

Appendix D: FNEMC Discussion Paper

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BC Hydro 2023 Call for Power- A Framework for Advancing Indigenous Economic Opportunities First Nations Energy and Mining Council

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Background and Context

On June 15, 2023, the Province of BC announced that BC Hydro would undertake a call for approximately 3,000 GWh per year of new, clean generation (the “2023 Call for Power”) and in addition to this 700GWh from existing facilities. At the same time, BC Hydro amended its Integrated Resource Plan (“IRP”) that was before the BC Utilities Commission (the “Commission”) to reflect, among other things, that BC Hydro would now require this new electricity. The previously filed IRP has maintained BC Hydro’s long-held stance that the Utility was in a surplus energy and capacity position and would be well into the 2030s. Now that the Province has recognized the need for more energy to meet both natural load growth and its environmental policy aims, the 2023 Call for Power has been directed to proceed by the Spring of 2024.

This sudden reconsideration of BC Hydro’s energy requirements and the associated short time frames for executing the 2023 Call for Power threaten the opportunity for First Nations to gain a meaningful share of the benefits and opportunities arising from new energy project development. And this threat will continue to exist unless appropriate engagement that is executed in partnership with Indigenous peoples immediately occurs. The June 15th 2023 Call to Power announcement¹ has made the following relevant commitments to ensuring First Nations economic participation:

- The Province and BC Hydro will work with First Nations to design a call for power that includes a minimum First Nations ownership in the project.
- Immediate consultation will also commence with First Nations and the First Nations Energy and Mining Council (FNEMC) on options for Indigenous economic participation requirements.
- This will include discussions around partnerships, project procurement opportunities, benefits-sharing agreements, and appropriate evaluation criteria for Indigenous participation.

In review of the above commitments, as well as the BC Hydro Call for Power Engagement Plan (Appendix A), it is recognised that the Province and BC Hydro are developing a more thoughtful approach to reconciliation than displayed in the past. However this approach can and must be strengthened in particular given the following: (a) First Nations’ repeated attempts to conduct the necessary conversations about First Nations involvement in the energy sector when the time was available to conduct those discussions properly (through the Indigenous Clean Energy Opportunities² (ICEO) process initiated in 2022 as one example); (b) the findings of the Commission in its Inquiry into the Regulation of Indigenous Utilities, which could have been helpful to First Nations but that have been ignored by BC; and (c) new and important recognition and reconciliation obligations on government that have arisen and been legislated since BC Hydro’s last material power call in 2008, but which still lack actionable definition and implementation in the energy sector.

¹ BC Gov News, “Clean power to electrify B.C.’s future”, June 15 2023,

² Indigenous Clean Energy Opportunities – Government of British Columbia,
<https://indigenoucleanenergyopportunities.gov.bc.ca/>

First Nations have already expressed that BC and BC Hydro's shortfall in future planning for the province's energy needs and leaving inadequate time to consult with First Nations about meeting that need, should not serve, yet again, as a reason to exclude First Nations from being material beneficiaries of the new generation and transmission developments that BC Hydro's 2023 Call for Power is motivating within their territories.

In recognition of this context as well as the legislated implementation of the United Nations Declaration on the Rights of Indigenous Peoples in BC (Bill 41- the Declaration Act), First Nations are reminding the province of their rights for both participation in, and benefits from, the 2023 Call for Power. The following sections sets out FNEMC's suggested Framework for ensuring that First Nations receive adequate benefits from the 2023 Call for Power, notwithstanding that BC Hydro's proposed schedule is simply inconsistent with leaving adequate time for the meaningful and thoughtful consultation that the Province's reconciliation obligations should have demanded.

Framework for Advancing First Nations Economic Opportunities

Framework Overview

The requirements for First Nations to be consulted and accommodated due to infringements of their rights and title remains with First Nations as the rights and title holders themselves. The new United Nations standard is now consent. This Framework builds on that obligation. As a result, to the extent that non-Indigenous proponents endeavour to respond to the 2023 Call for Power, these proponents must reach an Impact Benefit Agreement (IBA) (or similar) with the Nations in whose territories the planned projects infringe.

The Framework consists of four components.

Components A and B together set minimums for the First Nations' benefits arising from these IBAs entered into directly between proponents and First Nations as well as creates incentives for projects to exceed these minimums furthering the Provinces commitments to reconciliation. The benefit minimums (Component A) fall into four major categories: (1) granted equity or (at the Nation's discretion, a cash equivalent); (2) employment; (3) contracting opportunities with targets and penalties if the targets are not achieved; and (4) capacity building. Further incentives are reflected in the proposed evaluation model (Component B) which focuses on self-reporting.

Component C ensures that project proponents can be compensated for these requirements by BC Hydro, and that BC Hydro can, in turn, secure regulatory approvals for contracts containing incremental benefits for First Nations through the appropriate regulatory instruction.

Component D provides a solution to overcome the short time frame associated with this 2023 Call for Power that has deeply disadvantaged First Nations who have sought to develop their own generation or wires projects in response to the new demand. As noted above, this is a particularly concerning outcome, since First Nations anticipated this result, and sought to discuss

energy development models that would have effectively positioned Nations to participate directly in the call. As noted, these attempts at timely discussions were repeatedly rebuffed, with both the Province and BC Hydro citing large and persistent surpluses. First Nations must not be disadvantaged by the Province’s sudden claims of urgency. To ensure that this disadvantage does not arise, the Framework proposed by FNEMC seeks a set aside of 25 per cent of the proposed 3,700 GWh 2023 Call for Power, pending development of a model for this volume of energy to be supplied by projects that are entirely or substantially owned and controlled by First Nations (the “BC Hydro Indigenous Power Call”). The timing of this First Nations Power Call should be dictated by the time it takes First Nations, the Province, and BC Hydro to develop a fair and effective model for such a procurement process.

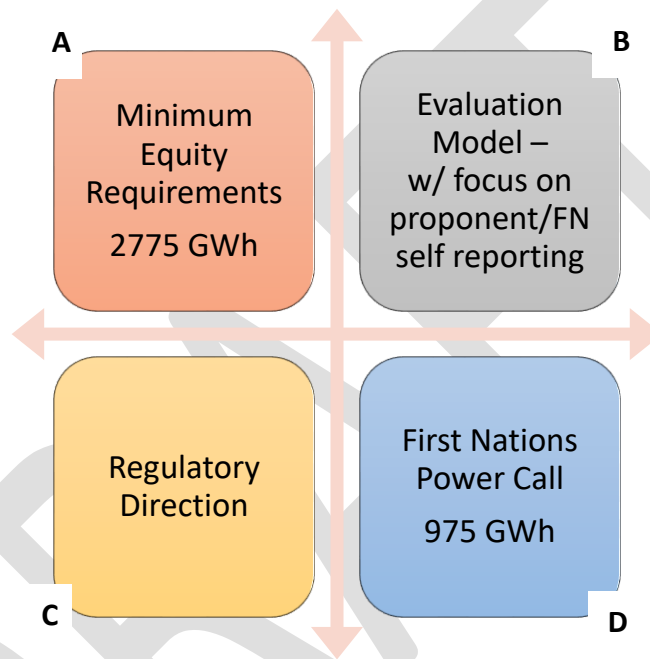


Figure 1 Four-part Framework to advance First Nations Economic Opportunities

Framework Components

This Framework intends to specifically apply to power generation investments (assets not owned by BC Hydro), and not transmission, distribution, grid connections improvement investments (assets typically owned by BC Hydro). For assets owned by BC Hydro, this will require different but comparable considerations in the ways of increasing First Nations economic opportunities. The Framework components for generation investments follow.

Component A) Minimum Equity Requirements on 2775 GWh

First Nations have an economic and social interest in both the financial and governance advantages of owning electricity generation and transmission projects that are being developed within their traditional territories. As already identified this Framework includes an exclusive “BC Hydro Indigenous Power Call” (see component D) to ensure with greater certainty that provincial reconciliation objectives are achieved. However within the remaining 2775 GWh

(non-deferred) portion there is still acceptable opportunity to advance First Nations economic opportunities through a minimum equity grant for those projects seeking participation in the 2023 Call for Power in conjunction with an adequate evaluation model with a focus on self-reporting (see component C).

On the 2775 GWh (non-deferred) portion FNEMC proposes that this equity grant should be provided by the project proponent under one of the following options:

Option 1 (Equity option)

This option would mandate a 35 per cent equity grant in the form of a unique class of preferred equity within the relevant project entity. This class should have a dividend designed to match on a forecast basis annual distributions provided to the most remunerative class of equity in the project entity. This class should also have a pro-rata claim to any retained equity within the company on a priority exceeding that of the most beneficial class of share in the project. This class of share should have no capital contribution obligations attached to it.

In addition, equity granted under this option should be entitled to seats on the board of directors for the project entity equal the class' pro-rata share of total outstanding equity. These board seats should have rights equal to all other seats on the project entity's board.

Option 2 (Non-equity option)

An annual cash grant in lieu of equity, equal to the return on a notional 35 per cent equity position. This payment should reflect a return on equity equal to at least 200 basis points above the Commission's Benchmark allowed return on equity, using an assumed capital structure of 40 per cent equity, applied to a total project capitalization inclusive of both generation and interconnection assets. Depreciation and reinvestment of the project capital should reflect assumptions contained in the relevant proponent's 2023 Call for Power bid.

No governance provisions should attach to this "quasi equity" Option, beyond any provisions that are otherwise a part of the IBA.

Option 3 (Equity option with opportunity to further advance stake)

In conjunction with either of Option 1 or Option 2, Nations should be provided the opportunity to contribute up to a further 15 per cent of the project equity utilizing government grants, loans such as the Canadian Infrastructure Bank or their own source revenue. This equity must be common equity, or return rights and benefits equal to the class of common equity in the project entity. At the same time, this equity would also be subject to any losses and capital contribution obligations of common equity holders, on a pro-rata basis.

For the purposes of the benefits self-reporting provisions of the Framework (further described in Component B), Nations will calculate the present value of expected equity distributions. Recognizing that the social discount rate of First Nations is likely well above the discount rate

for either BC or BC Hydro, Nations will be entitled to discount equity payments at a rate equal to at least 150 per cent of BC Hydro's weighted average cost of capital.

Component B) Evaluation Model – with focus on self reporting

To make certain that the minimums required by the Framework do not become a ceiling as well as a floor, the Framework includes a provision for First Nations to self-report, as part of the proponent's submission into the 2023 Call for Power, their expected benefits in each of the four benefits categories. Those categories are: (1) granted equity or (at the Nation's discretion, a cash equivalent); (2) employment; (3) contracting opportunities; and (4) capacity building. The form and calculation of that benefits reporting will be standardized to allow for comparison across projects, and the terms of the 2023 Call for Power shall be structured to assign selection benefits based on the relative size of these reported benefits.

FNEMC recognizes that the relative selection weight within the 2023 Call for Power that is attached to these benefits should be set to balance the cost of these benefits against other project selection criteria that BC Hydro may choose to consider, including rate impacts. However, the call's selection criteria must not be so focussed on price considerations that it creates a disincentive for project proponents and First nations to include reasonable accommodation and reconciliation costs within their bids. Effecting this balancing will require considerable discussion as the Framework is refined and implemented.

To ensure that the costs of these incremental benefits (that is, those benefits above the minimums) are not perceived as imprudent costs or construed to act against proponents' incentives to provide reasonable First Nations benefits, the importance of Commission instruction to mitigate this risk is further described in Framework Component C.

Employment, Contracting, and Capacity Building

In addition to an equity benefit the evaluation model should also ensure all non-Indigenous proponents seeking contracts under the 2023 Call for Power have reached IBAs with affected Nations that provide for valuable preferences in employment, contracting, and capacity building. FNEMC believes that the Framework should promote opportunities for Nations to receive these benefits without the call terms constraining the individual needs and preferences of affected Nations. As such, Nations and proponents should be encouraged to negotiate whatever benefits are suited to their circumstances.

Overall, the 2023 Call for Power should have provisions that are responsive to the self-reported benefits of the impacted Nations in each of the four categories (1) granted equity or (at the Nation's discretion, a cash equivalent); (2) employment; (3) contracting opportunities; and (4) capacity building. For example, the self-reporting regime could define a mechanism for positive or negative points against a "baseline" quantum and value in each of these benefits areas. Positive points should gain advantages for projects in the tendering process, while negative points (a failure to achieve the minima) should be disqualifying. The value of these points should be defined and require proponents to negotiate valuable opportunities in jobs, training, and

contracting. These point values should guarantee sole-sourced contracting, jobs at all levels of work and management, and robust training and advancement schemes.

Component C) Regulatory Direction

Provisions in the 2023 Call for Power and in instructions to the Commission should ensure that proponents face reasonable incentives to include such provisions in their IBAs, without fear that doing so will harm their competitive position in the 2023 Call for Power. The Framework must provide that the Province instruct, pursuant to section 3 of the *Utilities Commission Act* (the “Act”), that any incremental power costs associated with satisfying the Framework be allowed as part of the program design and resulting contracts, as BC Hydro seeks approval for these under s. 71 of the Act, or under s. 44.1(9).

Should BC choose to fund any of these accommodation and reconciliation costs directly rather than through BC Hydro’s payments to project proponents (and, therefore, through BC Hydro’s rates), it could do so explicitly, relieving ratepayers of these costs and removing to some extent the question of these costs’ reasonableness from the Commission’s jurisdiction. However, should the Province choose to make such a contribution in the form of grants for the Nations to acquire equity in the projects, both BC Hydro (in assessing project costs) and the Commission (in regulating the prudence of those costs) should be instructed to consider this equity as fully entitled to earn a fair return, in recognition of these funds belonging to the contributing First Nation.

Component D) First Nations Call to Power on 925 GWh

The Framework includes a carve out of 25% of the 3,700GWh exclusively for First Nations led projects or Utilities. The design and roll out of this carve out is to be Indigenous led through active engagement over 2023/2024.

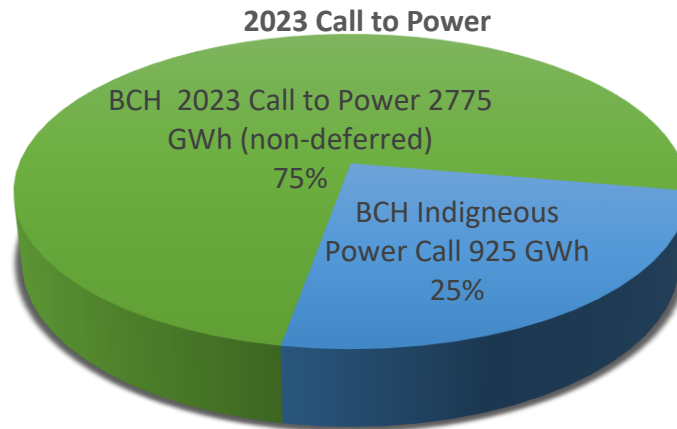


Figure 2 BC Hydro Indigenous Power Call for 925 GWh proportionate to the 2775 GWh

Recommended process for Framework development

Owing to the short time frame BC and BC Hydro have allowed for the 2023 Call for Power and, by extension, for the development of this Framework and the negotiation of IBAs, FNEMC suggests the following steps:

1. FNEMC and BC Hydro work to confirm and agree to the provisions of this Framework, including the equity options to be presented to First Nations, the self-reported benefits regime, and the application of the Framework within the 2023 Call for Power tendering and evaluation terms for presentation over August/September 2023 engagements.
2. Based on this work, First Nations rights-holders, FNEMC, BC Hydro, and the province should establish what instructions to the Commission are required to ensure that the determined Framework is not compromised by the Commission's jurisdiction under s. 71, 44.1(9) or other sections of the Act (such as cost approvals) that may apply to BC Hydro's actions and expenditures under the Framework. To be complete over October/November.
3. Following the accomplishment of this work, FNEMC and BC Hydro should work to determine the terms and conditions for First Nations participation in the 2023 Call to Power. December- March 2024 Finalize the design of First Nation participation.

Subsequent Calls and Concluding Remarks

As noted throughout this submission, FNEMC is disappointed that First Nations timely requests to develop a long-term plan to advance mechanisms and approaches to First Nations' involvement in the electricity sector were not received positively. To avoid a repeat of the hasty mechanisms and approaches that First Nations are now being asked to engage on for the 2023

Call for Power, FNEMC suggests that, following the first exclusive First Nations Power Call for the 925GWh, a schedule of regular power calls – with material First Nations’ opportunities – is developed and committed to, consistent with BC Hydro’s forecast energy needs as these are expected to unfold and refined in future IRPs.

FNEMC is hopeful that BC Hydro sees the value of identifying and reacting to such scheduled demand in conjunction with its IRP processes. FNEMC believes that such calls are a necessary means of ensuring robust private power sector (First Nations and non-Indigenous) that is ready and able to meet on-going electricity demand in the province. No power sector, First Nations or otherwise, benefits from sudden, reactive, and unforeseen spikes in demand, followed by long periods during which projects lose momentum and capital flees to more reliable opportunities.

As a result of the unnecessary urgency and pressure placed on our Nations, FNEMC will also be seeking commitments from BC that BC Hydro will improve its procurement planning and scheduling, including through consultation with First Nations, so that future power procurement and development is more consistent with the demands of reconciliation.

Appendix A- BC Hydro Call to Power Engagement Plan

