

# Letter of Comment

**For:** British Columbia Utilities Commission, Interveners and Interested Parties

**Date:** September 9, 2019

**By:** Dylan Heerema, Senior Analyst

**Re:** Indigenous Utilities Regulation Inquiry

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## Issue

The British Columbia Utilities Commission (BCUC) has been directed to advise the Government of British Columbia on “the appropriate nature and scope, if any, of the regulation of Indigenous utilities” in the province. The Pembina Institute respectfully submits the following letter of comment as an Interested Party in this proceeding.

### Summary

- Alternatives to regulation by the BCUC exist for Indigenous utilities, including exemptions similar to those that currently apply to municipalities, and regulation by another entity (such as a hypothetical Indigenous Utilities Commission).
- These examples of alternative forms of regulation might have some application to this inquiry, but care must be taken to consider the unique nature and situation of Indigenous nations in B.C. In this context, it is appropriate to consider unique alternatives rather than the repurposing or application of existing regulations.
- Determining the most appropriate means for regulation of Indigenous utilities must begin with consultation with Indigenous people and likely requires first considering questions related to unceded territory, historical and modern treaties, and Rights and Title for First Nations in B.C. These questions are not within the BCUC’s intended mandate and must be addressed, at least in part, by Indigenous and Crown governments.

## Context

- Regulated utilities in B.C. are defined by the Utilities Commission Act (UCA), and are currently interpreted to include public utilities as well as some entities that are partly or fully Indigenous owned and/or controlled. This situation has led to misunderstandings and a lack of clear process, which we understand to be motivating factors for government directing the BCUC to undertake this Inquiry.

- There are examples of unregulated utilities in B.C., including municipalities and regional districts as defined by the Local Government Act, and nine remote Indigenous communities acting as Independent Power Authorities (IPAs). Provision of utility service by local governments to their constituents is not regulated by the BCUC, as customers are also citizens of the local government and thus have a means of recourse through voting.
- The Pembina Institute works to advance policies and regulations that enable the transition of remote Indigenous communities away from diesel reliance and towards clean sources of energy.
- We advance this work by supporting the momentum of remote Indigenous communities seeking to own, operate or otherwise control their own energy systems, and are therefore generally opposed to additional regulation of such activities by the provincial government or a non-Indigenous quasi-judicial entity (e.g. the BCUC).

## Considerations

- There may be relatively straightforward cases where existing regulatory frameworks can be adapted for the purpose of addressing Indigenous utility regulation. For example, an Indigenous utility that is majority owned by an Indigenous government, providing utility service to its own constituents should likely be exempt from the definition of a public utility under the UCA, and hence regulation by the BCUC, in a similar but not equivalent manner to a municipality or regional district.
  - Remote Indigenous communities that are not connected to the North American electricity grid should also be exempt from regulation by the BCUC in cases where they opt to own and/or operate their own electricity systems. This situation already exists in B.C.'s nine remote Indigenous communities that act as IPAs.
  - As Coastal First Nations - Great Bear Initiative noted in their submission, a similar exemption could apply for customer-owned Indigenous utilities that are established under a co-operative model. In this case, there would likely be no need for independent regulation as customers would not be motivated to engage in profit-seeking behavior that does not benefit ratepayers.

- Where regulation and/or recourse may be required to protect the interests of ratepayers, the BCUC is not the only body that could serve this purpose. For example, recommendations made by intervenors in this inquiry include:
  - The B.C. First Nations Leadership Council recommended establishing an Indigenous Utilities Commission with equivalent powers to the BCUC.
  - The Collective First Nations argued that the practice of common law already provides an adequate means of recourse for utility customers through the provincial court system.
  - In contrast, Coastal First Nations - Great Bear Initiative recommended leaving such situations under the BCUC's purview.
- We have no recommendations at this time on which circumstances specifically require regulation, or the preferred means of regulation in these cases. As articulated by the First Nations Leadership Council, this requires considering questions of Indigenous sovereignty, self-government, rights and title. Such questions need to be addressed by Indigenous and Crown governments (see below).
  - Indigenous Rights and Title must be duly respected and acknowledged by the Crown, the BCUC, and any utility regulatory process impacting Indigenous governments in B.C.
  - Establishing the boundaries of a First Nations' territory for the purposes of comparison with an Indigenous utility's service area is a complex undertaking, and could include the consideration of traditional and/or unceded territory, in addition to reserve land. Where questions of First Nations jurisdiction and Rights and Title are of the essence, they should be considered outside of the BCUC's mandate and addressed by Indigenous and Crown governments.
- The regulation of utilities in B.C., including any regulation of Indigenous utilities, needs to evolve to reflect a broader definition of the public interest that includes considerations beyond the cost of service, safety and reliability. Issues that should be considered by regulatory bodies include, in our view:
  - A commitment to advancing reconciliation with Indigenous Peoples and upholding the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which the B.C. government intends to adopt into legislation.

- Environmental costs, including air quality impacts, impacts from diesel spills, and economic costs from climate change.
- Other socioeconomic factors including health impacts and local economic impacts.
- Different rate structures that reward utilities for meeting these key metrics (for example, through performance-based regulation).

## Recommendations

With regard to the direction provided to the BCUC to conduct an inquiry on “the appropriate nature and scope, if any, of the regulation of Indigenous utilities” in British Columbia, we submit that this question cannot be fully answered by the BCUC’s process. The scope of this inquiry is broad and complex; as several intervenors have pointed out, it involves considering questions of First Nations jurisdiction and Rights and Title. We recommend that the BCUC communicate these issues of scope and mandate to the Government of British Columbia.

In our view the BCUC should, given the balance of evidence, give examples in its report of cases where it considers that regulation of Indigenous utilities by the BCUC is *not* required. We further recommend that the BCUC not attempt to unilaterally establish where regulation of Indigenous utilities is required, or what entity would be responsible for such regulation, until broader questions of jurisdiction and Rights and Title have been sufficiently addressed by Indigenous governments and the provincial government. This should be seen as part of the overall effort towards advancing reconciliation, Indigenous self-government, and upholding the principles of UNDRIP.

There is considerable momentum among Indigenous nations in B.C. pursuing self-government and a higher degree of energy independence. The current regulatory environment has the potential to restrict such goals. At the heart of this Inquiry is the need to meaningfully consult with nations to shape any needed changes to the regulatory regime. A successful outcome will be one that provides opportunities for Indigenous utilities to operate in a manner consistent with Indigenous Rights, Title, and goals of self-determination, but still maintains representation for any ratepayers that are not constituents of an Indigenous nation.

We thank the Commission for the opportunity to submit our thoughts on this Inquiry and are happy to discuss further.

## **Contact**

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