

IN THE MATTER OF THE UTILITIES COMMISSION  
ACT, S.B.C. 1980, c. 60; and

IN THE MATTER OF AN APPLICATION BY COMINCO LTD.  
for an Exemption under Section 103(3); and

IN THE MATTER OF AN APPLICATION BY WEST  
KOOTENAY POWER AND LIGHT COMPANY, LIMITED  
for a Certificate of Public Convenience  
and Necessity

DECISION

April 2, 1982

Before M. Taylor, Chairman; J.D.V. Newlands,  
Deputy Chairman; and B.M. Sullivan, Commissioner

IN THE MATTER OF THE  
UTILITIES COMMISSION ACT,  
S.B.C. 1980, c. 60

and

IN THE MATTER OF AN APPLICATION BY  
COMINCO LTD. (COMINCO) FOR THE SALE  
OF SURPLUS POWER SERVICE AND AN EXEMPTION  
FROM PROVISIONS OF PART 3 OF THE ACT

SALE OF SURPLUS POWER SERVICE AND EXEMPTION ORDER

WHEREAS during the months of August, September and October, 1981, the British Columbia Utilities Commission (the Commission) heard two complementary applications made, on the one hand, by Cominco for an exemption from the provisions of the Act other than Part 2 and, on the other, by West Kootenay Power & Light Company Limited (WKPL) for a Certificate of Public Convenience and Necessity to purchase certain assets of Cominco;

AND WHEREAS the transactions underlying the applications were a proposed sale by Cominco of hydroelectric Plants Nos. 2 (Upper Bonnington), 3 (South Slocan) and 4 (Corra Linn) on the Kootenay River to WKPL more particularly described in a Sale of Plants Agreement dated the 4th day of June, 1981 (Sale of Plants Agreement) and in an associated agreement entitled Sale of Surplus Power Agreement between Cominco and WKPL dated the 21st day of November, 1980, dealing with electricity generated from Cominco's Plants Nos. 5 (Brilliant) and 6 (Waneta) to WKPL which is surplus to Cominco's requirements;

AND WHEREAS on the 2nd day of April, 1982, the Commission made certain recommendations to the Lieutenant Governor in Council concerning these applications;

AND WHEREAS the Lieutenant Governor in Council has considered the recommendations of the Commission but due to circumstances which have changed since the Commission heard the applications the Lieutenant Governor in Council is unwilling to approve the exemption on the terms and conditions prescribed by the Commission;

AND WHEREAS Cominco is a person who produces a power service primarily for its own purposes under the provisions of the Act;

AND WHEREAS pursuant to section 27 of the Act the Minister of Energy, Mines and Petroleum Resources is empowered to authorize the sale of surplus power service and to exempt the person selling the power service from provisions of Part 3 specified in the order subject to terms and conditions described therein;

AND WHEREAS the Minister considers it to be in the public interest that the proposed sale by Cominco to WKPL of hydroelectric Plants Nos. 2 (Upper Bonnington), 3 (South Slocan) and 4 (Corra Linn) as aforesaid be completed in accordance with the terms of this Order.

THE MINISTER OF ENERGY, MINES AND PETROLEUM RESOURCES pursuant to section 27 of the Act hereby authorizes Cominco to sell its surplus power service in accordance with the provisions of this Order and exempts Cominco from the provisions of Part 3 of the Act with the exception of sections 47, 51 and 53 subject to the following conditions, namely:

CONDITIONS

1. On or before the 31st day of October, 1982, Cominco shall file with the Commission for approval:
  - (a) amendments to the Sale of Plants Agreement providing for:
    - (i) the transfer of ownership of Plants Nos. 2 (Upper Bonnington), 3 (South Slocan) and 4 (Corra Linn) and all related and associated generation and transmission facilities, together with all licences, permits and approvals necessary to enable the exercise of all rights of ownership and operation, to WKPL for a purchase price of Twenty Million Dollars (\$20,000,000), such consideration to be paid and satisfied by the issue of two hundred thousand (200,000) common shares of WKPL;
    - (ii) the allocation of the purchase price between real property, dams and equipment, and buildings as the parties see fit;
    - (iii) a closing date that will enable the transfer of assets to be completed on or before the 31st day of December, 1982;
    - (iv) the change of Schedule B to reflect the method of payment of the purchase price;

(b) amendments to the Sale of Surplus Power Agreement providing for:

- (i) a procedure whereby WKPL may, until the 31st day of December, 1990, elect to purchase from Cominco, and Cominco shall be required to sell as firm energy up to 75 average annual megawatts, (a.a.m.w.) on a calendar year basis;
- (ii) a right of first refusal to WKPL of any further surplus;
- (iii) a procedure whereby Cominco and WKPL will contract in five year intervals for the sale and purchase of interruptible power during the period commencing on the 1st day of January, 1991, and terminating on the 30th day of September, 2005;
- (iv) the price for power to be paid by WKPL shall be as set out in the Sale of Surplus Power Agreement;
- (v) a force majeure proviso;
- (vi) a mechanism to adjust the price for reasonable actual contribution to replacement of capital costs in Schedule 1;
- (vii) a grant of a right of first refusal in favour of WKPL to acquire Plants Nos. 5 (Brilliant) and 6 (Waneta) or either of them, together with any associated facilities until the 30th day of September, 2005;
- (viii) dates which will permit performance in accordance with the foregoing amendments;

(c) agreements with WKPL for the common use of transmission and switching facilities so that facilities owned by each can be operated together as one integrated system.


2. On or before the 31st day of December, 1982, Cominco shall provide the Commission with evidence of the transfer of ownership of Plants Nos. 2 (Upper Bonnington), 3 (South Slokan) and 4 (Corra Linn) and all related and associated generation and transmission facilities, together with all licences, permits and approvals necessary to enable the exercise of all rights of ownership and operation, to WKPL for a purchase price

of Twenty Million Dollars (\$20,000,000), such consideration to be paid and satisfied by the issue of two hundred thousand (200,000) common shares of WKPL.

3. Cominco shall not sell or otherwise dispose of Plants Nos. 5 (Brilliant) and 6 (Waneta) or either of them without the prior approval of the Commission.
4. (a) WKPL shall forthwith submit to the Commission for its approval proposals to refinance WKPL to provide a better balance of debt and equity in the WKPL capital structure and to convert the sizeable short term bank borrowing into long term debt.  
  
(b) Cominco shall forthwith inform the Minister of its long term plans to reduce Cominco's equity in WKPL to not more than fifty per cent (50%).
5. (a) Cominco shall provide to the Minister not later than the 31st day of July in each year of the term of this Order with a report as to its industrial load requirements and expansion plans projected for a period of five years.  
  
(b) Cominco shall provide to the Minister not later than the 31st day of March in each year during the term of this Order a record of the previous calendar year transactions with WKPL under conditions 1(b)(i), (ii) and (iii).
6. Cominco shall
  - (a) file with the Minister on or before the 31st day of October, 1982, its undertaking to support any application made by WKPL for approval to expand the generating capacity at Plants Nos. 5 (Brilliant) and 6 (Waneta) or either of them, for the purpose of increasing the power supply to WKPL; and
  - (b) provide reasonable assistance to WKPL, not including the provision of or guarantee of funding, for any such application.
7. Cominco shall be permitted to sell to any customer outside of the Province of British Columbia, subject to obtaining an energy removal certificate, or any utility within the Province of British Columbia on an interruptible basis any part of the power service that is surplus to its requirements and to the requirements of WKPL imposed by this Order and the Sale of Surplus Power Agreement.

8. WKPL shall have obtained a Certificate of Public Convenience and Necessity for the purchase of Plants Nos. 2 (Upper Bonnington), 3 (South Slocan) and 4 (Corra Linn).
9. The approval of the Commission pursuant to section 57 of the Act shall be obtained to the issue of 200,000 common shares of WKPL to Cominco, being the consideration for the sale of Plants Nos. 2 (Upper Bonnington), 3 (South Slocan) and 4 (Corra Linn), not later than the 31st day of October, 1982.
10. This Order ceases to have effect on the 30th day of September, 2005.

Dated the 28th day of                      July     , 1982.

  
Minister of Energy, Mines  
and Petroleum Resources

## TABLE OF CONTENTS

	<u>Page</u>
APPEARANCES	(i)
LIST OF EXHIBITS	(ii)
SUMMARY OF REASONS AND DECISION	1
REASONS FOR DECISION	4
The Applications	4
The 1980 Energy Commission Decisions	7
Corporate Background	11
The Status of the Parties	14
The Justification for Cominco Exemption	17
The Issues	20
Security of Supply	21
Price and Cost of Power	22
Financial Integrity	24
Surplus Power	25
Future WKPL Access to Plants 5 and 6	33
WKPL Independence	34
Continued Application of Parts of the Act	35
DECISIONS	37
Decision on the Exemption Application	37
Decision on Certificate Application	41
Decision on Debenture Issue	41
Costs	41

APPEARANCES

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A.C. MICHELSON	Hearing Secretary
R.J. FLETCHER	Commission Staff
S.S. WONG	
J. HAGUE	
ALLWEST REPORTING LTD.	Court Reporters



LIST OF EXHIBITS

	<u>Exhibit No.</u>
Affidavit of Service, by G.K. Harper, Assistant to the President and Secretary, West Kootenay Power and Light Company, Limited	1
Affidavit of Publication of Notice of Public Hearing, by G.K. Harper	2
West Kootenay Power Applications and Written Evidence pursuant to B.C. Utilities Commission Order No. G-38-81 - Volume 1, July 6, 1981	3
West Kootenay Power Submission and Written Evidence pursuant to B.C. Utilities Commission Order No. G-38-81 - Volume 2, July 6, 1981	4
Replacement Page 1, Tab 10, Exhibit 4	4A
Replacement Page 3, Tab 10, Exhibit 4	4B
West Kootenay Power Submission to the B.C. Utilities Commission comprising the Reply to Request for Additional Information - Volume 3, July 28, 1981	5
West Kootenay Power Supplementary Material pursuant to B.C. Utilities Commission Order No. G-38-81	6
West Kootenay Power Photo - Plant #2, Upper Bonnington	7
West Kootenay Power Photo - Plant #3, South Slocan	8
West Kootenay Power Photo - Plant #4, Corra Linn	9
Sale of Plants Amending Agreement between Cominco Ltd. and West Kootenay Power dated August 7, 1981	10

LIST OF EXHIBITS  
(Cont'd)

	<u>Exhibit No.</u>
Canal Plant Subagreement between Cominco Ltd. and West Kootenay Power dated August 10, 1981	11
Cominco Ltd. Letter making Application for an Exemption pursuant to Section 103(3) of the Utilities Commission Act	12
Cominco Ltd. Application for Exemption	13
Cominco Ltd. Reply to Request for Additional Information dated July 6, 1981	14
Cominco Ltd. January 30, 1981 Letter to the B.C. Utilities Commission	15
Exhibit WGS-2 and Exhibit WGS-3	15B
West Kootenay Power - Schedule setting out Common Share Equity and Dividends on Common Shares for the years 1916 to 1951 inclusive	16
West Kootenay Power - Derivation of J.S. Brook's Estimates of Cominco's Cost of Capital	17
West Kootenay Power - Power Resource Study, An Overview; Prepared by Acres Consulting Services Limited (Vancouver, B.C.), July 14, 1981	18
Information Request - B.C. Hydro; Reference: Exhibit 6, Cominco - West Kootenay Power Agreement made as of February 25, 1980	19
Forestry Intervenor's re: West Kootenay Power, Average Cost of Capital	20
West Kootenay Power - Summary of Interim Rate Applications, 1976 through 1981	21
West Kootenay Power - Schedule of Selected Historical Financial Data (\$ Thousands)	22
Brief, August, 1981, by Regional District of Kootenay Boundary	23

LIST OF EXHIBITS  
(Cont'd)

	<u>Exhibit No.</u>
Written Submission of Christopher D'Arcy, M.L.A. (Rossland-Trail)	24
Appraisal of Cominco Power Facilities Located at Trail, B.C. (Main Report), Volume I - Prepared for Cominco Ltd. by Acres Consulting Services Limited	25
Appraisal of Cominco Power Facilities Located at Trail, B.C. (Appendices), Volume II - Prepared for Cominco Ltd. by Acres Consulting Services Limited	26
B.C. Utilities Commission Staff Schedule showing Comparative Annual Revenue Requirements under Plant Use Agreement dated November 21, 1980, and Sale of Plants Agreement dated June 4, 1981	27
Cominco Ltd. Comfort Letter dated October 23, 1980 to Bank of Montreal	28
West Kootenay Power - Capitalization of Rate Base for Regulatory Purposes for the Year Ending December 31, 1981,	
(a) Reflecting Plant Purchase and Debenture	
(b) Prior to Plant Purchase	29
Map (Colour Coded) to Identify Plant and Property (West Kootenay Power owned; Cominco owned; to be sold to West Kootenay Power by Cominco)	30
Cominco Ltd. Memorandum dated August 18, 1981 concerning "Transfer of Assets Under the Provisions of Section 85 of the Income Tax Act (Canada) (the "Act") (including copies of Section 69(1)(b) and Section 85 of the Act.)	31
August 13, 1981 Letter from Farris, Vaughan, Wills & Murphy enclosing copies of all of the Drafts of the Sale of the Plants Agreement between West Kootenay Power and Cominco Ltd.	32

LIST OF EXHIBITS  
(Cont'd)

	<u>Exhibit No.</u>
West Kootenay Power - Generation Outage Summary (Mwhs), Plants #1 through #6, 1976 through 1980	34
West Kootenay Power - Replacement Page 9 of Exhibit 3, Tab 10	35
West Kootenay Power - Pro Forma Capitalizations as at December 31, 1981, with Scenarios A, B, and C	36
No. 4 Plant Use Agreement dated October 1, 1980, between Cominco Ltd. and West Kootenay Power	37
Cominco Ltd. - Insurance Summary, Property and Business Interruption	38
West Kootenay Power - Analysis of Capital Expenditures for Plants 2, 3 and 4 for each of the years 1982 to 1991 (inclusive)	39
West Kootenay Power - Letter dated August 19, 1981 from Thorne Riddell to West Kootenay Power re: "Capital Cost of Depreciable Property Sale of Plants Agreement"	40
Page 3065.B (C.I.C.A. Handbook) (December, 1978 - Accounting Recommendations - Page 1178) - Leases, Appendix B	41
West Kootenay Power - Summary of Handy-Whitman Index of Public Utility Construction Costs	42
Agreement dated June 27, 1947 between West Kootenay Power and Cominco Ltd. concerning Arrangements pursuant to Sale of 3 Power Plants (Upper Bonnington, South Slocan and Corra Linn) by West Kootenay Power to Cominco Ltd.	43
Agreement dated August 1, 1972 between British Columbia Hydro and Power Authority, Cominco Ltd., and West Kootenay Power and Light Company, Limited (the Canal Plant Agreement)	44

LIST OF EXHIBITS  
(Cont'd)

	<u>Exhibit No.</u>
Excerpts from B.C. Hydro Load Forecast Report, being Pages 22 and 23; Probable Projections of Gross Electric Power Requirements Fiscal Years April to March 1980/81 through 1990/91 (Table PEI)	45
Letter dated November 26, 1980 from B.C. Utilities Commission to Cominco Ltd. (Attention: Mr. William G. Wilson, President)	46
Application pursuant to Sections 64 and 67 of the Utilities Commission Act, by West Kootenay Power to Amend its July 6, 1981 Application	47
West Kootenay Power August 21, 1981 Response to Commission Staff Request dated August 14, 1981	48
West Kootenay Power August 27, 1981 Response to Commission Staff Request dated August 14, 1981	48B
September 18, 1962 Letter from Mr. Ray Williston, Minister of Lands, Forests and Water Resources to Cominco Ltd. and Appended Memorandum of Agreement dated August 31, 1962	49
Memorandum of Agreement between Province of British Columbia (Minister of Lands, Forests and Water Resources) and Cominco Ltd., dated September 6, 1968	49A
Operating Agreement, Plant No. 2, January 1, 1974	50
Operating Agreement, Plant No. 3, October 1, 1975	51
Omnibus Agreement, January 1, 1975	52
Extract of All References and Matters Included in the Minutes of a Meeting of the Board of Directors held on April 21, 1981 Relating to the Sale of Plants Agreement dated June 4, 1981	53
West Kootenay Power, Volume 5 dated August 25, 1981, Submission to Revise Certain Rate Schedules	54

LIST OF EXHIBITS  
(Cont'd)

	<u>Exhibit No.</u>
West Kootenay Power, Response to Request for Additional Information dated August 14, 1981	55
Cominco Ltd. - February 25, 1980 Letter from Bryan Morris, Controller B.C. Group, Cominco Ltd. to B.C. Energy Commission Pertaining to Special Tax Provisions Extended to Cominco Re The Brilliant Power Plant	56
January 1, 1947 Transfer Document Concerning Properties and Plant Transferred by West Kootenay Power to Cominco Ltd.	57
Table 3 - Cominco Load (Average Megawatts) - Certain Years from 1920 through 1965; 1966 through 1974; 1975 through 1980	58
Cominco Ltd. - Examples of Cominco Guarantees of Prior West Kootenay Power Bond Issues Related to Certain West Kootenay Power Construction Programs	59
Cominco Ltd. - Graph of Cominco's Net Earnings (\$ Million), 1966 through 1980	60
Report of Province of British Columbia Executive Council to the Administrator in Council, dated July 6, 1949 together with Public Utilities Commission Order dated June 29, 1949 (Re: Pend D'Oreille Valley), and	
Public Utilities Commission Letter dated June 7, 1945 together with copy of Public Utilities Commission Order dated June 1, 1945 (Re: Brilliant) and a copy of a Minute of Approval Thereof by Cabinet dated June 5, 1945	61
Commission Staff - Exhibit AVM-4 (Cominco/WKPL, Energy Load/Resource Balance)	62
Cominco Ltd. - Letter from B.C. Hydro, June 9, 1981 to Cominco Ltd. and Cominco Reply dated August 10, 1981	63

LIST OF EXHIBITS  
(Cont'd)

	<u>Exhibit No.</u>
Supplementary Testimony for the Financial Panel, Phase 4	64
West Kootenay Power; Response to Commission Staff Request Per Transcript Page No. 2346	65
West Kootenay Power Forecast Depreciated Rate Base Calculation for Year Ending December 31, 1982 (Schedule A)	66
West Kootenay Power Allowance for Working Capital - Lag Study Method (Schedule B)	67
West Kootenay Power Forecast Statement of Earnings for the Year Ending December 31, 1982 (Schedule C)	68
West Kootenay Power Forecast Income Tax Expense for the Year Ending December 31, 1982 (Schedule D-1)	69
West Kootenay Power Calculation of Income Taxes on Utility Income, 1982 Forecast (Schedule D-2)	70
West Kootenay Power Amended Capitalization of Rate Base for Regulatory Purposes for the Year Ending December 31, 1981 (Schedule E)	71
West Kootenay Power - Common Equity as at December 31, 1982	71A
West Kootenay Power - Report of Cabinet (#565), dated May 14, 1940	72
June 17, 1981 Letter from B.C. Hydro (H.J. Goldie) to West Kootenay Power (J.S. McKay) Re: Economic Analysis of Future Sources of Energy for West Kootenay Power	73
Supplemental Information Concerning Exhibit 73	73A
West Kootenay Power - Residential Power Rates, 1975 through 1981 (Based on 1000 Kwh used/month)	74

LIST OF EXHIBITS  
(Cont'd)

	<u>Exhibit No.</u>
West Kootenay Power - Comparison of Residential Customer Billings, West Kootenay Power and Certain Other Canadian Electric Utilities, Showing Increases (% and Amount), 1975 through 1981	75
Clauses 10.03/10.04/10.05 from "Wheeling Agreement Between W.K.P.L. and B.C. Hydro"	76
1980 Published Annual Report - West Kootenay Power and Light Company, Limited	77
Revised Testimony of J.S. McKay (Replacement)	78
West Kootenay Power - Company's Net Earnings, 1979 and 1980, Displaying Rate of Return on Common Equity, Including and/or Excluding Interim Increase	79
West Kootenay Power - Statement of Forecast Earnings 1981 and 1982 Displaying Various Assumptions and Rate of Return on Common Equity	80
West Kootenay Power - Schedules dated September 4, 1981 Incorporating Certain Amendments to Material Filed July 6, 1981 as Volume 2 (Exhibit 4)	81
West Kootenay Power - Schedule of Capital Expenditures for Years Ending December 31, 1975 through 1980	82
West Kootenay Power - Comparison of Commercial and Industrial Rates, Effective April 1, 1981, West Kootenay Power and Certain Canadian Utilities	83
West Kootenay Power - December, 1977 Report by Woods, Gordon & Co. re: "Inventory Control System Procedures Manual"	84
West Kootenay Power - July 30, 1981 Memorandum of Cost Increase Comparison for Major Usage Items	85



LIST OF EXHIBITS  
(Cont'd)

	<u>Exhibit No.</u>
Letter dated May 7, 1979 to West Kootenay Power from F.R. Wright, Pemberton Securities Ltd.	86
West Kootenay Power - Responses to Request for Additional Information, September 17, 1981	87
West Kootenay Power - Estimated Cost of Power from Plants Nos. 5 and 6	88
Cominco Ltd. - Comparison of Residential Billings, B.C. Electric/B.C. Hydro and West Kootenay Power (5-Year Intervals), 1940 through 1980	89
Graphs Related to "Weekly Close and Volume Common Share Trading", Pacific Northern Gas Ltd. and Inland Natural Gas Co. Ltd. and (McLeod, Young & Weir) "MYW Index Utilities (Months)", 1975 to Date	90
West Kootenay Power - Average Yield of McLeod, Young & Weir "BBB" Long Bond Index	91
Written Testimony of Dr. William H. Melody on behalf of Consumers' Association of Canada (B.C. Branch)	92
Written Testimony of William Robert Waters on behalf of the Forest Industry Intervenors	93
Supplementary Testimony of W.R. Waters, September, 1981	93A
West Kootenay Power August 25, 1980 Letter to B.C. Hydro Pertaining to Load Forecast, 1981 to 2001	94
Cominco Ltd. - Copy of West Kootenay Power Journal Entry in Sale of Plants and Equipment to Cominco as at October 31, 1947	95
West Kootenay Power - Calculations to Determine the Effect to West Kootenay Power of Being Able to Store Cominco's Surplus Energy for Later Use by West Kootenay Power	96

LIST OF EXHIBITS  
(Cont'd)

	<u>Exhibit No.</u>
Licence No. EL-105, In Favour of Cominco Ltd., For Exportation of Interruptible Energy (Part VI - National Energy Board Act), dated September 1, 1977	97
Volume 1, Tab 4, Page 4, West Kootenay Power Application dated November 7, 1980 (Forecast Statement of Earnings Adjusted with Rate Increase for the Year Ending December 31, 1981)	98
Transmission and Distribution; General and Administrative Forecast Analyzed on a Cost Per Customer Basis (1981 vs. 1979, 1981 vs. 1980)	99
Cominco Ltd. - Memorandum re: Transfer of Assets Under the Provisions of Section 85 of the Federal Income Tax Act	100
West Kootenay Power - Analysis of Rate Application Costs, Schedules A through E	101
West Kootenay Power - Schedule of Monthly Return on Common Share Equity for the Year Ending December 31, 1981	102
Power Purchase Agreement, West Kootenay Power and B.C. Power Commission, August 31, 1956	103A
Supplementary Agreement on Rate for Wheeling Power of the Power Company, West Kootenay Power and B.C. Power Commission, August 17, 1965	103B
Supplementary Agreement on rate for Wheeling Power of the Power Company, West Kootenay Power and B.C. Power Commission, (August 17, 1965), Effective October 1, 1980	103C
Summary of General Wheeling Agreement with B.C. Hydro, Effective October 1, 1977 to September 30, 2005	103D

LIST OF EXHIBITS  
(Cont'd)

	<u>Exhibit No.</u>
West Kootenay Power - March 23, 1981 Report on West Kootenay Power Subsidiary Companies, Cascade Water, Power and Light Company, Limited, Okanagan Water-Power Company, South Kootenay Water-Power Company	104A
West Kootenay Power - Explanation of Wind-Up of Subsidiary Companies	104B
Chapter 51, An Act to Incorporate the Cascade Water, Power and Light Company, Limited, May 8, 1897	105A
Chapter 62, An Act to Incorporate "The South Kootenay Water-Power Company", May 8, 1897	105B
Chapter 67, An Act to Incorporate the "Okanagan Water-Power Company", May 8, 1897	105C
Evidence of F.R. Wright	106
West Kootenay Power - Analysis of Transmission and Distribution 1981 Forecast Expenditures	107
West Kootenay Power - Analysis of General and Administrative 1981 Forecast Expenditures	108
West Kootenay Power - Response to questions by R.B. Wallace, reference Volume 16 (September 21, 1981) Page 3027	109
West Kootenay Power - Analysis of Net Expenditures on Fixed Assets for the Period 1976-1981	110
West Kootenay Power - Analysis of Line Losses for the Period January - August, 1981	111
Letter Dated October 7, 1981 from Cominco Ltd. to West Kootenay Power Amending November 21, 1980 Sale of Surplus Power Agreement and Plant Use Agreement	112
VOID	113

LIST OF EXHIBITS  
(Cont'd)

	<u>Exhibit No.</u>
West Kootenay Power - Comments Regarding the Cost of Separating Services Shared by West Kootenay Power and Cominco Ltd.	114
October 7, 1981 Letter from E. LeRose Enclosing Petition on Behalf of 3,617 Persons in Support of Cominco's Application for Exemption from Section 103(3) of the Utilities Commission Act	115
October 9, 1981 Request for Information (B.C. Utilities Commission Staff to West Kootenay Power)	116
West Kootenay Power - Purchase of Plants Nos. 2, 3 and 4, Summary of Value	117
Affffidavit of Service Pertaining to Exhibit 54 (Volume 5) (G.K. Harper)	118
West Kootenay Power - Response to Exhibit 116	119
West Kootenay Power - Response to Exhibit 116	119A
West Kootenay Power - Real Estate as at December 31, 1980	120
West Kootenay Power - Reconciliation of Loss on Goat River plant to Annual Amortization Charge	121
Forestry Intervenors - Breakdown of Hearing Costs 1977 - 1981 (From Exhibit 101)	122
West Kootenay Power - Summary of Rate Class (Actual and Forecast) Consumption for Years Ending December 31, 1978 to 1980	123
West Kootenay Power - 1982 Forecast Capitalization, Schedule 1, Exhibit 119	124
West Kootenay Power - Response to Questions Raised by R.J. Gibbs in Cross-Examination, Transcript Page 4956 (October 14, 1981)	125

LIST OF EXHIBITS  
(Cont'd)

	<u>Exhibit No.</u>
West Kootenay Power - Summary of Amendments to Rate Application	126



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and Necessity

### SUMMARY OF REASONS AND DECISION

These reasons and the decision which follows arise out of two complementary applications heard by the Commission in August, September and October, 1981. The transaction underlying the applications is a proposed sale by Cominco Ltd. ("Cominco") of hydroelectric Plants Nos. 2 "Upper Bonnington", 3 "South Slocan" and 4 "Corra Linn" on the Kootenay River, and associated facilities, to its wholly-owned distribution utility, West Kootenay Power and Light Company, Limited ("WKPL"). The parties proposed that the purchase price be \$20 million payable by a debenture issued by WKPL to Cominco, carrying interest at 16% and repayable over a 15-year term. There is also an associated agreement dealing with the electricity generated from Cominco's Plants Nos. 5 "Brilliant" and 6 "Waneta" which is surplus to Cominco's requirements.

The complementary applications were:

1. An application by WKPL under Section 51 of the Utilities Commission Act (the "Act") for a Certificate of Public Convenience and Necessity authorizing the purchase of the

plants and associated facilities. Approval of the proposed debenture would also be required pursuant to Section 57 of the Act. Both the issuance of the Certificate and the approval of the debenture are within the jurisdiction of the Commission.

2. An application by Cominco under Section 103(3) of the Act for an order exempting the company from all of the provisions of the Act excepting Part 2 thereof. The Commission can only grant an exemption if the prior approval of the Lieutenant Governor in Council is given.

An application by WKPL for interim and permanent rate relief was heard at the same time. The rate decision is wholly within the jurisdiction of the Commission. It is not dealt with in these reasons. It will be the subject of a separate decision.

For the reasons explained in detail in the Reasons for Decision which follow, and after having given appropriate weight to the various aspects of the public interest implicit in the proposed transaction, the Commission concluded:

1. That the sale of Plants Nos. 2, 3 and 4 and associated facilities to WKPL should be approved.
2. That the purchase price should be \$9.2 million determined on the basis of historic cost net of depreciation.
3. That electric power from Cominco's Plants Nos. 5 and 6 which is surplus to Cominco's industrial requirement, now and in future, some of which is now being exported, should pass on a staged basis to WKPL.



4. That WKPL should have the opportunity to, and have funds to assist it to, expand the generation capability at Brilliant and Waneta from time to time to meet its increasing load requirements.

5. That revenues available to WKPL from the sale of surplus electric power should be set up in a special fund for the purpose of assisting in the financing of the aforesaid expansion of generation capability at Brilliant and Waneta.

6. That Cominco should be granted exemption from the provisions of the Act excepting Part 2, and Sections 47 (limited to apply to Plants Nos. 5 and 6), 51 and 133 (limited to these proceedings).

The Commission's decision therefore is that with the approval of the Lieutenant Governor in Council it will grant Cominco an exemption and issue to WKPL a Certificate of Public Convenience and Necessity upon conditions which will accomplish the above objectives. The precise conditions are spelled out under the subheadings "Decision on Exemption Application", "Decision on Certificate Application" and "Decision on Debenture Issue" of this Decision.

## REASONS FOR DECISION

### THE APPLICATIONS

Commencing on August 11, 1981 and concluding on October 16, 1981, the Commission heard interrelated applications by Cominco and WKPL, based upon a proposed transaction between the parties involving three of Cominco's hydroelectric plants on the Kootenay River, namely, No. 2 "Upper Bonnington", No. 3 "South Slocan" and No. 4 "Corra Linn". The transaction put forward in the applications has three linked components:

1. Pursuant to a conditional agreement dated June 4, 1981 ("the Sale of Plants Agreement"), a sale by Cominco to WKPL of Plants 2, 3 and 4, and related facilities, licences and permits for \$20 million payable by a debenture issued by WKPL to Cominco. The Sale of Plants Agreement provides that it does not become operative until a Certificate of Public Convenience and Necessity approving the transaction is issued to WKPL by the Commission.
2. A subordinated, unsecured debenture issued by WKPL to Cominco for \$20 million at 16% repayable over 15 years in annual instalments of \$800,000 with a final "balloon" payment of \$8 million. This instrument cannot be issued by WKPL without Commission approval under Section 57 of the Utilities Commission Act.
3. The sale by Cominco to WKPL under an agreement dated November 21, 1980 (the "Sale of Surplus Power Agreement") of electric power from Plants Nos. 5 ("Brilliant") and 6 ("Waneta") which is surplus to Cominco's load requirements,

under certain conditions, at a price of 6.227 mills per kilowatt-hour increased or decreased from time to time in accordance with a formula.

There is another agreement which, although not a part of the proposed transaction is nonetheless of significance. It is an agreement dated November 21, 1980, and entitled "Plant Use Agreement". Under the Plant Use Agreement WKPL has exclusive use of and exclusive right to the electricity from Plants 2, 3 and 4 together with associated facilities in return for a monthly payment of \$291,666. If the sale of plants under the Sale of Plants Agreement goes forward the Plant Use Agreement will terminate. On the other hand if the sale of plants does not go forward the Plant Use Agreement will continue in force subject to summary termination if "Cominco's electric power facilities become regulated as a utility".

The application by Cominco is expressed in a letter dated January 30, 1981, (Exhibit 12) as follows:

"Cominco Ltd. hereby makes application for an exemption pursuant to Section 103(3) of the Utilities Commission Act. The details of our application are being prepared and will be forwarded to you as soon as possible. We anticipate that the details will be available within one month."

On July 6, 1981 Cominco supplied additional information in a document marked Exhibit 13 at the hearing.

Section 103(3) of the Act provides:

"(3) The commission may, on conditions it considers advisable, with the prior approval of the Lieutenant Governor in Council, exempt a person, equipment or facilities from the application of all or any of the

provisions of this Act, other than Part 2, or may limit or vary the application of this Act, other than Part 2."

The WKPL application (Exhibit 3) filed on June 4, 1981, addressed the Commission as follows:

"Pursuant to certain proposals made to the Commission to provide West Kootenay Power and Light Company, Limited with a secure source of power, West Kootenay Power has negotiated and concluded an agreement (Sale of Plants Agreement) covering the purchase by the Company of Cominco Ltd.'s Plants Nos. 2, 3 and 4 and related facilities. Implementation of the agreement is subject to the receipt from the Commission of a Certificate of Public Convenience and Necessity approving the purchase. Accordingly, West Kootenay Power and Light Company, Limited hereby applies pursuant to Section 51(1) of the Utilities Commission Act, for a Certificate of Public Convenience and Necessity in respect of the said Sale of Plants Agreement."

Section 51(1) of the Act provides:

"(1) Except as otherwise provided, no person shall, after this section comes into force, 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."

The applications were heard in public at Kelowna in 1981, August 11 through 14, August 18 through 21 and August 25 through 28, and in Vancouver September 2, 3 and 4, September 21 through 24, October 5, 6, 8, 9, 13, 14 and 16. An application by WKPL for rate relief, and for disposition of interim rate orders issued by the Commission from time to time, was dealt with at the same time because the details of the rate relief application were, in some respects, related to the sale of plants transaction.

THE 1980 ENERGY COMMISSION DECISIONS

In complementary decisions dated May 30, 1980, entitled "Cominco Ltd., Exemption Application" (the 1980 Cominco Decision) and "West Kootenay Power and Light Company, Limited, Certificate Application" (the 1980 WKPL Decision) respectively, the British Columbia Energy Commission (the Energy Commission), predecessor to the British Columbia Utilities Commission (the Commission) dealt with complementary applications by Cominco and WKPL.

The Energy Commission found that the applications were interdependent and that one could not succeed without the other.

The basis of the applications was a proposed Plants and Surplus Energy Agreement under which WKPL would acquire the exclusive use of Plants 2, 3 and 4 for a period of 25 years through a long term lease. WKPL was and is the owner of Plant No. 1 "Lower Bonnington".

The agreement provided WKPL with an option to purchase Plants Nos. 2, 3 and 4, and to purchase from Cominco interruptible power from Plants 5 and 6 which was surplus to Cominco's requirements. Implementation of the agreement was contingent upon Cominco being granted exemption from the provisions of the Energy Act, since repealed and replaced by the Utilities Commission Act, pursuant to Section 101(3) of the Energy Act, now Section 103(3) of the Utilities Commission Act.

The applications were by Cominco for the aforesaid exemption and by WKPL for a Certificate of Public Convenience and Necessity approving the agreement. The application of WKPL was within the power of the Energy Commission to grant or

refuse whereas the application of Cominco could only be granted by the Energy Commission "with the prior approval of the Lieutenant Governor in Council".

The operative part of the 1980 Cominco Decision recites that the Energy Commission would, with the approval of the Lieutenant Governor in Council, exempt Cominco from regulation under the Energy Act and approve the Plants and Surplus Energy Agreement, upon the following conditions:

- "1. That on or before December 31, 1980, Cominco Ltd.:
  - (i) Satisfy the Commission that the ownership of Plants 2 (Upper Bonnington), 3 (South Slocan), and 4 (Corra Linn), and all related and associated generation and transmission facilities have been transferred to West Kootenay Power and Light Company, Limited for a price not to exceed \$10.4 million.
  - (ii) Provide to the Commission evidence that all licenses, permits and approvals necessary to enable West Kootenay Power and Light Company, Limited to exercise all rights of ownership and operation have been similarly transferred at a consideration agreed upon between the parties and forming part of the aforesaid price.
2. That Cominco Ltd. assist West Kootenay Power and Light Company, Limited in the financing of the purchase as aforesaid, by acquisition of equity stock in West Kootenay Power and Light Company, Limited or by such other means as may be deemed appropriate by Cominco Ltd. but in such manner that the terms, conditions and carrying charges associated with the financing be not more onerous than West Kootenay Power and Light Company, Limited would be required to assume if it were an energy utility dealing at arms length with financial institutions.
3. That on or before September 1, 1980, Cominco Ltd. enter into and file with the Commission for approval, an Agreement with West Kootenay Power and Light Company, Limited providing for the sale of firm power

from Plants 5 (Brilliant) and 6 (Waneta), surplus to the industrial requirements of Cominco Ltd., on the declining scale shown under Tab 3 of Exhibit 6 in the West Kootenay Power and Light Company, Limited certificate hearing, at a price calculated as described in the Plants and Surplus Agreement, subject only to interruption for use in the industrial operations of Cominco Ltd. by reasons of force majeure in such circumstances as would otherwise cause an interruption in the industrial operations of Cominco Ltd., and providing further that any power in excess of that shown on the declining scale, which is surplus to the requirements of Cominco Ltd. in its industrial operations, will first be offered for purchase by West Kootenay Power and Light Company, Limited upon the same terms and at the same price as the "firm surplus", before being disposed of to others.

4. That Cominco Ltd. confirm by resolution of its Board of Directors, filed with the Commission on or before September 1, 1980, the following undertakings:
  - (i) That without first obtaining the approval of the Commission, Cominco Ltd. will not dispose of Plants 5 and 6 or the associated generation and transmission facilities, licenses, permits, concessions or privileges by sale, lease, transfer, amalgamation, merger or otherwise.
  - (ii) That it will support and facilitate any application made by West Kootenay Power and Light Company, Limited for approval to expand the generating capacity at Plants 5 and 6, or either of them, for the purpose of increasing the power supply to West Kootenay Power and Light Company, Limited.
5. That commencing with the month of October, 1980, Cominco Ltd. file with the Commission a monthly report on each of Plants 5 and 6 identifying:
  - (i) total energy, by generation or entitlement - in Mwh.
  - (ii) energy sold to West Kootenay Power and Light Company, Limited - in Mwh and dollars.
  - (iii) energy sold to, exchanged with, or stored with Others (to be identified) - in Mwh.

6. That on or before December 31, 1980, Cominco Ltd. enter into and file with the Commission for approval, such agreements with West Kootenay Power and Light Company, Limited, for the common use of transmission and switching facilities to the end that systems owned by each can be operated together as one integrated system."

In the 1980 WKPL Decision the Energy Commission decided that it would issue a Certificate of Public Convenience and Necessity to WKPL on the following conditions:

- "1. That on or before December 31, 1980, WKPL satisfy the Commission that it is the owner of Plants 2, 3 and 4 and all related and associated generation and transmission facilities, approvals necessarily incidental to full ownership and power to operate, all having been acquired at a price not to exceed \$10.4 million.
2. That on or before September 1, 1980, WKPL enter into and file with the Commission for approval, an Agreement with Cominco providing for the sale of firm power from Plants 5 (Brilliant) and 6 (Waneta), surplus to the industrial requirements of Cominco, on the declining scale shown under Tab 3 of Exhibit 6 in the WKPL certificate hearing, at a price calculated as described in the Agreement, subject only to interruption for use in the industrial operation of Cominco by reasons of force majeure in such circumstances as would otherwise cause an interruption in the industrial operations of Cominco, and providing further that any power in excess of that shown on the declining scale, which is surplus to the requirements of Cominco in its industrial operations, will first be offered for purchase by WKPL at the same price and on the same terms as the "firm surplus", before being disposed of to others.
3. That WKPL advise the Commission on or before the 1st day of May, each year, of its plans for increasing its power supply for the purpose of meeting its expanding load, including its plans for the expansion of Plants 5 and 6.



4. That on or before December 31, 1980, WKPL enter into and file with the Commission for approval such agreements with Cominco as may be reasonably necessary and appropriate for the common use of transmission and switching facilities to the end that the systems owned by each can be operated together as one integrated system."

In the result the Lieutenant Governor in Council did not approve the Cominco application for exemption. Accordingly, by Orders Numbered G-42-80 and G-43-80 respectively, dated June 23, 1980, the Energy Commission denied both applications.

The parties thereupon restructured their intercorporate arrangements into the form presented for Commission approval in the 1981 hearings.

#### CORPORATE BACKGROUND

Cominco was incorporated in 1906 as a federal company under the name of The Canadian Consolidated Mines Limited, by the amalgamation of two mining companies active on the Red Mountain copper deposit. Six months later the name was changed to The Consolidated Mining and Smelting Company of Canada Limited and in 1966 to Cominco Ltd. From its inception the company has been controlled by the Canadian Pacific Railway Company or affiliated companies. The head office of Cominco is in Vancouver and there are district offices in Trail, Calgary and Yellowknife.

In British Columbia, Cominco is engaged primarily in mining, metallurgical and fertilizer operations. Lead smelting was introduced in the Trail area in 1899 and an electrolytic zinc plant was built in 1916. Fertilizer production commenced

in 1931. Copper mining commenced in the Trail area in 1890; lead-zinc at Moyie Lake in 1892. Cominco's major mine, the Sullivan lead-zinc mine at Kimberley, began operations in 1910. Today, the Trail smelter treats concentrates not only from local mines in the Kootenay area but also from mines in other parts of Canada, its principal sources being the Sullivan and Pine Point (Yellowknife, NWT) mines. The company's lead-zinc smelter at Trail is one of the largest in the world. As well as lead and zinc it also produces such other metallurgical products as gold, silver, cadmium and bismuth.

Cominco witnesses testified that, at present, the company has underway a \$700 million capital programme to improve the efficiency and environmental quality of its mining, milling, metallurgical and fertilizer operations in the Kootenay areas and to expand output at Trail.

Cominco's operations in the East and West Kootenay areas form an important part of the economic base of these regions. The company employs some 6,000 people with an annual payroll in excess of \$100 million. Cominco is the largest employer in the area and the company's Trail operations are the most important single industrial activity in the region.

WKPL was incorporated in British Columbia by provincial statute in 1897. It was a pioneer in the development of hydroelectric energy in the West Kootenay area through the construction of Plant No. 1 in 1898 which was rebuilt in 1925. Throughout the years additional hydroelectric generation was developed as follows:

<u>Plant No.</u>	<u>Name</u>	<u>Capacity M.W.</u>	<u>Energy Average M.W.</u>	<u>Year</u>
2	Upper Bonnington	59.4	49.0	1907
3	South Slocan	53.2	48.3	1929
4	Corra Linn	51.2	39.1	1932
5	Brilliant	128.9	97.4	1944
6	Waneta	373.9	281.4	1954

In 1916 Cominco acquired the common shares of WKPL which has been a wholly-owned subsidiary of Cominco since then. During the period to 1947, however, Cominco continued to be an industrial customer, and indeed by far the biggest customer, of WKPL.

The evidence is that in 1947 WKPL sold Plants 2, 3 and 4 and related licences, permits and facilities to Cominco for the then book value of approximately \$8 million. Shortly thereafter WKPL paid approximately \$6 million back to Cominco by way of a dividend on the common shares and transferred the Waneta Water Licence to Cominco. The purchase of the three plants from WKPL effectively reversed the roles of Cominco and WKPL for Cominco ceased to be a customer of WKPL and instead WKPL became a customer of Cominco as the WKPL load requirements increased beyond the capability of Plant No. 1. At one stroke WKPL was deprived of its major generating capacity, its only significant industrial customer and three quarters of the purchase price of the plants and related assets.

Since 1947 Cominco has allocated the electricity generated from Plants 2 through 6 to meet its own industrial requirements and to meet the WKPL ever-increasing load requirements, and the balance remaining has been sold by Cominco into the export market for its own account. Although WKPL operates the plants as agent for Cominco and for a fee, it has been regarded by Cominco as a division of the Cominco industrial complex, and managed accordingly.

#### THE STATUS OF THE PARTIES

In Section 1 of the Act, public utility is defined in part as follows:

"'public utility'

means a person, or his lessee, trustee, receiver or liquidator, who owns or operates in the Province, equipment or facilities for

- (a) the production, generation, storage, transmission, sale, delivery or furnishing of electricity, 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, or"

There is no dispute about WKPL being a public utility as defined. In the Commission's view, it cannot be seriously argued that Cominco is not a public utility. It is clear from the evidence that Cominco owns equipment and facilities in the Province for the production, generation, storage, transmission, sale, delivery and furnishing of electricity to or for the public or a corporation for compensation. It follows therefore that Cominco is within the four corners of the definition.

A continuing theme underlying the issues in the proceedings, and in the proceedings which culminated in the 1980 decisions, is whether or not Cominco, even though within the definition of a public utility, is sheltered from regulation under Part 3 of the Act, Regulation of Public Utilities, by reason of the provisions of Section 27. If Section 27 is a shelter to Cominco, two consequences seem to follow. Firstly, Cominco would not be exposed to the regulatory constraints about which it expressed apprehension. Secondly, an exemption order under Section 103(3) would not appear to be necessary to protect Cominco from regulation. In the Commission's view the application of Section 27 to the Cominco circumstances must be resolved as a first step since, if Section 27 is a bar to regulation of Cominco as a public utility, the merits of the Cominco application for exemption need not be addressed.

Section 27 provides:

- "27. Where a corporation generates electricity primarily for its own industrial purposes, that corporation is not subject to this Part for electric service furnished to others if
- (a) the furnishing of that service is wholly incidental to the industrial purposes of the corporation and is not in competition with a public utility that is subject to the jurisdiction of the commission and that is capable of supplying and willing to supply that service, and
  - (b) the service furnished to persons other than itself, its employees and tenants does not use more than 15% of the electricity generated by the corporation."

It is the Commission's conclusion that Cominco is not protected from regulation by Section 27. Cominco furnishes electric service to others, WKPL and export customers, which is not wholly incidental to its industrial purposes. In furnishing the electric service to those others Cominco is in competition with a public utility, British Columbia Hydro and Power Authority ("B.C. Hydro"), which is subject to the jurisdiction of the Commission. B.C. Hydro would be capable of supplying the service to those others and although there was no evidence of "willingness", the Commission notes that there are existing arrangements between B.C. Hydro and WKPL for the supply of incremental electric energy from time to time. Furthermore, on any reasonable, common sense test it seems to be abundantly clear that the supply of electric service by Cominco to others has exceeded 15% of the electricity generated by Cominco.

Given these conclusions, the Commission is obliged to assess the Cominco exemption application on the merits. At this point, the Commission notes, in passing, that none of the Intervenor at the hearing opposed the granting of an exemption to Cominco providing suitable conditions were attached. For the reasons which will appear, the Commission concurs that an exemption from certain of the provisions of the Act should be granted subject to conditions which will be specified, and it will so recommend.

THE JUSTIFICATION FOR COMINCO EXEMPTION

In the 1980 Cominco Decision the Energy Commission characterized the Cominco position as follows:

"The basis for the Cominco application was its apprehension that regulation would hamper its industrial operation and lead to erosion of its low-cost power resources.

In support of its application Cominco outlined the extent to which its British Columbia operation is dependant upon inexpensive power. It was suggested that its renovation and expansion program in the province might hinge in large measure on the continuation of its favorable competitive position in the international scene, attributable to low-cost power."

That description is equally accurate when applied to the 1981 Cominco application. Cominco's position at the hearing was that low-cost hydroelectric power was the primary reason for the initial location and subsequent expansion of the company's operations in the Kootenay region. Cominco testified that the economic disadvantage of its location within British Columbia is overcome only by the advantage of its low-cost power supply by virtue of its hydro generation capability. Cominco argued that electrical energy plays a very significant role in the costs of its finished products and illustrated this position by asserting that one ton of zinc requires 4600 kWh of power with the result that an increase of 10 mills per kWh produces an increase of \$46 per ton. In 1979 Cominco utilized 1700 GWH of power with the result that every increase of 10 mills per kWh the average cost would increase by \$17 million per year. Cominco testified that electrical power is vital to its modernization programme at Trail and Kimberley. This programme, upon completion, will require, in Cominco's evidence, a 40% increase in electrical power requirements.

In summary Cominco argued that an assured supply of low-cost hydroelectric power has been and continues to be of paramount importance to the company's industrial operation.

Cominco's position is that an exemption order under Section 103(3) of the Act is a necessity in order to secure certainty of supply of low-cost hydroelectric power and thereby justify its continued investment in industrial production facilities in the Kootenays. The company contends that the continued prospect of future challenges to its status and its obligation to supply power from Plants 5 and 6 poses a serious threat to the economic viability of continued investment in the Trail metallurgical facilities and the Sullivan mine. It would appear from the evidence of Mr. Marcolin that the company's current expansion programme was dependent upon obtaining an exemption from the provisions of the Act. Mr. Marcolin, chief policy witness for Cominco, testified that the Cominco decision was based as follows:

"A utility has a duty to provide service to everyone who needs it. If the generating plants of Cominco were to become a utility it seems Cominco would just become another of the many customers and one whose requirements would have a low priority. I would not have recommended the current expansion program on that basis."

Mr. Marcolin also raised doubts about Cominco's future in the Trail area if it were regulated, saying:

"If Cominco became a regulated public utility in my view, Cominco as an industrial corporation in Trail would fade away."



He stressed that in his view it is simply untenable for a company engaged in a fluctuating free enterprise competitive market to be subject to regulation.

Mr. Marcolin's evidence was consistent throughout with a response from Cominco to an information request by the Commission that Cominco summarize the reasons why, in its view, the Commission should recommend an exemption. The response, in Exhibit 14, was:

- "(1) To enable West Kootenay to obtain the maximum surplus power at the most favourable rate of all the alternatives actually or potentially available to it.
- (2) To provide Cominco with continuity to enable it to continue with its investment in industrial facilities in the Kootenays. The exemption will remove the possibility of Cominco's industrial plans being fettered by allegations of regulatory jurisdiction over Cominco. Such regulatory jurisdiction would seriously affect the economic viability of present and future investments in the Trail and Kimberley operations."

It appears to the Commission that Cominco's apprehensions are exaggerated and proceed upon an assumption that insufficient regard for the needs of the Cominco industrial base would be given under the regulatory process. Doubtless the perception is honestly held but it seems to the Commission more to be grounded upon the present uncertainty of Cominco's status than upon a likelihood that the supply required by industrial operations, present and planned, would be diverted elsewhere. In any event, the Commission is satisfied that Cominco is entitled to be assured that it will not be deprived of the self-generated electric power it requires for its current industrial operations and for those projects that are

integral to the current modernization programme. Reluctance to invest large sums of money in the present state of uncertainty is understandable.

As a counter balance however the Commission must have regard to the statutory obligations of WKPL as a distribution utility and to the legitimate interests of the residential, commercial and industrial customers of WKPL. On the one hand the public interest requires that the ability of WKPL to continue to serve its customers at reasonable rates be preserved. On the other hand the public interest also requires that the continuation of the Cominco industrial operation, to the extent that it is dependent upon a long-term source of inexpensive electricity, should not be impaired.

#### THE ISSUES

In the 1980 WKPL Decision the Energy Commission expressed itself with respect to the issues as follows:

"The Energy Act provides that the Commission shall not give its approval for a certificate unless it determines that the privilege, concession or franchise proposed to be granted is necessary for the public convenience and properly conserves the public interest. The Commission has determined that the following are the issues to be resolved, keeping in mind that WKPL is a wholly-owned subsidiary of Cominco and in such a clearly non-arms-length relationship all agreements between the parent and its subsidiary must be thoroughly examined:

- Security of Supply and Cost of Power
- Arbitration
- Price
- Financial Integrity
- Surplus Power
- Future WKPL Access to Power from Plants 5 and 6."

In the Commission's view those words are equally applicable to the 1981 applications except that Arbitration is no longer an issue. However, a matter which, although not referred to by the Energy Commission as an issue, became of importance during the 1981 hearings is that of the long range objective of enabling WKPL to become independent of Cominco.

#### SECURITY OF SUPPLY

The sale of Plants 2, 3 and 4 by Cominco to WKPL as reflected by the sale of Plants Agreement overcomes, in large part, the concern of the Energy Commission in the 1980 WKPL Decision that the lease arrangement then in contemplation did not "significantly enhance WKPL's security of supply". With exclusive, non-terminable ownership of Plants 1, 2, 3, and 4 and associated facilities and the electricity output therefrom, WKPL would have a firm base which for calendar year 1981, would have represented approximately 72% of the WKPL 1981 base load. An additional portion of WKPL load can be satisfied by surplus available from Plants 5 and 6.

On balance the Commission is of the opinion that the sale of Plants 2, 3 and 4 to WKPL, at the price discussed later in these reasons, is in the public interest.

PRICE AND COST OF POWER

In the 1980 WKPL Decision the Energy Commission held that the sale price of Plants 2, 3 and 4 and related facilities should be "no greater than \$10.4 million". The \$10.4 million was calculated on the basis of the energy entitlements of Plants 2, 3 and 4 as a proportion of the energy entitlements of Plants 2 to 6 inclusive multiplied by the value of Plants 2 to 6 inclusive (\$39.2 million). It is apparent that "value" was determined by the original cost methodology and is to be related to the year in which "value" was calculated.

On August 13, 1981, during the Kelowna sessions of the 1981 hearings, Mr. Macintosh, Counsel for WKPL, speaking for WKPL, advised the Commission as follows:

"MR. MACINTOSH: Next, Madam Chairman, Mr. Wallace asked us to calculate the original cost less depreciation, plus capital replacements of plants 2, 3 and 4, as though we had kept the plants as part of the utility continuously from 1947 onward. The current value of those assets would be \$9.2 million on that method of assessment, on that method of valuation, and that includes all the assets which are the subject of the current Sale of Plant Agreement that's before the Commission."

It is the Commission's opinion that \$9.2 million is the appropriate sale price of Plants 2, 3, and 4. It represents the most recent calculation of adjusted original cost for those plants, it is "no greater than \$10.4 million", and it is consistent with utility accounting principles.

The Commission is seriously concerned that payment by WKPL of a sum greater than \$9.2 million would adversely affect the financial integrity of WKPL. In respect of this kind of transaction the Uniform System of Accounts provides:

"Where the utility purchases property from another company, the difference between the purchase price paid by the utility and the original cost of the property, less accumulated provisions for depreciation, amortization and depletion, shall be recorded in Account No. 114, 'Utility Plant Acquisition Adjustments'".

The effect of recording the difference in Account No. 114 is that it is unlikely to qualify for rate base treatment. Where, as here, the transaction is not at arm's-length, the normal disposition of the acquisition adjustment would be to regard it as an income deduction chargeable against the equity element of the capital structure. Given the current condition of WKPL's financial affairs, the Commission cannot find that it would be in the interest of the company or its customers to impose such an income deduction.

Another consequence which would arise should the plants and related facilities be transferred at the price contemplated by the parties, is that the capital cost to WKPL for income tax purposes (i.e. the cost base for future capital cost allowance deductions) will be determined by the manner in which the transfer is structured for taxation purposes. The capital cost allowance base resulting from the non-arm's-length transfer will be restricted to an amount elected for tax purposes as deemed proceeds of disposition. This amount may differ from the transfer price as determined by this decision. The Commission accordingly recommends that the parties be required to deem the proceeds of disposition and resultant capital cost to WKPL for tax purposes to be an amount equal to the original cost to Cominco of the assets to be transferred (i.e. approximately \$8 million).

For all of these reasons the Commission cannot approve the proposed \$20 million purchase price, whereas it finds \$9.2 million to be fair and reasonable to WKPL and, given the present and historical circumstances, not unfair or unreasonable to Cominco.

With the transfer of Plants 2, 3 and 4, and associated facilities to WKPL at a price of \$9.2 million there would be a likelihood of a reduction in the utility's future cost of service as compared to the cost of the current arrangements. The Commission finds that potential future annual savings should not be directed in reducing current rates but rather provide funds for the planning and construction of additional generation at Waneta and Brilliant. Accordingly WKPL will be directed to record such annual savings as "Special Customer Contributions" for regulatory and financial accounting purposes, and to utilize contributions for the purpose aforementioned.

#### FINANCIAL INTEGRITY

Cominco and WKPL responded to the Energy Commission's concern, expressed in the 1980 WKPL Decision, about the ability of WKPL to finance the purchase price of Plants 2, 3 and 4 by proposing the subordinated, unsecured debenture device as a solution in the 1981 applications. The Commission regards this as a responsible method, although not the only method, of responding to the Energy Commission conclusion that Cominco should "facilitate the necessary financing by WKPL of the purchase of Plants Nos. 2, 3 and 4".

The Commission would be prepared to approve the debenture, pursuant to Section 57 of the Act, on the terms and conditions put forward by the parties with changes to reflect the following:

1. A principal amount of \$9.2 million.
2. A term of not less than 10 years.
3. Principal repayment in equal annual instalments.

Having regard to the passage of time since the parties agreed upon the interest rate to be employed in the debenture, and having regard to the volatility of the capital markets, the Commission would not find it to be unreasonable if the parties chose to substitute for the 16% debenture interest rate the interest rate which a utility with financial integrity would have to pay if it were borrowing \$9.2 million for 10 years from the financial institutions it customarily deals with for borrowings for a similar term of years. The Commission would also be prepared to consider the acquisition by equity financing.

#### SURPLUS POWER

The fair and reasonable treatment to be accorded to "surplus power", that is to say electricity generated from Plants 5 and 6 that is in excess of the industrial load requirements of Cominco, is difficult to resolve. The Sale of Surplus Power Agreement provides to WKPL a first right of refusal of the surplus power, limited by the caveat that WKPL cannot take more than it can use by way of "resale within the West Kootenay service area". Effectively this means that any electric power generated from Plants 5 and 6 which is surplus

to the load requirements of Cominco and WKPL is left with Cominco to sell elsewhere. Elsewhere, in the past, has been the export market from which Cominco has received gross export revenues over the five-year period ending 1980 of \$111.46 million. The Cominco licence to sell into the export market will expire at the end of 1982. Given that it is necessary to obtain an energy removal certificate under Section 22 of the Act as a condition to removing electricity from the Province and that it is necessary to obtain a licence under Part VI of the National Energy Board Act as a condition to exporting electricity from Canada there can be no certainty that exports after 1982 will continue.

In past years Cominco has enjoyed substantial revenues from the sale of electric power into the export market and, in the view of the Commission, it would not be appropriate to interfere with those revenues during the balance of the licence which is the instrument through which the revenues are received, that is to say, export revenues received to the end of 1982. It follows that the Commission finds the method of handling surplus power in the Sale of Surplus Power Agreement to be satisfactory to the end of 1982.

Because of the uncertainty of the fact of, the level of, and the price of, exports of electricity after 1982, it appears unlikely to the Commission that Cominco can have placed much reliance on export revenues after 1982 as an essential element in their projected revenue stream. Support is lent to this conclusion by the provisions of the Sale of Surplus Power Agreement under which all surplus will flow to WKPL if WKPL requires it for use in its own market area. The only certainty which could be attached to sale of surplus power revenues, in view of the provisions of the Sale of Surplus Power Agreement,



is the level of revenues which would be realized from the sale of surplus power to WKPL at the price specified in the Sale of Surplus Power Agreement.

It appears to the Commission therefore that there could be a post 1982 allocation of surplus power from Plants 5 and 6 which confers maximum long term benefits upon WKPL and its customers without unduly interfering with Cominco's future revenues and without impairing Cominco's industrial operations.

The current modernization programme, which is scheduled to utilize increasing amounts of power, is claimed by Cominco to be important to the continuing economic viability of its B.C. operation. Cominco stated that the programme will result not only in increased metal production levels but also in improved productivity, the latter being essential in the competitive world metal markets. Cominco also claimed that a resource essential to the programme is a stable supply of low-cost electrical energy. The Commission concurs that both of these claims are valid.

It is apparent that Cominco's modernization programme is not a firm programme with a definite plan of projects all with approved budgets. Rather the programme is in a state of flux. It contains some projects that have firm, approved capital budgets. Some of these have in fact been completed or are currently under construction. The programme also contains projects that are still in the feasibility study stage and hence require management consideration and approval.

Since the programme was announced in 1979, additional projects have been added that in the opinion of the Commission are not integral to the success of the programme. These

include magnesium, ferrosilicon and silicon metal production and a 25-30% increase in zinc metal production. In Cominco documents filed at the Hearings these new projects were listed and the cost of the overall programme including the new projects was stated to be \$700 million.

Because of the importance of the modernization programme to Cominco's economic well-being and the livelihood of its employees, the resulting impact on the West Kootenays and the Province, and because of the importance of secure electrical energy to this programme, the Commission finds it is essential that Cominco be assured sufficient additional electrical energy to successfully carry out its plans to improve efficiency. A difficulty, however, arises in determining with accuracy the amount of power required and hence the allocation of surplus power from Plants Nos. 5 and 6 between Cominco and WKPL. The starting point for considering a fair allocation after 1982 is the load forecast in Cominco's Exhibit 14:

		<u>Average Annual MW of Energy</u>	
1980 Actual			226
1981 Changes	- additional zinc production	16(*)	
	- mine ventilation	1(*)	
	- miscellaneous projects	1(*)	18
			<u>244</u>
1982 Changes	- additional zinc production	5(*)	
	- mine ventilation	2(*)	
	- concentrator improvements	6(x)	13
			<u>257</u>
1983 Changes	- additional zinc production	5(*)	
	- zinc residue leach plant	28(x)	
	- concentrator improvements	3(x)	36
			<u>293</u>

		Average Annual MW of Energy (Cont'd)	
1984 Changes	-magnesium/ferrosilicon operation	50(x)	
	-new lead smelter	16(x)	<u>66</u>
			<u>359</u>
1985 Changes	-additional zinc production	39(x)	
	-concentrator improvements	4(x)	<u>43</u>
			<u>402</u>
1986 Changes	-		<u>0</u>
1987 Changes	-electronic grade silicon		
	operation	30(x)	<u>30</u>
			<u>432</u>

(Note: The loads marked (\*) are those which on August 26, Mr. Marcolin put in the company-approved category. Those marked (x) had not, according to Mr. Marcolin, received company approval).

From the evidence it is apparent that these projects can be divided into various categories:

- (a) firm - approved at the time of the Hearings.
- (b) likely - unconfirmed at the time of the Hearings but judged by the Commission as likely to be implemented.
- (c) speculative - projects related to existing operations but judged to have a high degree of uncertainty.
- (d) new ventures.

Using these categories it is then possible to assign arbitrary degrees of uncertainty to Cominco's future power needs as follows:

	<u>Average Annual MW of Energy</u>	
1980 Actual load		226
(a) Firm approved projects:		
1981 - additional zinc production	16	
- mine ventilation	1	
- miscellaneous	1	
1982 - additional zinc production	5	
- mine ventilation	2	
1983 - additional zinc production	5	30
		<u>256</u>
(b) Likely projects:		
1982 and 1983 concentrator changes	9	9
		<u>265</u>
(c) Speculative projects:		
1983 -zinc residue leach plant	28	
1984 -new lead smelter	16	44
		<u>309</u>
(d) New ventures:		
1984 - magnesium/ferrosilicon	50	
1985 - additional zinc production	43	
1987 - silicon metal	30	123
		<u><u>432</u></u>

Using these categories it can be concluded that Cominco's requirements will almost certainly increase from the 1980 actual load of 226 MW to 256 MW and, in all probability, to 265 MW. Should the speculative parts be completed on schedule the total modernization programme exclusive of "new ventures" would utilize 309 MW by 1984.

The total of 1980 actual plus "approved" and "likely" additions through 1983 is 265 average annual megawatts of energy. It is noteworthy that the average annual megawatts from Plant 5 is 97.4 and from Plant 6 is 281.4. Accordingly, Plant 6 would be more than sufficient to meet the likely requirement of 265 through 1983. If the transaction had involved the sale of Plant 5 to WKPL as well as Plants 2, 3 and 4, the parties could have been independent of each other in terms of supply and it is probable that the Sale of Surplus Power Agreement would have been unnecessary.

Another figure to be kept in mind in addition to the 265 calculated above, is the total load requirement of 309 MW should the modernization programme be fully carried out without the "new ventures". It is the Commission's understanding that as all components of the modernization without the new ventures have not yet been fully approved it cannot be said at this time that ultimately all will be implemented. If it turns out that the programme is performed in its entirety the plan is to be complete in 1984. Completion dates of major construction being notoriously uncertain, the Commission prefers to regard 1987 as a more probable completion year. By the end of 1987, if modernization is fully carried out, the load will total 309 average annual megawatts, comprising 1980 actual load (226), plus new approved projects (30), plus likely projects (9) and speculative projects (44).

The difference between the 1984 projected Cominco load of 309 average annual megawatts and the total capability of Plants 5 and 6 of 378.8 average annual megawatts is 69.8 average annual megawatts, or approximately 72% of Plant 5. In the Commission's opinion the 69.8 average annual megawatts should be designated "firm surplus" for the period 1983 through 1987. For the period after 1987, the remainder after subtracting 309 or the normalized 1987 load, whichever is the least, from 378.8 should be designated "firm surplus". The normalized load shall be inclusive of projects in an advanced stage of construction.

The Commission is of the view that equity between the parties will be achieved, that the public interest will be served, and that Cominco's industrial requirements into the foreseeable future will be guaranteed by requiring Cominco to sell and WKPL to purchase all firm surplus. WKPL should also be given a right of first refusal to purchase any interruptible surplus that is required for the use of WKPL's own utility customers or for disposal elsewhere.

The Commission concludes that an orderly phasing of export entitlement will be achieved by an allocation of 1983 net export revenues on an equal percentage basis to Cominco and WKPL. In 1984 the Cominco share should reduce to 25% of the net total.

After 1984 WKPL would benefit from the sale of any surplus power. WKPL will be required to accumulate funds derived from the resale of power outside of its service area, net of costs, into a special rate equalization reserve fund. The purpose will be to provide capital for the projected Brilliant and Waneta expansions as discussed below. WKPL's collection of

such funds will not impact on dividends payable or on rates properly chargeable to customers to pay for the utility service as presently provided.

With respect to price it is the Commission's conclusion that the 6.227 mills per kilowatt hour agreed upon by the parties in the Sale of Surplus Power Agreement should be the price paid by WKPL for all delivered surplus power purchased from Cominco regardless of which of the above designated categories such power falls into, provided that any adjustments to the price are to be restricted to increases or decreases in operating costs as provided in Paragraph 3 of Schedule "One" to the Sale of Surplus Power Agreement.

Being of the view that protection of Cominco's industrial load requirements so as to enable Cominco to continue its industrial operations is of prime importance, and being of the view that if the transaction is restructured in accordance with these reasons that end will be achieved consistent with what is just and reasonable to WKPL and its customers, the Commission has had regard to what, if anything, should be done in the event that there is an interruption in Cominco's industrial operations in and around Trail. It appears to the Commission that in those circumstances the respective entitlements of Cominco and WKPL should be re-examined.

#### FUTURE WKPL ACCESS TO PLANTS 5 AND 6

In the 1980 WKPL Decision the Energy Commission expressed some concerns in respect of the possible or probable expansion of generation facilities at Plants 5 and 6. Some months after that decision the Act was proclaimed. It would seem to be clear

that any expansion of either Plant 5 or Plant 6 would fall within the definition of "regulated project" in Section 16 and would be dealt with under Part 2 of the Act. The identity of the applicant, the economic and technical feasibility of the project and the disposition of the electricity to be generated would all be dealt with in the Part 2 proceedings. However, because the long-term security of supply to WKPL is a matter of continuing concern to the Commission it would expect, as did the Energy Commission in the 1980 Cominco Decision, to receive an undertaking from Cominco that Cominco will support and facilitate any application made by WKPL for approval to expand the generating capacity at Plants 5 and 6, or either of them.

#### WKPL INDEPENDENCE

In Exhibit 13 Cominco referred to the desirability of assisting "West Kootenay to attain the economic base necessary to achieve independent development of West Kootenay". Also this passage appears in the Cominco 1980 Annual Report:

"...in March 1981 Cominco and West Kootenay announced a plan to make West Kootenay independent of Cominco. Subject to obtaining the required regulatory approvals, the plan contemplates West Kootenay will acquire three of Cominco's power plants and raise funds for its ongoing capital requirements by offering its shares to the public. When this plan is completed, Cominco will own 50 percent or less of West Kootenay."

During the proceedings the Commission heard evidence about the proposed plan of independence. Evidently it is intended also to achieve a better balance of debt and equity in the WKPL capital structure, and to convert the sizeable short-term bank borrowing into long-term debt.



Of necessity the refinancing plan will have to be shaped to meet the conditions of the capital markets at the time of issue. As well it will have to accommodate this decision and the decision on rate relief to be issued shortly.

The Commission expects that within a reasonable time from the decision being served upon WKPL the company will present its financing plan for approval.

#### CONTINUED APPLICATION OF PARTS OF THE ACT

In the Status of the Parties section of these reasons the Commission used the expression "an exemption from certain of the provisions of the Act". That is because of the Commission's view that the discharge of the statutory responsibilities conferred on it by the Act requires that it exercise some continuing supervision over Plants 5 and 6, although not to the extent that there will be interference with Cominco's industrial operations or the supply of inexpensive power to those operations. Also, the Commission is of the opinion that, although Cominco undertook development of the Plants 5 and 6 at its own risk, it must be recognized that there is a large element of public interest inasmuch as the rivers and water flowing in the rivers are public resources.

The Commission believes that it can discharge its responsibilities and that Cominco's industrial activities will not be impaired by excluding the following sections of the Act from any exemption which is approved:

- Section 47        -     prohibition against ceasing operations  
                              (of Plants 5 and 6) without first  
                              obtaining Commission permission.
  
- Section 51        -     provisions relating to Certificates of  
                              Public Convenience and Necessity for  
                              new construction or operation, or  
                              extensions of construction or operation  
                              of public utility plant.
  
- Section 133       -     power to order payment of costs of  
                              proceedings (limited to these  
                              proceedings).



DECISIONSDECISION ON THE EXEMPTION APPLICATION

With the approval of the Lieutenant Governor in Council as required under Section 103(3) of the Utilities Commission Act, the Commission will exempt Cominco Ltd. from regulation under the Utilities Commission Act, except Part 2 and Sections 47, 51, and 133 (limited to costs of these proceedings), and approve the Sale of Plants Agreement and the Sale of Surplus Power Agreement upon the following conditions:

1. That on or before October 31, 1982, Cominco Ltd.:
  - (i) Satisfy the Commission that the ownership of Plants 2 (Upper Bonnington), 3 (South Slocan), and 4 (Corra Linn), and all related and associated generation and transmission facilities have been transferred to West Kootenay Power and Light Company, Limited for a price of \$9.2 million.
  - (ii) Provide to the Commission evidence that all licences, permits and approvals necessary to enable West Kootenay Power and Light Company, Limited to exercise all rights of ownership and operation have been similarly transferred at a consideration agreed upon between the parties and forming part of the aforesaid price.

2. That Cominco Ltd. and West Kootenay Power and Light Company, Limited, on or before June 30, 1982:

(i) File with the Commission for approval the Sale of Surplus Power Agreement amended to reflect the following changes:

- remove for the period after 1982 the restriction on WKPL to the purchase of only that amount of surplus power required by it "for resale within...the service area" and clarify that Cominco's load requirements are limited to the requirements of its industrial operations
- change the sub-clauses of Clause 1 to reflect the Commission's views and opinions as to the appropriate treatment of surplus after 1982 as set forth in the Surplus Power portion of these reasons
- change the expiry date to a date which will permit performance in accordance with these reasons.

(ii) File with the Commission for approval the sale of Plants Agreement amended to reflect the following changes:

- change purchase price to \$9.2 million, allocated as the parties see fit between real property, dams and equipment, and buildings

- change the closing date to a date that will enable the transfer of assets to be completed not later than October 31, 1982
  - change Clause 12(b) to provide that the continued application of some sections of the Act to Cominco shall be deemed not to be regulating Cominco as a utility
  - change Schedule "B" to an amount of \$9.2 million repayable over not less than 10 years in equal annual instalments at the interest rate determined in accordance with the Commission's finding under the Financial Integrity portion of these reasons.
- (iii) File with the Commission the subordinated, unsecured debenture amended to reflect the following changes:
- change to conform to the above described changes to Schedule "B" to the Sale of Plants Agreement
  - as an alternative to the debenture form of purchase, file with the Commission for approval such other plan of purchase financing as set forth in the Financial Integrity portion of these reasons.

3. That on or before October 31, 1982, Cominco Ltd. enter into and file with the Commission for approval, agreements with West Kootenay Power and Light Company, Limited, for the common use of transmission and switching facilities to the end that systems owned by each can be operated together as one integrated system.
4. That on or before October 31, 1982, Cominco Ltd. file with the Commission an undertaking that it will support and facilitate any application made by West Kootenay Power and Light Company, Limited for approval to expand the generating capacity at Plants 5 and 6, or either of them, for the purpose of increasing the power supply to West Kootenay Power and Light Company, Limited.
5. That Cominco Ltd. shall not without the prior approval of the Commission sell, assign, transfer or otherwise dispose of Plants Nos. 5 and 6 and associated facilities to any party other than West Kootenay Power and Light Company, Limited.

DECISION ON CERTIFICATE APPLICATION

Providing that the Lieutenant Governor in Council approves the issuance by the Commission of an exemption order with conditions as aforesaid, and provided the conditions are met, in timely fashion, by Cominco Ltd., the Commission will issue the Certificate of Public Convenience and Necessity for which West Kootenay Power and Light Company, Limited made application.

DECISION ON DEBENTURE ISSUE

Providing the Lieutenant Governor in Council approves the issuance by the Commission of an exemption order with conditions as aforesaid, and provided the conditions are met, in timely fashion, by Cominco Ltd., the Commission will approve the issuance of the subordinated, unsecured debenture by West Kootenay Power and Light Company, Limited pursuant to Section 57 of the Utilities Commission Act, or give consideration to an appropriate plan of equity financing.

COSTS

In due course, by Order, the Commission will direct what costs of these proceedings are to be paid and by whom to whom, in accordance with Section 133 of the Act.



DATED at the City of Vancouver, in the Province of British  
Columbia, this 2<sup>ND</sup> day of April, 1982.

  
\_\_\_\_\_  
M. Taylor, Chairman

  
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J.D.V. Newlands, Deputy Chairman

  
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B.M. Sullivan, Commissioner.