisdiction over various aspects of safety of an Indigenous utility, regardless whether the BCUC or the First Nation is the regulator.

We recommend that a First Nation determine the means of regulation of safety with respect to an Indigenous utility. If the First Nation delegates authority to the BCUC to regulate safety, the applicable portions of the UCA governing safety will remain in force for that First Nation (Final Recommendation 20).

We accept FortisBC' submission concerning the need for the BCUC to clarify its role in the regulation of safety regarding Indigenous utilities. There are multiple regulatory agencies, such as Technical Services BC and the Oil and Gas Commission with oversight of specific aspects of utility operation. Generally speaking, the UCA provides the BCUC with a broad oversight role of utility functions, including safety and reliability. In addition, BCUC has broad oversight of utility spending, including on safety and reliability programs. However, further clarity concerning the role of the BCUC in the regulation of safety would be helpful, including clarity concerning the jurisdiction of other safety regulators. The BCUC is considering an inquiry to provide further clarity on this issue.

4.9 Retail Energy Sales

Having made recommendations regarding regulation of Indigenous utilities different types of First Nations lands, we now consider issues related to Indigenous utilities providing service beyond reserve or treaty lands, and the co-existence of Indigenous utilities and incumbent utilities under different regulatory frameworks.

4.9.1 Existing Utility Service Areas

Much of the populated areas of the province lie within an existing electric utility's service area. Both FEI²⁰³ and BC Hydro²⁰⁴ state that their service territories areas arise from the grant of a CPCN – either actual or deemed by section 45(2) of the UCA. In Fortis' view, a CPCN does not confer exclusivity over a particular service area in the formal legal sense. Rather, exclusivity arises in practice because of the combination of:

- a. the legal requirement for a potential new utility to obtain a [Certificate of Public Convenience and Necessity] CPCN from the BCUC to provide service in the area, such that the potential new entrant must establish that having two utilities offering the same service in the same area would be in the public interest; and
- b. the economic reality that a particular utility service, with its significant capital requirements and finite customer base, can be provided most cost-effectively by one firm (i.e. the economic principle of sub-additivity of costs).²⁰⁵

Fortis also submits that, unlike FEI's or BC Hydro's service area, FBC's service area is not defined with reference to an existing infrastructure. Instead its service territory "was created by an 1897 statute called 'An Act to Incorporate the West Kootenay Power and Light Company, Limited' (WKPA). FBC is still subject to the obligations, and has all the rights granted, pursuant to the incorporating statute, as amended."²⁰⁶

²⁰³ Exhibit C4-10, FortisBC Response to BCUC Panel IR 1.1.1

²⁰⁴ Exhibit C2-6, BC Hydro Response to, BCUC Panel IR 2.1.

²⁰⁵ Exhibit C4-10, FortisBC Response to BCUC Panel IR 1.1.1.

²⁰⁶ Ibid., FortisBC Response to BCUC Panel IR 1.1.1.



Fortis explains that this franchise granted by government essentially confers an exclusive right to provide electricity to customers within the boundaries defined in the map above.

We take no issue with the views of Fortis or BC Hydro concerning their service area boundaries. We further note that Fortis’ comments on exclusivity are consistent with regulatory practice and common law in many jurisdictions.

However, as Fortis points out,²⁰⁷ exclusivity is not an explicit right granted by a Certificate of Public Convenience and Necessity (CPCN). Any other utility that wishes to “set up shop” in what is otherwise the service area of another utility requires a CPCN from the BCUC to build necessary infrastructure. At that point the BCUC will apply a public interest test and it is here that the new utility must make the case for the existence of two utilities.

In considering the public interest test, the BCUC considers, among other things, the energy objectives outlined in the CEA, one of which is economic development for First Nations communities. Other considerations include the impact on the ratepayers of the incumbent utility. A utility that generates its own electricity has the potential to take existing and future customers away from the incumbent utility, thereby reducing its demand. Given the typically high fixed cost environment of integrated utilities this has the effect of driving rates up for its existing customers.

²⁰⁷ Ibid., FortisBC Response to BCUC Panel IR 1.1.1.

Next we will consider the issue of other utilities operating in an incumbent utility's service area.

4.9.2 Other Utilities Operating in an Incumbent Utility's Service Area

In many cases, when an Indigenous utility begins operation, there is already an incumbent utility providing service. In this section we consider the practical aspects of two utilities operating in the same area and the economic implications to both utilities.

Electric utilities in BC are "vertically integrated." This means that the utility provides generation, transmission and distribution services, along with customer service and care. Customers generally see a single charge for all of these services on their bill. This is also referred to as "bundled" services.

If a new electric utility, with its own generation capability, begins operating in the service area of an incumbent integrated electric utility, it will compete with that incumbent utility for either the incumbent utility's present customers, its potential future customers, or both. If the competition is for present customers and the incumbent utility's load is not otherwise increasing, this will lead to a reduction in demand for the incumbent utility and, given its high fixed costs, an increase in rates for the existing customers that remain with the utility. In addition, it raises stranding issues for those parts of the incumbent utility's system that may no longer be needed to serve those customers that move to the new utility.

However, if that new utility competes only for new customers and/or there is an increase in existing customer demand, there may be an opportunity for the new utility to grow without rates for the existing utility's customers necessarily increasing. In some cases, the Incumbent Utility may have made recent investments to meet expected future demand – such as Site C and any demand unexpectedly lost to a new utility operating in the Incumbent Utility's service area can put upward pressure on rates for the Incumbent Utility's customers.

If the new electric utility does not have its own generation source, purchases its electricity from the incumbent utility and serves only new customers, the impact on the existing customers of the incumbent utility is much more favourable, although potentially not as favourable as it would be if the incumbent utility served that load.

Therefore, the issue is whether it is in the public interest for two (or more) utilities to serve the same territory – or for a second utility to "take over" the customers of an Incumbent Utility - if the result is an increase in rates to the customers of the incumbent utility.

The business model of a gas distribution utility is somewhat similar to that of an electric utility. The equivalent to local generation is, for example, a biomass source that can be converted to renewal gas. However, within Fortis' service area, which represents more than 90 percent of the natural gas distribution system in BC, natural gas services are unbundled. Any person can provide natural gas to any other person connected to Fortis' distribution system. Fortis' customers see charges for the provision of the natural gas commodity separately from the delivery costs.

A First Nation connected to Fortis' system that seeks to establish a utility to produce renewable gas and retail it either to residents on its own land or anyone else in the province connected to Fortis' gas grid. This is similar to Scenario 9 outlined in Section 4.2.4. In this scenario there is no impairment of an incumbent utility's franchise. Only if a parallel distribution grid were built and operated would the existing franchise be impaired.

Thermal utilities differ significantly from either gas or electric utilities. Hot water or steam, the typical working fluid in a district heating system, does not travel well, so thermal utilities are much smaller in geographic scale. Further, building a district heating system in the service area of a gas or electric utility is not considered a franchise infringement even though it may result in a reduction of the demand for either or both of those products. Scenarios 2, 3 and 7 are examples of geothermal utilities.

Next, we will look at retail sales of utility services on reserve/treaty lands and then on traditional territories.

4.9.3 Retail Sales On-Reserve or on Treaty Lands

Here, we consider issues that arise when the operations of an Indigenous utility impacts existing incumbent utilities.

Most communities on reserve or treaty lands take at least some utility services from an incumbent utility. For example, many take electricity service from BC Hydro, whether from the provincial transmission/distribution grid or as a Zone II remote community, in which case it is served by a BC Hydro owned and operated micro-grid.

Thus, for example, a First Nation electric utility serving customers on its own land could potentially serve the customers of the incumbent utility, new customers that move onto the land or some combination of both. Therefore, in this example the First Nation owned utility will likely materially impair the franchise of the incumbent utility even if it only sold electricity to new customers through a distribution system that it owns and operates. In order to facilitate this course of action, a limited carve-out of the incumbent utility's service area is required. Scenarios 1, 2, 3, 4, 6 and 8 in Section 4.2.4 are further examples of this.

Whether the First Nation utility is regulated by the First Nation or the BCUC, the UCA requires BCUC approval for a utility to: "dispose of or encumber the whole or a part of its property, franchises, licences, permits, concessions, privileges or rights [emphasis added]."²⁰⁸ If the First Nation chose for its utility to be regulated by the BCUC, generally speaking, as discussed above, a CPCN would be required which entails the consideration of the public interest before the utility could begin operation.

Given the submissions made in this Inquiry, and in keeping with the necessity of recognizing Indigenous rights, we do not consider it reasonable that the existence of an existing franchise should prevent a First Nation owned utility from operating on reserve or treaty land to provide retail energy to residential, commercial or industrial customer on that land. This is consistent with the exception granted to municipal utilities in the UCA.

In the example above, if the First Nation seeks to serve the incumbent utility's existing customers it must either build duplicate distribution infrastructure or acquire it from BC Hydro, the incumbent utility. If it is acquired, the transaction must be approved by the BCUC under section 52(1)(a) which is set out above. If new infrastructure is built that will leave the old distribution stranded, in both the physical and the financial sense.

The effective transfer of service area from the incumbent utility and the stranding of the incumbent utility's assets can be viewed as a seizure of the incumbent utility's assets unless compensation is provided or a compelling public interest reason exists.

²⁰⁸ UCA Section 52(1)(a).

There is no evidence in this Inquiry of a circumstance where the ownership of distribution infrastructure has been transferred, nor are we aware of any such instance in British Columbia. However, in our view, in order for Indigenous peoples to “freely pursue their economic development” it is not enough to enable a First Nation to determine its means of regulation and effectively transfer the regulated public utility’s rights to the First Nation but then leave a significant barrier- in the form of the incumbent utility’s distribution assets - in place. To do so would be counter to UNDRIP Article 3:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

As well as, Article 4:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

We therefore consider it consistent with Articles 3 and 4 of UNDRIP that the First Nation has the opportunity to acquire the existing assets at a price that is fair to both the First Nation and the incumbent utility.

In most circumstances the economic consequence to the incumbent public utility of the loss of load loss – the essential future value of the franchise - will be minimal and will therefore have little ratepayer impact. This is based on the assumption that even if all First Nations eventually chose to operate such a public utility on reserve or treaty land, they are not all likely to have their own generation source and those that don’t are likely to become wholesale customers of the incumbent utility. However, the value of the distribution assets may be material.

In any event, we are of the view that the incumbent public utility should be compensated for its losses. Reasonable compensation for the stranded assets could be the book value, which represents the portion of costs that are unrecovered, or the market value.

Our recommendations are summarized below:

We recommend that the UCA be amended to enable the BCUC to determine, in a public proceeding, fair compensation for an incumbent utility, if the operations of an Indigenous utility materially impact that incumbent utility (Final Recommendation 21).

We recommend that section 52 of the UCA be amended to require the BCUC to consider UNDRIP and the economic development needs of a First Nation seeking to acquire public utility assets (Final Recommendation 22).

For clarification, in the above illustrative example, if the First Nation owns or operates, for example, a thermal utility that provides heat and hot water to the community, it would not infringe on the incumbent (electric) public utility’s service area.

We also note that if the Indigenous utility held a generation asset instead of seeking to acquire the incumbent public utility's distribution system, it could negotiate an EPA with the incumbent public utility to sell a volume of electricity roughly equal to the load of the First Nation's community.

We have heard from some parties that a key part of economic self-determination is the ability to charge its utility customers rates that are sufficient to recover the cost of producing that energy, even if that is more expensive than energy that may otherwise be available.

However, if the rate the incumbent public utility charged the customers on that reserve or treaty land are postage stamp rates - as are most utility rates in the province - this would not provide the First Nation with the flexibility to set rates for energy produced on its reserve or treaty land that are lower or higher than that postage stamp rate.

We therefore make the following recommendation:

We recommend that if an incumbent utility acquires energy from an Indigenous utility, when setting rates for that incumbent utility on that First Nation's reserve, modern treaty First Nation's former reserve land, Nisga'a or Tsawwassen lands, the UCA be amended to require the BCUC to consider the cost of that energy, even if the resulting rate differs from the rate that would otherwise be set (Final Recommendation 23).

In this scenario, the rate must be sufficient to also allow the incumbent public utility to recover its prudently incurred expenses and provide the opportunity to earn a fair return on its assets deployed on that land. We note that this scenario is illustrative only. In practice the amount of energy generated would in all likelihood be higher or lower than the actual demand of the First Nation's community. If it is higher, there may be an opportunity to also sell the surplus to the incumbent public utility for export off the First Nation's land. If lower, the incumbent public utility would have to provide energy over that generated by the Indigenous Utility, such as during peak times and for backup.

4.9.4 Traditional Territory

As noted in Section 4.5.1 [Regulation on reserve], many participants consider that the scope of the BCUC's draft recommendations around regulation on reserve lands is too narrow and should be broadened to include First Nations' Traditional Territory.

Some participants expressed the need to recognize First Nations' inherent rights jurisdiction within their territories, with FNLC submitting that falling back on colonial constructs (such as reserve boundaries) due to the potential complexities of a regulatory regime centred on traditional territories is not consistent with the DRIPA, noting Articles 3 and 26 of UNDRIP.²⁰⁹ Additionally, many were concerned that limiting the scope of self-regulation to reserve boundaries only, would significantly constrain economic opportunities for Indigenous utilities, in turn restricting economic reconciliation. CERG highlights this would reinforce the isolation of First

²⁰⁹ Beecher Bay and Adams Lake Comments on Draft Report, pp. 2-3. Westbank Comments on Draft Report, p. 1. Collective First Nations Comments on Draft Report, p. 11. Transcript Vol. 15, p. 788. Transcript Vol. 17, pp. 900 – 901, 920, 933. Transcript Vol. 20, p. 1149.

Nations rather than posing as potential contributors to provincial clean energy. Practically, a reserve-only approach would also be challenging for First Nations that have multiple non-contiguous reserves.²¹⁰

In their comments, some parties also addressed potential issues or solutions associated with a regulatory framework that facilitated self-regulation of Indigenous utilities on First Nations' own Traditional Territory. Several parties identified the complexity of recognizing First Nations' specific rights with respect to Traditional Territory, particularly with respect to overlapping claims to that territory, with some stating this Inquiry is not the appropriate place for such discussions. Some note that government-to-government discussions and agreements are required between First Nations themselves, with the Provincial Government and potentially Federal Government. Another suggestion was "economic zones" of joint First Nations' jurisdiction. Beecher Bay First Nation and Adams Lake First Nation state that this Inquiry can recognize rights in a general way and take an incremental approach. FNLC recommends the BCUC take a regional or territorial approach where individual First Nations are partnering or working together, and also notes the existing viability of servicing agreements for off-reserve consumers.²¹¹

FortisBC notes that First Nations' asserted Traditional Territory encompasses the entire service areas of existing utilities like FortisBC, Pacific Northern Gas, and BC Hydro. FortisBC submits the presence of multiple utilities could result in redundant infrastructure, which combined with a splitting of the customer base would increase the rates paid by all consumers. Furthermore, the fundamental challenge to operating as a BCUC-regulated monopoly utility introduces business risks with respect to recovering the costs of up-front infrastructure investment.²¹² FortisBC suggests that 'Indigenous utility' be defined such that its operating area not include the entire geographic territory of an historic treaty or traditional territory because that would have detrimental implications.²¹³

Likewise, Flintoff submits that existing utilities should be allowed to recover the costs of stranded assets resulting from loss of customers.²¹⁴

However, Collective First Nations consider that there are bigger threats to existing utilities than Indigenous utilities, such as distributed generation for electricity and greenhouse gas reductions for gas utilities.²¹⁵ CFN-GBI submits that the BCUC should not assume stranding of assets just because it is conceptually possible, adding that Indigenous utilities are likely to come at the geographic margins of current utility systems and serve new customers with relatively small volumes of electricity. Furthermore, risks to existing utilities should be balanced against reconciliation benefits, and reconciliation is needed because such utilities have already infringed Indigenous Traditional Territory.²¹⁶

²¹⁰ FNLC Comments on Draft Report, p. 6. CFN-GBI Comments on Draft Report, p. 2. KGI Comments on Draft Report, p. 8. Exhibit E-10, CERG, p. 12. Transcript Vol. 15, pp. 779, 784. Transcript Vol. 16, p. 847. Transcript Vol. 18, pp. 1002 – 1003.

²¹¹ Collective First Nations Comments on Draft Report, p. 6. Exhibit E-10, CERG, p. 9. FortisBC Comments on Draft Report, p. 13. Beecher Bay and Adams Lake Comments on Draft Report, pp. 3 – 4. FNLC Comments on Draft Report, p. 6. Transcript Vol. 15, pp. 792 – 797. Transcript Vol. 16, p. 859. Transcript Vol. 17, p. 939. Transcript Vol. 18, pp. 1014 – 1015. West Moberly Reply Comments on Draft Report, pp. 4, 6

²¹² FortisBC Comments on Draft Report, pp. 12 – 13.

²¹³ FortisBC Comments on Draft Report, p. 11

²¹⁴ Flintoff Comments on Draft Report, p. 18.

²¹⁵ Collective First Nations Reply Comments on Draft Report, p. 7.

²¹⁶ CFN-GBI Reply Comments on Draft Report, p. 4

It was noted by others that there could be comparative advantages associated with an Indigenous utility's service, with KGI highlighting that in the AES Inquiry Report, the BCUC noted regulation should not impede competitive markets. KGI submits that in the case of potential impact to existing utilities, a framework should balance economic impact to the existing utility with any First Nations reconciliation and economic self-determination, but that all else being equal (e.g. environmental impact) the Indigenous utility's claim should prevail. Leq'á:mel considers that some form of CPCN process could be warranted in such circumstances.²¹⁷ Some parties consider that there will need to be a significant increase in future clean energy supply in order to reduce greenhouse gas emissions, and it would be beneficial to have Indigenous utilities competing with existing utilities to meet the additional demand.²¹⁸

FNLC submits that “[d]enying this Nation rebuilding effort continues past harmful divide-and conquer strategies of Crown. First Nations should have the opportunity to self-regulate when providing services within their territories off-reserve. First Nations rebuilding their governance structures, either individually or through partnerships, tribal councils or other collective structures be given the opportunity to self-regulate across their territory.”²¹⁹

FNLC further notes:

.... limiting exemptions to reserve boundaries would necessarily limit the economic viability of Indigenous utilities, and avoids the complex, but essential, work of addressing shared territories between Nations. If the BCUC is sincere in its intention to align its recommendation with UNDRIP (p. 71), and aiming to demonstrate the first act by a provincial regulator in accordance with the new Declaration on the Rights of Indigenous Peoples Act legislation, FNLC recommends the development of stronger regulatory changes that meet the minimum standards as well as the TRC's imperative of economic reconciliation.²²⁰

FNLC provides some examples of Indigenous utilities operating on Traditional Territory elsewhere in North America:

Communities in Alaska have developed a cooperative model that allows remote villages, largely Indigenous, to develop and operate renewable power production and distribution on a regional, more cost-effective scale. Some of the largest utilities in Alaska operate this way. For example, the Alaska Village Electric Cooperative (AVEC), a non-profit electric utility, is owned and operated by the people in the 58 villages it serves. Some of these cooperatives have voted not to be regulated by the Regulatory Commission of Alaska and instead regulate themselves through internal governance structures. This is enabled through a deregulation election process under the Alaska Public Utilities Regulatory Act (APURA) and the Alaska Admin Code. For those

²¹⁷ Leq'á:mel Comments on Draft Report, pp. 8 – 9. KGI Comments on Draft Report, pp. 9 – 10. West Moberly Reply Comments on Draft Report, p. 5.

²¹⁸ Collective First Nations Comments on Draft Report, p. 5; Appendix B. Exhibit E-10, CERG, pp. 12-17, 19.

²¹⁹ Exhibit C16-5, FNLC Comments on Draft Report, p. 3.

²²⁰ Ibid, p. 5.

that remain regulated under the APURA, the regulations set out simplified rate filing procedures for cooperatives.²²¹

As discussed at the July 4, 2019 Inquiry Hearing, the First Nations Major Projects Coalition has connected with 27 self-governing Tribes in the United States who service consumers living within and between their reserves. Each of the Tribes, federally recognized as a sovereign authority, operates its own utilities. The US Department of Energy's Tribal Energy Program is enacted through legislation and supports the regulatory sovereignty of these Tribes. Tribal utility associations are non-profit organizations established to "increase Tribal control over natural resources, the creation of renewable energy...and give Indian Tribes a voice in energy policy and legislation." Tribal utility associations provide technical support, group procurement and access to legal-type services for tribal members. The US context differs from Canada in that US states allow for private market competition between utilities. Few tribal utilities have a regulated rate structure, relying on the private market to set competitive rates. More research is needed to understand how this model could inform the BC context in light of the outstanding need to recognize First Nations territorial jurisdiction over our unceded lands.²²²

We acknowledge the rights of First Nations, as expressed in UNDRIP section 26, to their Traditional Territories. In our view this supports the positions of parties that we should consider the broader issue of traditional territories. These territories provide access to additional customers for Indigenous utilities and natural resources for new generation and renewable fuel opportunities for those utilities.

That said, the exercise of this right by an individual First Nation with respect to its utility is not straight forward. There may be equally compelling and competing rights that must be accommodated or otherwise resolved. These include:

1. Other First Nations' rights to the same Traditional Territory. While this may not be an issue generally, as we and participants have discussed, utilities require economies of scale and competition for customers if multiple Indigenous utilities operate in the same area may limit their effective expansion.
2. There are large incumbent electric and gas utilities operating in most of the currently populated areas of the province, and they have established service areas. Previously in this section (section 11) we discussed the issue of material impairment of these service areas. In addition to the issue of franchise infringement, these incumbent utilities provide economic barriers to the development of new electricity and gas utilities on Traditional Territories.

Further, much Traditional Territory is subject to the treaty negotiation process.

Adams Lake and Beecher Bay "appreciate that recognizing Indigenous rights in this context may require an incremental process and that it may be appropriate to begin with an exemption for certain utility activities on certain Indigenous lands that broadens over time as the capacity for Indigenous Utilities builds. The Panel explicitly recommending an incremental approach will allow all parties to respond to the unique circumstances

²²¹ C16-2-FNLC-WrittenEvidence, p. 12.

²²² Ibid, p. 12.

and objectives of each Nation. Adams Lake and Beecher Bay are an example of the diversity among Indigenous Nations in British Columbia.”²²³

FNLC recommends that “to respect First Nations’ Nation rebuilding efforts, the BCUC take a regional or territorial approach where individual First Nations are partnering or working together in tribal councils or other collective governance structures. These collective structures or partnerships, as the case may be, should also be given the opportunity to self-regulate across territory, as they are an expression of self-determination and align with the SCC’s decision as to the territorial nature of Title in *Tsilhqot’in*.”²²⁴

In FNLC’s view, this approach “creates better economic opportunities at a viable scale, and has the potential to facilitate collaboration and revitalization of Indigenous governance and law. This is consistent with Article 26 of UNDRIP, the right to own, use, develop and control traditional lands, territories and resources, with due respect for Indigenous systems of land tenure; and Article 3, the right to self-determination, including the right to freely determine political status and freely pursue economic development.”²²⁵

The Draft Report suggested that “a First Nations owned utility can apply to the BCUC on a case-by-case basis for a s. 88 exemption from regulation on traditional territory.”²²⁶ However, FNLC points out that “the difficulty in achieving a s. 88 exemption is one of the very reasons for this Inquiry and should not be relied on as a solution. Instead, the BCUC should convene a special panel or taskforce with relevant expertise to create a set of indicators and to support interested Nations who wish to self-regulate a utility service across territory.”²²⁷

Given the complexities of the issue of Traditional Territories, we are persuaded by those parties that suggest an incremental approach to the recognition of jurisdiction. This is clearly an important issue to First Nations and to put it “on hold” pending the resolution of other processes (e.g. treaty negotiations, government-to-government agreements) would run counter to at least the spirit of Article 26 of UNDRIP and to the goals of the DRIPA. Reconciliation Agreements between First Nations and the Provincial Government regarding rights within Traditional Territories offer a mechanism to address the issue of utility regulation on those territories. They may also provide a way delineate the rights of incumbent utilities and Indigenous utilities to operate in those territories. Our recommendations below are intended to support an overall objective of providing First Nations an opportunity to achieve some degree of economic self determination on their Traditional Territory.

We recommend that as the modern treaty process is the accepted means of clarifying Indigenous rights on Traditional Territories the modern treaty process should address the issue of utilities regulation and the rights of both incumbent utilities and Indigenous utilities to operate in those territories (Final Recommendation 24).

Issues involving incumbent utilities operating on traditional territory are currently subject to BCUC regulation. As discussed previously in this section, BCUC oversight includes review of material impairments of incumbent utility franchises. We therefore make the following recommendation regarding BCUC oversight of the operation of Indigenous utilities on Traditional Territory.

²²³ Exhibit C9-4-AdamsLake-BeecherBay-Comments-on-Draft-Report, p. 3.

²²⁴ FNLC Comments on Draft Report, p. 6

²²⁵ C16-5-FNLC-Comments-on-DraftReport, p.6.

²²⁶ Draft Report, p. 88.

²²⁷ Exhibit C16-5-FNLC-Comments-on-DraftReport, p. 6.

We recommend as an incremental approach to the entry of Indigenous utility operation on Traditional Territory, the UCA be amended to require the BCUC to consider UNDRIP and the economic development needs of a First Nation applying for a CPCN to operate an Indigenous utility on Traditional Territory (Final Recommendation 25).

4.9.4.1 Economic Reconciliation and Traditional Territories

Recognizing that both the Reconciliation Principles and UNDRIP address economic opportunities on Traditional Territories, the Panel has looked for ways to facilitate possible reconciliation measures to address existing assets on Traditional Territories. Although to date, the transfer of existing utility assets to First Nations has not occurred in BC, examples from other Canadian jurisdictions are useful examples that enable Indigenous people to participate in the public utility sector. In Ontario, a partnership of 129 Ontario First Nations became co-owners in Hydro One, Ontario's electricity transmission and distribution service provider through share offering to Ontario First Nations acquired by way of a low-interest government loan.²²⁸ Private shareholders hold 51% of Hydro One's shares, the Province of Ontario holds 47.4%, while the remaining 2.5% are held by the First Nation partnership. This model of joint ownership provides an interesting example of a reconciliation initiative in the context of a partially privatized public utility.

Another example of economic partnership from Ontario involves 24 First Nations that are majority owners of an electricity transmission company Wataynikaneyap (Watay) Power. Situated in Northwestern Ontario, Watay is building 1800 km of high voltage transmission lines to connect to the provincial electricity grid. Watay has partnered with Fortis Ontario Inc. and RES Canada to build and operate the initial 300 km and subsequent 1,800 km of power lines. The 24 First Nations will become 100% owners of the project over time.²²⁹

In Alberta, transmission company AltaLink has formed partnerships with Piikani Nation and Kainai Nation (PiikaniLink LP and KainaiLink LP respectively), where the First Nations own 51% in their respective partnerships. In 2017, AltaLink applied to the Alberta Utilities Commission (AUC) for the transfer and sale of transmission assets located on reserve lands and previously owned by AltaLink to these new partnerships, with AltaLink providing loans to the First Nations to finance the sales. Babaie notes that in its decision, the AUC was guided by the "no-harm test", i.e. that ratepayers would be left no worse off as a result of the sale and transfer. The fact that the partnerships were involved with the Indigenous owners was not considered important. The AUC in its decision found that the no-harm test had not been met, and approved the application on the condition that certain costs were not included in the tariffs of AltaLink, PiikaniLink LP and KainaiLink LP.²³⁰

In Ontario, Five Nations Energy Inc. (FNEI) is a First Nations controlled electricity transmission company regulated by the Ontario Energy Board (OEB). In 2015 FNEI applied to the OEB for an extension of its transmission licence to facilitate purchase and operation of 80km of Hydro One's transmission assets, which were located on Crown land. OEB approved the application subject to amendment of FNEI's Land Use Permit from the Ontario Ministry of Natural Resources, since the assets were on Crown land.²³¹

²²⁸ Exhibit C3-2, p. 21.

²²⁹ Exhibit C3-2, pp. 26-28.

²³⁰ Exhibit A-13, pp. 6 – 9.

²³¹ Exhibit A-13, pp. 28 – 30.

The latter two examples are instructive for the situation in BC. Under the UCA, the sale of utility assets must be approved under section 52. Even if a purchasing Indigenous utility were exempt from the UCA, the BCUC would still need to review an application to determine if the sale by BC Hydro meets the public interest test, which would include a consideration of ratepayer harm. The BCUC may also attach conditions as appropriate. Furthermore, First Nations would need Provincial Government approval to operate utility assets on Crown land.

The DRIPA establishes the framework for reconciliation agreements and legislative change, and the Reconciliation Principles establish an overarching policy direction that all government agencies are responsible for implementing. The Panel believes that these provide an opportunity to both address institutional change in the short term and offer a pathway to broader participation of First Nations in the utility industry in the longer term.

We recommend that the Province consider mechanisms to encourage the development of further economic partnerships between incumbent utilities and First Nations (Final Recommendation 26).

4.10 Wholesale Energy Sales

The Panel agrees that the ability to sell energy that is produced by Indigenous utilities is important to First Nations economic development. Elsewhere in this report we discussed retailing such energy.²³² With regards to electricity specifically, retail opportunities are more limited, given the bundled regulatory environment and the economic challenges of delivering retail electricity in the footprint of incumbent utilities.

However, wholesale opportunities exist for both electricity and natural gas. By its nature, thermal energy does not travel well, so wholesale opportunities are limited geographically and most economic opportunities lie with local retail provision of heat and hot water, although co-generation opportunities exist, especially for thermal energy generated from biomass, renewal gas or geothermal energy. Co-generation allows for the sale of electricity either locally or wholesale through an EPA, in addition to the provision of thermal energy locally.

There is a potential for the production of renewable gas from biomass and other sources and, after upgrading, this could be sold and injected into the gas transmission/distribution system provided that the gas system was close enough to be economically accessed. In this regard, we note the goal of the Clean BC Plan for 15% renewable gas in the natural gas system in BC by 2030. In our view this creates significant opportunities for First Nations that are so situated to take advantage of this opportunity. At this time, we do not think there is any need for a specific recommendation on this issue, although this should be monitored going forward to ensure that First Nations are aware of these opportunities and that they continue to have access to them.

There is a history spanning more than 20 years of successful Indigenous electricity projects entering into long term IPP agreements with BC Hydro, either through the Standing Offer Program or a Clean Power Call. However, the SOP program has been discontinued due to a surplus of electricity. There has not been a clean power call since 2008.

²³² See Section 4.9

Until a few years ago, the Standing Offer Program (SOP) provided IPPs of a certain size the ability to connect to BC Hydro's system and sell their electricity at a fixed price. However, the program was discontinued. On October 28, 2019, the BC Government made the following statement on its website:²³³

BC Hydro has a surplus supply of electricity which is expected to continue into the 2030s. The surplus means there is no need for new electricity supplies for the foreseeable future. Suspending the SOP will reduce BC Hydro's energy costs and take pressure off rates for all British Columbians.

Many Indigenous Nations in British Columbia have expressed interest in developing or partnering on clean energy projects under the SOP. The Province remains committed to reconciliation with Indigenous Nations.

As noted in the Draft Report, several participants in this Inquiry were concerned about the impact of the closure of the SOP program on First Nations.²³⁴ In addition, we also note additional factors relating to the SOP program, in particular:²³⁵

- The price paid under the program did not reflect the nature of the energy produced or when it was delivered. In particular, firm or dispatchable electricity can be valued more highly than non-dispatchable or non-firm electricity by the purchaser and this can be reflected in the price they are willing to pay. In contrast, under the SOP program, there was one price for all electricity no matter when it was delivered. This may have been appropriate as long as the energy acquired from an SOP vendor was used for domestic purposes and BC Hydro's significant hydro storage assets could be used as a large "battery." However, in times of surplus it may be more appropriate to vary the price paid for different types of electricity.

Doing so would send price signals to SOP vendors thereby further incenting the development of innovative technologies such as storage.

- The previous SOP program did not allow a "Developer that is otherwise a public utility, such as one actively serving customers" to apply under the SOP. This provision can provide a barrier by preventing a participant from taking advantage of economies of scale.
- The SOP limited participants to a combined total Nameplate Capacity of 15 MW. This provision can also provide a barrier by preventing a participant from taking advantage of economies of scale.

We recommend that the Provincial government reconsider the SOP program along with the cap for that program and any other provision that places undue economic barriers on potential participants. If the program is restructured and reintroduced, we further recommend it should be based on market electricity prices, so that Indigenous utilities are provided meaningful competitive economic opportunities while ensuring that all BC Hydro ratepayers are not harmed (Final Recommendation 27).

²³³ <https://engage.gov.bc.ca/govtogetherbc/impact/standing-offer-program-results/>

²³⁴ Draft Report, p. 64

²³⁵ <https://www.bchydro.com/content/dam/BCHydro/customer-portal/documents/corporate/independent-power-producers-calls-for-power/standing-offer/standing-offer-program-rules.pdf>

Under certain circumstances, it may be appropriate to provide a subsidy (or a premium to market price) if it can be shown that a subsidy or premium is required to “mitigate adverse environmental, economic, social, cultural or spiritual impact.” In our view, this is appropriate given Articles 20 and 21:

Article 20 - 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. 2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21 - 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Premiums to the price offered in the SOP could be provided by government if it was determined that a specific project required it to mitigate adverse economic impact and that this mitigation was required for the province to meet its obligations under the DRIPA.

We note also that the point of sale could be on the First Nation land or it could be anywhere else in the province. If the latter, the Indigenous utility faces the same issues delivering the energy as it does delivering to a retail customer. If the wholesale customer is in the service territory of another public utility then public interest issues may apply. Further the Indigenous utility will need to wheel the energy there. We discussed these issues in the previous section.

Although First Nation owned utilities are free to pursue those customers we have heard there are perceived barriers to doing so, notably, with regards to electricity, the cost of transmission, access to transmission and the availability of transmission.²³⁶

We also note that there are no provincial regulatory prohibitions to selling energy to a customer outside the province. However, exports require customers and may require transmission access in both BC and in the jurisdiction being exported to.²³⁷ In addition, exports to the US require licences from the Canadian Energy Regulator. Powerex, BC Hydro’s export subsidiary, has substantial expertise with electricity export sales and as such could provide assistance to Indigenous utilities. This does not necessarily mean financial assistance, but sharing its expertise and assistance with finding customers, obtaining transmission rights and acquiring export licences would be valuable to many smaller energy suppliers.

We therefore make the following recommendation:

²³⁶ Transcript Vol. 12, pp. 587 – 588.

²³⁷ Transcript Vol. 12, pp. 587 – 588.

We recommend that assistance be provided to Indigenous utilities seeking to export energy to customers outside the province (Final Recommendation 28).

4.11 Wheeling Electricity over BC Hydro’s System

As noted in the BCUC’s Draft Report, there is currently a ban on “retail access” in the province, which means that a utility other than BC Hydro cannot use the BC Hydro transmission and distribution infrastructure to sell power to customers that are in BC Hydro’s service area.

Some participants considered that the current prohibition on retail access is constraining economic opportunities for prospective Indigenous utilities. For example, as noted in Smithers, retail access could provide an “entry point” for Indigenous utilities using existing assets. KGI considers that recognition of First Nation rights is less meaningful if Indigenous utilities are relegated to sub-scale utilities, and that they should be able to sell to anyone as restricted by normal market forces. West Moberly submits that existing utility infrastructure has come at great cost to First Nations, and that providing access to such infrastructure is a small but meaningful step towards reconciliation. FNLC suggests the Province may need to establish a fund to subsidize any rate variability that major purchases of energy from an Indigenous utility might create. Collective First Nations submit the recommendations should state that Direction 8 should clarify that First Nations utilities are not retail load customers, and that FortisBC and BC Hydro should have distribution tariffs that would allow First Nations utilities to have access to the respective electrical distribution systems. In Kamloops, a suggestion was that retail access should not be an issue if exempt entities wish sell to each other. It was also highlighted that the prohibition could be a constraint on future renewable energy development.²³⁸

However, CFN-GBI submits that simply reinstating retail access is not enough, noting that retail access was previously permitted in BC and it wasn’t used. Instead, it would be useful for BCUC to outline how access to wheeling can be practically facilitated.²³⁹ CERG suggests a decentralized “system operator” approach to dispatching Indigenous electricity offered at a competitive rate.²⁴⁰ FortisBC observes that unbundling of vertically integrated electric utilities would be a fundamental change in BC, and that retail access could be expected to have major impacts on all electricity consumers in the province.²⁴¹

4.11.1 Direction 8

Scenarios 3, 4 and 6 illustrate possible circumstances where an Indigenous utility may need access to the distribution system of an incumbent utility in order to provide electricity to a customer. In Scenarios 3 and 4 the Indigenous Utility sells to retail customers in a portion of its own service territory that is not contiguous to the generation source. A variant on these scenarios is to sell electricity to a different Indigenous utility located on land that is not contiguous to the generation source. In scenario 6 the Indigenous Utility sells energy to a customer – perhaps a mine, a factory or a municipality – not located on its First Nation owner’s land.

²³⁸ KGI Comments on Draft Report, p. 6. FNLC Comments on Draft Report, p. 11. Collective First Nations Comments on Draft Report, p. 8. Transcript Vol. 15, p. 790. Transcript Vol. 16, p. 853. Exhibit A2-5, p. 14. Transcript Vol. 18, pp. 1000 – 1001. Exhibit A2-6, p. 7. Transcript Vol. 19, p. 1074. Transcript Vol. 20, p. 1144. West Moberly Reply Comments on Draft Report, p. 6.

²³⁹ CFN-GBI Comments on Draft Report, pp. 6 – 7. Exhibit A2-3, p. 2.

²⁴⁰ Exhibit E-10, CERG, p. 25.

²⁴¹ FortisBC Comments on Draft Report, p. 22.

In all of these scenarios the Indigenous Utility needs to build its own infrastructure to deliver the electricity to its customer, unless it can access the Incumbent Utility's system. If the Indigenous Utility is BC Hydro, or if some of the path between the generation source and the customer is BC Hydro, this may not be possible because of the "Retail Access" provision of Direction 8²⁴² to the BCUC:

Except on application by the authority, the commission must not set rates for the authority that would result in the direct or indirect provision of unbundled transmission services to retail customers in British Columbia, or to those who supply such customers.

BC Hydro submits that

[This] lack of availability of retail access does not affect the ability of a power producer in B.C., whether or not owned wholly or partly by an Indigenous Nation, to access BC Hydro's transmission system for the purpose of selling power to:

- A wholesale customer connected to the BC Hydro system, such as another public utility; or
- To an entity based in B.C., or otherwise, that is not a retail customer of BC Hydro."²⁴³

In response to a Panel IR, BC Hydro stated: "Direction 8 is seeking to prevent a BC Hydro retail load customer from using BC Hydro's transmission system, either directly or indirectly, to acquire energy from sources other than BC Hydro."²⁴⁴

BC Hydro's interpretation of Direction 8 precludes anyone, including Indigenous utilities, from selling energy to a BC Hydro retail customer. We note that BC Hydro does not explain its view of exactly what a retail customer of BC Hydro is. However, BC Hydro views its service territory to be within 200 meters of its "footprint" in the province.²⁴⁵ Based on this, the Panel assumes that a BC Hydro retail customer is anyone that is either already connected to the BC Hydro system, or anyone that could potentially take service within 200 meters of BC Hydro's footprint.

In the Panel's view, the wording of Direction 8 does not differentiate between BC Hydro's retail customers or retail customers of any other public utility. Direction 8 does not limit customers to be a retail customer of any particular public utility, simply that they be a retail customer. Neither the term "Retail Customer" nor the term "retail" is defined in the Direction 8, the *Hydro and Power Authority Act*, the *UCA* or the *Interpretation Act*. However, the Oxford dictionary defines "Retail" as:

The sale of goods to the public in relatively small quantities for use or consumption rather than for resale".

We therefore interpret Direction 8 to preclude the use of BC Hydro's transmission system to wheel electricity to any customer who will directly consume that electricity in British Columbia whether it is a customer of BC Hydro or another public utility.

²⁴² BC Reg 24/2019

²⁴³ Exhibit C 2-3, BCUC IR 1.8.1.

²⁴⁴ Exhibit C 2-6, Panel IR 1.1.

²⁴⁵ Exhibit C 2-6, Panel IR 2.1.

Although BC Hydro used the term “transmission system” in the IR response cited above, reflecting the wording of Direction 8, it also explained that Direction 8 applies to its distribution system as well:

Even if the retail load customer and the generator it was buying energy from were both only using BC Hydro’s distribution system and BC Hydro had such a rate, BC Hydro’s view is that Direction 8 would still apply to the extent that the retail load customer would rely on BC Hydro to provide either energy or support services to it from time to time. In order to do this, BC Hydro’s generation and transmission system would be required to either provide energy by way of BC Hydro’s transmission services reservation as the NITS customer or to supply the ancillary services under OATT Rate Schedules 03 through 09 that would be attracted in order to maintain system reliability and compensate for line losses. In this way, enabling the distribution connected retail load customer to rely on BC Hydro for energy or system support would constitute an “indirect” provision of unbundled transmission services.²⁴⁶

The Panel accepts that a retail customer will, in all likelihood, require transmission services as described above and that this could be prohibited under the restriction on “indirect provision....” However, the full phrase is “the direct provision of unbundled services.” It is not clear that the OATT provides for unbundled ancillary services. Under the OATT, The Transmission Provider is required to offer to provide the following Ancillary Services *only to the Transmission Customer serving load* within the Transmission Provider's Control Area: (i) Regulation and Frequency Response; (ii) Energy Imbalance; (iii) Operating Reserve - Spinning; and (iv) Operating Reserve-Supplemental. The Transmission Customer serving load within the Transmission Provider's Control Area is required to acquire these Ancillary Services, whether from the Transmission Provider, from a third party, or by self-supply.²⁴⁷

Further, there exists an interpretation of Direction 8 that would preclude anyone from using BC Hydro’s system to sell electricity to a wholesaler that supplies retail customers:

*Except on application by the authority, the commission must not set rates for the authority that would result in the direct provision of unbundled transmission services to those who supply [retail customers in British Columbia].*²⁴⁸

The Oxford dictionary defines a wholesaler as “a person or company that sells goods in large quantities to other companies or people who then sell them to the public”, thereby satisfying the terms (those who supply retail customers) of the prohibition described above.

We acknowledge BC Hydro’s interpretation of Direction 8 as one possible interpretation. However, based on our plain reading of Direction 8 we are unable to agree with this interpretation. On the subject of statutory interpretation, the SCC states: “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”²⁴⁹ Direction 8 is issued pursuant to the *UCA* and when considering the scheme and

²⁴⁶ Exhibit C 2-6, Panel IR 1.1.

²⁴⁷ Open Access Transmission Tariff p. 14. <https://www.bchydro.com/content/dam/BCHydro/customer-portal/documents/corporate/tariff-filings/electric-tariff/00-bch-oatt.pdf>

²⁴⁸ Direction No. 8 to the BCUC, section 7. http://www.bclaws.ca/civix/document/id/crbc/crbc/24_2019

²⁴⁹ Exhibit C 2-6, Panel IR 1.1.

context of the *UCA* in a manner that is harmonious with Direction 8, we of the view that the Direction 8 is ambiguous, at best, and BC Hydro’s interpretation is no more persuasive than our interpretation of the same.

We recommend that Direction 8 be reviewed to reflect the intention regarding the prohibition on retail access, namely, whether that prohibition is limited to only customers of BC Hydro or to customers of any public utility. We also recommend that the BCUC review transmission and distribution tariffs to reflect Direction 8 and/or any amendments to Direction 8 (Final Recommendation 29).

4.11.2 Potential Impact of Direction 8 on Indigenous Economic Development

Regardless of the specific interpretation of Direction 8, it does preclude a large part of the province’s existing retail customers from taking service from an Indigenous utility, including in some cases members of the First Nation that owns the utility and other Indigenous Utilities. For example, utilizing BC Hydro’s interpretation, any retail customer within 200 meters²⁵⁰ of BC Hydro’s system is off limits for any other utility, Indigenous or otherwise.²⁵¹

We have previously discussed the need for a critical mass of customers for an integrated utility in order for it to become economically viable.²⁵² FNLC states “Retail Access must be made available to First Nations to overcome the difficulty of scale that impacts Nations’ ability to obtain financing or achieve economic viability.” KGI considers that recognition of First Nation rights is less meaningful if Indigenous utilities are relegated to sub-scale utilities, and that they should be able to sell to anyone as restricted by normal market forces.²⁵³

We note the Collective First Nations’ submission that “the recommendations should state that Direction 8 should clarify that First Nations utilities are not retail load customers, and that FortisBC and BC Hydro should have distribution tariffs that would allow First Nations utilities to have access to the respective electrical distribution systems.”²⁵⁴ We agree and make the following recommendation.

We recommend that the Provincial Government review and revise any policies that, in restricting an Indigenous utility’s access to BC Hydro’s transmission system, may result in an undue barrier to the First Nation’s pursuit of economic self determination (Final Recommendation 30).

4.12 Electricity Purchase Agreements

In the Draft Report, the BCUC noted that the test for acceptance of an Electricity Purchase Agreement (EPA) under section 71 of the *UCA* is that it must be in the public interest, and asked if the BCUC should consider public interest issues particular to First Nations in approving EPAs involving Indigenous utilities.

FortisBC considered there is scope within the current public interest test to consider involvement of an Indigenous utility or First Nation as a factor in the BCUC’s determination.²⁵⁵ Other participants highlighted

²⁵⁰ *UCA*, s. 28(1).

²⁵¹ ²⁵¹ See section 28(1) of the *UCA*

²⁵² See Section 4.2.2.

²⁵³ KGI Comments on Draft Report, p. 6

²⁵⁴ Collective First Nations Comments on Draft Report, p. 8

²⁵⁵ FortisBC Comments on Draft Report, p. 23.

specific factors that they believe the BCUC should be considering in such applications. Many suggested that reconciliation should be one such factor, for instance CFN-GBI said it would be appropriate to include new “reconciliation objectives” in addition to the existing CEA energy objectives to guide BCUC decisions related to Indigenous utilities, e.g. granting First Nations CPCNs to operate merchant transmission lines.²⁵⁶ KGI suggested public interest issues should include self-determination issues, and they and others submitted the BCUC should consider the extent that the EPAs may provide First Nations with economic self-determination and independence.²⁵⁷

KGI also suggested that due to impact of the indefinite suspension of the Standing Offer Program (SOP) on limiting Indigenous energy projects, the BCUC should consider approval of EPAs where material steps are taken toward participating in SOP. FNLC added that purchases of renewable, sustainable sources should not have to meet the standard of being comparable to market value. Environmental, social and reliability benefits were also highlighted as further applicable public interest considerations.²⁵⁸

BC Hydro submitted that “the Province has articulated in the Clean Energy Act that one of British Columbia’s energy objectives is to foster the development of First Nation communities through the use and development of clean or renewable resources.”²⁵⁹ The BCUC is required to consider British Columbia’s energy objectives when a public utility brings forward resource plans (s.44.1, UCA), capital filings (s.44.2, 45, UCA) or energy supply contracts (s.71, UCA) for BCUC approval or acceptance.

On its face, the objective quoted above appears to support First Nation economic development. However, there are some 15 other energy objectives laid out in section 2 of the CEA, and while not all are applicable in every situation, often a decision-making Panel is left to decide between competing objectives. For example, when evaluating Energy Purchase Agreements, the following objective is relevant:

to ensure the authority's rates remain among the most competitive of rates charged by public utilities in North America;²⁶⁰

Energy from smaller (relative to BC Hydro’s legacy generation fleet) clean energy projects often comes with a price tag greater than BC Hydro’s embedded cost of energy. Further, if that energy is surplus to BC Hydro’s needs, it must then be sold for export by BC Hydro (or its unregulated subsidiary Powerex). If the EPA is accepted at a higher cost than BC Hydro can either produce it or can acquire it on the open market that will drive up BC Hydro’s rates. In the past, costs of purchased energy have been deferred thereby not affecting current rates. However, they affect rates in the medium and longer term.

To balance this consideration, the energy project is likely very important to the economic development of the Indigenous project proponent. Therefore, the project satisfies the objective BC Hydro cited above, namely, it fosters the development of First Nation communities through the use and development of clean or renewable resources. However, there is no statutory requirement to prioritize any particular clean energy objective over another.

²⁵⁶ CFN-GBI Comments on Draft Report, p. 8. Leq’á:mel Comments on Draft Report, p. 7. Exhibit A2-3, p. 2. Exhibit A2-5, p. 15.

²⁵⁷ KGI Comments on Draft Report, p.6-7. FNLC Comments on Draft Report, p. 11. Leq’á:mel Comments on Draft Report p. 6. Exhibit A2-4, p. 9

²⁵⁸ KGI Comments on Draft Report, p.6-7. FNLC Comments on Draft Report, p. 11. Transcript Vol. 19, p. 1074

²⁵⁹ BC Hydro Comments on Draft Report, p. 2

²⁶⁰ *Clean Energy Act*, Section 2(f)

We recommend that the UCA be amended to require the BCUC to consider the principles of UNDRIP when considering the CEA energy objective to “foster the development of first nation... communities...” (Final Recommendation 31).

4.13 Indigenous Utilities Commission

During the first phase of engagement, FNLC and others suggest the creation of an independent Indigenous led body such as an “Indigenous Utilities Commission” (IUC) to provide expert guidance to Indigenous utilities in BC as well as acting with similar functions to the BCUC. In the Draft Report the Panel supported the idea but suggested that the specifics of such a proposal should be left to Indigenous Nations and government to work out together.

FNLC submits that declining to make a recommendation for future work is equivalent to taking a position against it. FNLC recommends that a taskforce composed of Indigenous people with the relevant expertise (in Indigenous governance and utility services) be created to investigate whether an association, a commission, or other model would be of value to First Nations, either in taking on a specialized regulatory or appeals role, or in providing non-binding expert advice and support to First Nations for the provision of utility services and the development of dispute resolution processes.²⁶¹

Beecher Bay and Adams Lake submits the issue of a new administrative body to assist and support Indigenous utilities requires further review and discussion.²⁶² Collective First Nations say that an IUC may have merit in the future but there is presently no need for it, noting First Nations need to be able to first establish their utilities and then address what other needs they have.²⁶³

The Panel respectfully disagrees with the FNLC’s submission that the absence of a specific recommendation regarding a body such as an Indigenous Utilities Commission is akin to taking a position against it. The Final Recommendations in this report reflect, among other factors, the Panel’s recognition of the importance of reconciliation and First Nations’ right to self-determination. We believe that it would be contrary to self-determination for us to recommend any specific regulatory body to act as a regulator in the absence of regulation by the BCUC. The appropriate regulatory institution that provides oversight must be for the First Nations themselves to decide.

We also note that in the absence of any critical mass of Indigenous utilities, it may be premature to contemplate a potential role for a new body to oversee or provide support to Indigenous utilities. The Panel recognizes the importance of capacity building, particularly in this earlier stage of Indigenous utilities’ development. As discussed in the next section, more work will be needed to build capacity in other ways, requiring further initiatives involving provincial, federal and First Nations governments that go beyond what can be achieved or anticipated as a direct result of this Inquiry. Identification of needs will likely be an evolving process as more prospective Indigenous utilities emerge. To the extent that such government-to-government engagement reveals a need and appetite for a body such as an Indigenous Utilities Commission, the BCUC observes that Provincial Government support for developing such a body would be in the spirit of reconciliation.

²⁶¹ FNLC Comments on Draft Report, p. 3

²⁶² Beecher Bay and Adams Lake Comments on Draft Report, p. 7

²⁶³ Collective First Nations Reply Comments on Draft Report, p. 6

4.14 Next steps

While we hope that many of our Final Recommendations will resonate with those who have the ability to implement them through executive or legislative actions, as well as through efforts of the incumbent public utilities in British Columbia to provide assistance to emerging Indigenous utilities, this report only contains recommendations. However, we believe that it is important for the BCUC to show initiative to advance reconciliation with First Nations in adapting its own policies and processes in pursuit of reconciliation with First Nations and in anticipation of the implementation of the DRIPA.

The concept of reconciliation implies the development of meaningful relationships with Indigenous peoples and the creation of common goals. It requires active on-going engagement and change so that Indigenous people can see themselves reflected in all aspects of BCUC's work. While it is impossible for us to address all elements of needed institutional change in this report, we nonetheless believe that it is important for us to recommend that the BCUC develop, with the involvement of Indigenous representatives, a strategy to go forward.

We believe that the following recommendations to the BCUC will provide an opportunity for the BCUC to address institutional change within the BCUC in the short term, and offer a pathway to broader participation of First Nations in the public utility industry in British Columbia in the longer term.

We recommend that the BCUC develop, in collaboration with Indigenous representatives, a strategy to build First Nations' capacity in Indigenous utility regulation and a strategy to reduce barriers to the recruitment and placement of Indigenous people in advisory, staff and Commissioner roles in the BCUC (Final Recommendation 32).

We recommend that the BCUC include Indigenous representatives with expertise in such matters as First Nations governance, on BCUC panels where applications of Indigenous utilities are being considered (Final Recommendation 33).

We recommend that the BCUC modify its regulatory policies and procedures to better reflect the objectives of reconciliation in its proceedings (Final Recommendation 34).

We recognize that the implementation of our recommendations will entail much work and require resources on the part of many, particularly with respect to First Nations. In order to undertake this work, they will undoubtedly require funding. With that in mind, we make the following recommendation:

We recommend, where necessary for the implementation of these recommendations, the Province consider making funding available to First Nations (Final Recommendation 35).

DATED at the City of Vancouver, in the Province of British Columbia, this

30th

day of April 2020.

Original signed by:

D. M. Morton
Panel Chair / Commissioner

Original signed by:

A. K. Fung, QC
Commissioner

Original signed by:

E. B. Lockhart
Commissioner

Original signed by:

C. Brewer
Commissioner

Glossary and List of Acronyms

Term	Explanation
BC Oil and Gas Commission	Crown corporation that regulates oil and gas activities and pipelines in British Columbia. https://www.bcogc.ca/
Certificate of Public Convenience and Necessity (CPCN)	A certificate issued by the BCUC that grants a person authority to begin the construction, extension, or operation of a public utility plant or system.
<i>Clean Energy Act</i> (CEA)	BC government energy efficiency legislation to support the Province's energy, economic and greenhouse gas reduction priorities. The <i>Clean Energy Act</i> specifies BC's energy objectives.
<i>Constitution of Canada</i>	The Constitution of Canada includes the <i>Constitution Act, 1867</i> , and the <i>Constitution Act, 1982</i> . It is the supreme law of Canada. The <i>Constitution Act, 1867</i> reaffirms the division of powers between the Federal Government and the Provincial and Territorial Governments. The <i>Constitution Act, 1982</i> recognizes Aboriginal Rights and Title. https://www.justice.gc.ca/eng/csj-sjc/just/05.html
Cost of service	The regulator (e.g. BCUC) determines the Revenue Requirement —i.e., the “cost of service” —that reflects the total amount that must be collected in rates for the utility to recover its costs and earn a reasonable return.
Crown corporation	Crown corporations are public sector organizations established and funded by the B.C. government to provide specialized goods and services to citizens. More information can be found at https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations
<i>Declaration on the Rights of Indigenous Peoples Act</i> (DRIPA)	Legislation passed in 2019 which affirms the application of UNDRIP to the laws of British Columbia. http://www.bclaws.ca/civix/document/id/complete/statreg/19044
Duty/obligation to serve	The duty/obligation to serve is the obligation to (a) provide the services defined by a public utility's franchise agreements and its statute, (b) maintain quality levels defined by commission rule, and (c) comply with commission rules and orders. The duty/obligation arises under the UCA but also exists at common law.
Electricity Purchase Agreement (EPA)	Agreement between a generator and a purchasing utility for sale of electricity. Subject to Section 71 of the UCA.

Term	Explanation
<p><i>First Nations Land Management Act</i> (FNLMA)</p>	<p><i>First Nations Land Management Act</i> enables First Nations to opt-out of 40 sections of the <i>Indian Act</i> relating to land management. First Nations can then develop their own laws about land use, the environment and natural resources and take advantage of cultural and economic development opportunities with their new land management authorities.</p> <p>https://www.aadnc-aandc.gc.ca/eng/1327090675492/1327090738973</p>
<p>Independent Power Producer (IPP)</p>	<p>IPPs develop and operate projects such as wind, hydro and biomass. IPPs include power production companies, municipalities, First Nations and customers.</p> <p>https://www.bchydro.com/work-with-us/selling-clean-energy/meeting-energy-needs/how-power-is-acquired.html</p>
<p><i>The Indian Act</i></p>	<p>The Indian Act is the principal statute through which the federal government administers Indian status, local First Nations governments and the management of reserve land and communal monies.</p> <p>https://www.thecanadianencyclopedia.ca/en/article/indian-act</p>
<p>Indigenous Utilities Commission (IUC)</p>	<p>A body proposed by FNLC with similar functions to the BCUC, led and directed by First Nations to provide expert guidance to Indigenous utilities in BC and empowered by statute to operate independently from government.</p>
<p>Mandatory Reliability Standards (MRS)</p>	<p>The BC transmission system is part of a much larger, interconnected grid, requiring work with other jurisdictions to maximize the benefits of interconnection, remain consistent with evolving North American reliability standards, and ensure BC's infrastructure remains capable of meeting customer needs. Reliability standards includes: a reliability standard, rule or code established by a standard-making body for the purpose of being a mandatory reliability standard for planning and operating the North American bulk electric system.</p> <p>More information can be found at: https://www.bcuc.com/industry/mandatory-reliability-standards.html</p>
<p>Open Access Same-time Information System (OASIS)</p>	<p>Open Access Same-time Information System (OASIS) allows registered users to make reservations for transmission service on the BC Hydro transmission system.</p> <p>https://www.bchydro.com/energy-in-bc/operations/transmission/transmission-scheduling/oasis.html</p>
<p>Open Access Transmission Tariff (OATT)</p>	<p>OATT sets out the BCUC-approved terms and conditions for BC Hydro's transmission service. The accompanying rate schedules to the tariff outline the prices for transmission services purchased from BC Hydro.</p> <p>https://www.bchydro.com/toolbar/about/planning_regulatory/tariff_filings/oatt.html</p>
<p>Order in Council (OIC)</p>	<p>An Order in Council (OIC) is a government order recommended by the Executive Council and signed by the Provincial Lieutenant Governor in Council.</p>

Term	Explanation
Standing Offer Program (SOP)	<p>The SOP was developed to streamline the process for selling electricity to BC Hydro for independent power producers with small-scale renewable energy projects. After a Government review of BC Hydro the SOP was suspended indefinitely except for five First Nations projects that BC Hydro committed to proceed with in March 2018.</p> <p>More information on the SOP can be found at: https://www.bchydro.com/work-with-us/selling-clean-energy/standing-offer-program.html</p>
Stranded asset	An asset which is obsolete before the end of its useful life
Technical Safety BC (TSBC)	<p>Body responsible for overseeing the safe installation and operation of technical systems and equipment across British Columbia, Canada.</p> <p>https://www.technicalafetybc.ca/</p>
<i>Utilities Commission Act (UCA)</i>	<p>The <i>Utilities Commission Act</i> is the legislation the BCUC operates under and administers.</p> <p>The UCA can be found at: http://www.bclaws.ca/Recon/document/ID/freeside/00_96473_01</p>
<i>United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)</i>	<p>UNDRIP delineates and defines the individual and collective rights of Indigenous peoples, including their ownership rights to cultural and ceremonial expression, identity, language, employment, health, education and other issues.</p> <p>https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf</p>
<i>Western Interconnection Grid</i>	<p>The Western Interconnection is a physically and electrically defined area that comprises the infrastructure of the Bulk Electric System. It extends from Canada to Mexico. It includes the Canadian provinces of Alberta and British Columbia, the northern part of Baja California in Mexico, and all or part of the 14 Western states in between.</p> <p>https://www.wecc.org/Pages/101.aspx</p>

Additional Information Regarding BCUC Engagement

In June and July, 2019, the BCUC held a series of community input sessions around British Columbia to hear comments on the issues raised in the Inquiry:

Location of the Community Input Session	Date of Community Input Session
Cranbrook	June 3, 2019
Kelowna	June 5, 2019
Kamloops	June 6, 2019
Williams Lake	June 7, 2019
Prince Rupert	June 10, 2019
Vancouver	June 12, 2019
Fort St John	June 25, 2019
Prince George	June 27, 2019
Campbell River	July 3, 2019
Victoria	July 4, 2019
Vancouver	September 18, 2019 ²⁶⁴

On September 18, 2019, David Morton, the Chair and CEO of the BCUC and of the Inquiry Panel, spoke at the BC Assembly of First Nations 16th Annual General Assembly in Vancouver to discuss the progress of the Inquiry. This was followed by a special Community Input Session later that evening.

The following participants spoke at one or more Community Input Sessions:

Name	Affiliated with
F. Alexis	Okanagan Indian Band
K. Andrews	Métis Citizen
J. Balabanowicz	Innergex Renewable Energy
Chief D. Blaney	Homalco First Nations
E. Bolton	Tsimshian Nation, traditional territory of Kitselas
Chief A. Campbell	Hereditary Chief Lax Kw'alaams (Kisiox tribe, Eagle Crest and nine tribes of Lax Kw'alaams)
J. Cawley	Resolution Electric

²⁶⁴ Special session to coincide with the BC Assembly of First Nations 16th Annual General Assembly

Name	Affiliated with
Chief L. Chasity Shanoss (Daniels)	Gitwangak Indian Band (Gitxsan)
Chief R. Chipps	Beecher Bay Scia'new
R. Corman	Kwikwetlem First Nation
C. Derrickson	Westbank First Nation (Treaty 8 Nation)
T. Dokkie	West Moberly First Nations
T. Donkers	Wei Wai Kum First Nation
L. Duke	Kelly Lake Community
N. Edwards	First Nation Major Projects Coalition
M. Eunson	Mikisew Cree First Nation, Ktunaxa First Nation
R. Foden	Silver Star Property Owners Association
R. Gemeinhardt	Kitsumkalum First Nation
J. Gottfriedson	Tk'emlúps te Secwepemc (Kamloops Indian Band)
M. Griffin (Niik'ap)	Nisga'a Nation
Z. Harmer	Canadian Geothermal Energy Association
J. Hooper	Secwepemc
T. Hoy	Clean Energy Consulting
C. Knight	Kitselas Geothermal Inc.
Manuel	Tk'emlups Indian Band
K. Matthew	Simpco Resources Limited
C. McCurry	?aq'am First Nation
A. McDames	Kitselas First Nation
Chief H. McLeod	Upper Nicola, Okanagan Nation
Chief P. Michell	Kanaka Bar Indian Band
T. Moraes	Skidegate Band Council and TII Yahda Energy Ltd
C. Morven (Daax'hee)	Nisga'a Village of Gitwinksihlkw
L. Morven	Nisga'a Village of Gitwinksihlkw
Chief Na'Moks (J. Risdale)	Tsayu, Wet'suwet'en Nation
K. Odrigewitsch	Spirit Bay Development
M. Podlasly	First Nation Major Projects Coalition
V. Robinson	Nuxalk Nation
S. Roka	Enerpro Systems
P. Sanchez	Ktunaxa Nation
R. Sauder	Beecher Bay First Nation

Name	Affiliated with
M. Skidmore	Metlakatla First Nation
M. Starlund	Community of Gitanyow
T. Thompson	Kitselas Geothermal Inc.
C. Tolmie	Gitanmaax Band Council
M. Waberski	Silver Star Property Owners Association
Chief W. Webber	Nuxalk Nation
R. Wilson	Metlakatla Stewardship Society

Subsequent to the issuance of the Draft Report on November 1, 2019, the BCUC held the following Draft Report workshops:

Location	Date
Prince George	November 18, 2019
Kelowna	November 21, 2019
Vancouver	November 27, 2019
Nanaimo	November 28, 2019
Victoria	November 29, 2019
Smithers	December 9, 2019
Kamloops	January 14, 2020
Fort St John	January 17, 2020

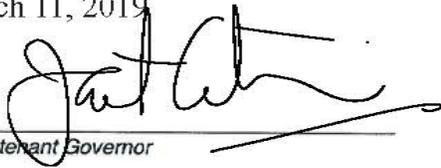
The table below lists the parties who registered as interveners in the Inquiry. Registered interveners had the opportunity to file written evidence, submit and respond to information requests, provide final arguments, and file comments on the Draft Report.

Registered Intervenors
Adams Lake Indian Band (Adams Lake)
Beecher Bay (Sc'lanew) First Nation (Beecher Bay)
British Columbia Hydro and Power Authority (BC Hydro)
Canadian Geothermal Energy Association (CanGEA)
Commercial Energy Consumers Association of British Columbia (CEC)
Coastal First Nations-Great Bear Initiative Society (CFN-GBI)
Don Flintoff (Flintoff)
Enerpro Systems Corp (Enerpro)

Registered Interveners
First Nation Major Projects Coalition (FNMPC)
First Nations Energy and Mining Council (FNEMC)
First Nations Leadership Council (FNLC)
Foothills First Nation
FortisBC Energy and Fortis BC Inc. (FortisBC)
Heilttuk Tribal Council
Kitselas Geothermal Inc. (KGI)
Leq'á:mel First Nation
Nisga'a Lisims Government (Nisga'a Nation)
Nuu-chah-nulth Tribal Council, Cowichan Tribes, Gitanyow First Nation, Homalcow First Nation, B.C. First Nations Clean Energy Working Group (Collective First Nations)
Osoyoos Indian Band (OIB)
Tzeachten First Nation
Westbank First Nation Government (Westbank First Nation)

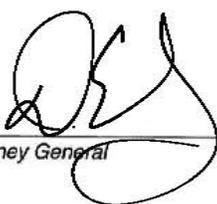
PROVINCE OF BRITISH COLUMBIA
ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 108, Approved and Ordered March 11, 2019


Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the attached order, British Columbia Utilities Commission Inquiry Respecting the Regulation of Indigenous Utilities, is made.


Attorney General


Presiding Member of the Executive Council

(This part is for administrative purposes only and is not part of the Order.)

Authority under which Order is made:

Act and section: Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 5

Other: _____

**BRITISH COLUMBIA UTILITIES COMMISSION INQUIRY RESPECTING
THE REGULATION OF INDIGENOUS UTILITIES**

Definitions

1 In this order:

“Act” means the *Utilities Commission Act*;

“indigenous nation” means any of the following:

- (a) a band within the meaning of the *Indian Act* (Canada);
- (b) the Westbank First Nation;
- (c) the Sechelt Indian Band and the Sechelt Indian Government District established under the *Sechelt Indian Band Self-Government Act* (Canada);
- (d) a treaty first nation;
- (e) the Nisga’a Nation and Nisga’a Villages;
- (f) another indigenous community within British Columbia, if the legal entity representing the community is a party to a treaty and land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982* that is the subject of Provincial settlement legislation;

“indigenous utility” means a public utility that is owned or operated, in full or in part, by an indigenous nation.

Referral to commission

2 By this order, the Lieutenant Governor in Council, under section 5 (1) of the Act, requests that the commission advise the Lieutenant Governor in Council respecting the regulation of indigenous utilities in accordance with the terms of reference set out in section 3 of this order.

Terms of reference

- 3 (1) Subject to subsection (2), the terms of reference, in accordance with which the commission must inquire into the matter referred to it by section 2, are as follows:
- (a) the commission must advise on the appropriate nature and scope, if any, of the regulation of indigenous utilities;
 - (b) without limiting paragraph (a), the commission must provide response to the following questions:
 - (i) What are the defining characteristics of indigenous utilities, having regard to
 - (A) the nature of the ownership and operation of indigenous utilities,
 - (B) the types of services provided by indigenous utilities,
 - (C) the persons to whom services are provided by indigenous utilities, and
 - (D) the geographic areas served by indigenous utilities.

- (ii) Should indigenous utilities be regulated under the Act or under another mechanism, or be unregulated?
 - (iii) If it is appropriate to regulate indigenous utilities under the Act, is there any matter under the Act in respect of which indigenous utilities should be regulated differently from other public utilities, and, if so, how should that matter be regulated?
 - (iv) If it is not appropriate to regulate indigenous utilities under the Act but is appropriate to regulate indigenous utilities in some manner, how should indigenous utilities be regulated?
 - (v) If an indigenous utility is not regulated under the Act, would the utility become subject to the Act on ceasing to be an indigenous utility, and, if not, what transitional and other mechanisms are required to ensure that the utility is subject to the Act on ceasing to be an indigenous utility?
- (2) It is a further term of reference that the commission must submit to the minister responsible for the *Hydro and Power Authority Act* reports as follows:
- (a) an interim report describing the commission's progress to date and the commission's preliminary findings must be submitted no later than December 31, 2019;
 - (b) a final report describing the results of consultations undertaken by the commission and the commission's findings and recommendations must be submitted no later than January 31, 2020.

PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 559

, Approved and Ordered

October 31, 2019


Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that section 3 (2) (b) of Order in Council 108/2019 is amended by striking out "January 31, 2020" and substituting "April 30, 2020".


Attorney General
Presiding Member of the Executive Council

(This part is for administrative purposes only and is not part of the Order.)

Authority under which Order is made:

Act and section: Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 5

Other: OIC 108/2019