

IN THE MATTER OF THE ENERGY ACT
AND
IN THE MATTER OF AN APPLICATION
BY COMINCO LTD.

DECISION

May 30, 1980

Before Norman R. Gish, Chairman,
R. John Ludgate, Deputy Chairman,
D.B. Kilpatrick, J.D. King and F.E. Walden,
Commissioners

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APPEARANCES

D.M.M. Goldie, Q.C. M. Allan	for Cominco Ltd.
D.C. Duff	for B.C. Hydro and Power Authority
G.D. Gillis	for Canadian Cellulose Company, Limited
J.E. Ogilvie	for City of Kimberley
R.J. Bauman	for The Corporation of the City of Grand Forks The Corporation of the City of Penticton The Corporation of the District of Summerland The City of Kelowna
D. Roberts	for The Corporation of the City of Nelson
P.A. Gall	for Consumers' Association of Canada (B.C. Division)
R.B. Wallace	for Atco Lumber Limited Hadikin Bros. Lumbering Ltd. Kalesnikoff Lumbering Company Limited Kootenay Forest Products Limited Louisiana-Pacific Canada Limited Pope and Talbot Limited - Grand Forks Division - Midway Division Slocan Forest Products Limited T & H Sawmills Limited Weyerhaeuser Canada Ltd. Wyndel Box & Lumber Co. Ltd.

APPEARANCES CONTINUED

G. Gould	for Princeton Light & Power Company, Limited
K. Catalano	for Trail District Chamber of Commerce
P. Butler J.A. Angus	for West Kootenay Power and Light Company, Limited
L. Wanjoff	On His Own Behalf
R.J. Gibbs, Q.C.	Commission Counsel

LIST OF EXHIBITS

	<u>Exhibit No.</u>
Affidavit of Service dated April 23, 1980	1
Application of Cominco Ltd. pursuant to Section 105(3) of the Act and information in support thereof, by letter dated February 22, 1980	2
Cominco Ltd. reply to request for additional information dated March 17, 1980	3
Cominco Ltd. written evidence of A.V. Marcolin and W.G. Siddall	4
Letter from Cominco Ltd. to B.C.E.C. dated February 25, 1980 re WKPL Application to Amend Rate Schedules	5
WKPL reply to request for additional information, March 17, 1980 - Volume I, exhibit 6 in WKPL Hearing	6
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Prepared testimony of Dr. W.H. Melody on behalf of the Consumers' Association of Canada (B.C.)	9
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COMINCO LTD.

EXEMPTION APPLICATION

DECISION DATED MAY 30, 1980

PURPOSE

This decision deals with an Application by Cominco Ltd. ("Cominco") for an Order of the British Columbia Energy Commission under former Section 105(3) now Section 101(3) of the Energy Act (Chapter 108 RSBC 1979), with the prior approval of the Lieutenant Governor-in-Council, exempting Cominco and its hydro-electric plants, equipment and facilities from the application of the Energy Act.

BACKGROUND

Cominco is a public company incorporated under the laws of Canada, engaged in mining, smelting and other industrial activities in Canada and other parts of the world. It owns five hydro-electric generating facilities on the Kootenay and Pend d'Oreille Rivers in British Columbia. Two of these plants known as No. 2 "Upper Bonnington" and No. 3 "South Slocan" are leased to Cominco's wholly-owned subsidiary, West Kootenay Power and Light Company, Limited ("WKPL"). The remaining plants No. 4 "Corra Linn", No. 5 "Brilliant" and No. 6 "Waneta" are managed by WKPL for Cominco.

The generating characteristics of these plants are:

Plant No.	Name	Capacity (MW)	Energy Average MW
<hr/>			
2	Upper Bonnington	59.4	49.0
3	South Slocan	53.2	48.3
4	Corra Linn	51.3	39.1
5	Brilliant	128.9	97.4
6	Waneta	373.9	281.4

Cominco uses the power from Plants No. 4, 5, and 6 for its own industrial use, the surplus being sold to WKPL, Calgary Power Ltd., one industrial customer Canadian Cellulose Company, Limited, and in the United States.

WKPL is a public utility providing electrical energy in a service area including the West Kootenay and Okanagan regions. It owns one generating plant situated on the Kootenay River, known as No. 1 "Lower Bonnington". WKPL obtains its power for resale from this plant and from Cominco through the provisions of various agreements including an agreement with Cominco dated January 1, 1975 (the Omnibus Agreement) and an agreement with B. C. Hydro and Power Authority ("B.C. Hydro"), known as the Canal Plant Agreement, dated August 1972.

WKPL manages the entire system for itself and as agent for Cominco, but its entitlement under these agreements is restricted to the output of its own plant (No. 1) and Plants No. 2 and 3. It has the right under the Omnibus Agreement to purchase surplus power from Cominco. Cominco has the right, with appropriate notice, to curtail the supply of surplus power to WKPL. For requirements beyond the supply

available to WKPL from Cominco, WKPL has an agreement to purchase power from B.C. Hydro at negotiated rates.

In previous decisions the Commission has indicated its concern for the security of supply of power to WKPL. The present application responds to that concern by presenting an agreement between WKPL and Cominco called the "Plants and Surplus Agreement" (hereafter referred to as the "Agreement"). The Agreement provides for the lease with option to purchase by WKPL of Plants No. 2, 3 and 4 at a price to be determined by arbitration.

The Agreement also gives WKPL the right to purchase electric power on an interruptible basis from Plants No. 5 and 6 that is in excess of Cominco's load requirements. This Agreement is the essential feature of Cominco's application for exemption from the provisions of the Energy Act. It is the subject of an application also by WKPL for a Certificate of Public Convenience and Necessity permitting WKPL to lease, with option to purchase, Plants No. 2, 3 and 4. The present application and that of WKPL are therefore interdependent and one cannot succeed without the other.

THE APPLICATION

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.

The Applicant presented its forecasts of requirements for electrical energy through 1989 and related these to its planned expansion and to the output of Plants No. 5 and 6. On the basis of these forecasts it appears that Cominco will have no surplus over its own requirements beyond 1989.

In argument by Cominco it was suggested that if exemption were not granted not only would the cost of power for its industrial operations increase, it would also face the prospect of regulation through the effect of Section 21X of the Energy Act, with the attendant problems of dealing with its industrial operations in the public forum and public scrutiny of its expansion plans, financing, etc.

INTERVENORS

Intervenors in this matter represented certain forest products companies, a number of municipalities and the Consumers' Association of Canada (B.C. Division). In addition, Canadian Cellulose Company, Limited, the City of Nelson, the Trail District Chamber of Commerce and Mr. Larry Wanjoff participated. The only expert witness for the Intervenors was Dr. William Melody who gave evidence on behalf of the Consumers' Association.

Dr. Melody testified as to the incidence of the public interest and as to his concepts of market value and windfall profits applicable in this case. He concluded that the hydro properties owned by Cominco are affected by the public interest and "that the Commission should treat these properties as under regulation and establish appropriate rates for the region on the basis of the costs of those properties". At the same time, Dr. Melody stated he "believed Cominco deserves to continue to have the advantage of low cost electricity" and testified as to the rights of private ownership.

Counsel for the forestry group argued that the case was really whether Cominco was and is an energy utility subject to regulation. If it is, then exemption could be granted but it was argued that such exemption could not be made on the basis of anticipated future circumstances.

Counsel for the Municipality group presented a similar argument but indicated that the Municipalities do not oppose exemption if appropriate conditions are attached.

Counsel for Canadian Cellulose Company, Limited did not present argument.

Counsel for the Consumers' Association argued that if Cominco is found by the Commission to be an energy utility subject to regulation under the Act, an exemption under Section 101(3) should only be granted if the Commission is satisfied that the distribution of the total available power supply between Cominco and WKPL, and the purchase price to be paid by WKPL for Plants No. 2, 3, and 4 under the proposed Agreement, are fair and reasonable.

Mr. Wanjoff's concern centered on an understanding of the public interest and a desire to preserve a life-style consonant with the farming activities which dominated the Kootenays in his early years. He indicated also a concern that his intervention should not jeopardize the continued local employment provided by Cominco.

The position of the City of Nelson was presented during the hearing of the application by WKPL for a Certificate of Public Convenience and Necessity in respect of the Agreement. It should be noted that there is much confusion as to why the City of Nelson, the owner of a generating plant on the Kootenay River, was not included in the negotiations that led to the Canal Plant Agreement. It is a matter that cannot be addressed in this decision however, as water licenses are under the jurisdiction of the Controller of Water Rights.

While the City of Kimberley and the Trail District Chamber of Commerce were also registered as Intervenor, they confined their participation to the hearing of the Certificate application by WKPL. It should be noted they indicated then that their comments applied equally to the Cominco application for exemption. It appears their concerns are for the protection of the service area from action that might reduce the activity of Cominco as an employer and stimulus to business generally.

THE ISSUES

There are three separate but related issues to be addressed in this application for exemption under Section 101(3). First, can an exemption be granted prospectively or must the Applicant be subject to the Act when the exemption is granted? Secondly, should, in any event, exemption be granted to Cominco? Thirdly, what conditions, if any, should be attached to the exemptions?

There is no doubt in the view of the Commission that the Applicant falls within the definition of "energy utility" under Section 1 of the Act. That Cominco "owns or operates in the Province, equipment or facilities for the production, generation, storage, transmission, sale, delivery ... of ... electricity" is not questioned and it does not fall within any of the exceptions set out in the definition. It follows then that Cominco is subject to the Act by definition unless it qualifies for exemption under Section 21X. It is concluded therefore that the matter of prospective exemption is not at issue, as Cominco now must be considered eligible for exemption under Section 101(3).

The question of whether an exemption for Cominco is justifiable requires a brief analysis of the history of the development of electrical generation in the Kootenay region. The initial generating facilities were constructed by WKPL which from 1916 was the wholly-owned subsidiary of Cominco. These facilities consisted of Plants No. 1, 2, 3 and 4 with an average output in 1940 of 174 MW. Consumption by Cominco was approximately 95% of this amount. In 1944, in response to wartime needs, Cominco constructed Plant No. 5 "Brilliant" and in 1954, to supply increasing requirements Plant No. 6 "Waneta". In 1947 Cominco had acquired Plants No. 2, 3 and 4

from WKPL so that from that time all of the plants of the system were owned by Cominco with the exception of the original plant at Lower Bonnington which was and remains owned by WKPL.

In 1972 Cominco and WKPL entered into an agreement with B.C. Hydro to facilitate the construction of the Canal Plant by B.C. Hydro, for the more efficient use of the water flow of the Kootenay River. By this agreement WKPL and Cominco are entitled to energy in amounts related to the capability and average generation of Plants No. 1 through 4 together with Plants No. 5 and 6. Plants No. 1 through 4 are required to be kept in full operating condition but are used only intermittently.

WKPL leases Plants No. 2 and 3 from Cominco and purchases the remainder of its requirements from Cominco. WKPL is therefore dependant upon Cominco and the Canal Plant Agreement for most of its energy.

The WKPL system has a very low load factor. At the present time the average energy required by WKPL is 226 MW while its peak demand is 404 MW. The cost of this power has traditionally been low because of the Cominco demand which gives the overall system an efficient (high) load factor. While Cominco could have survived without WKPL, the reverse is unlikely to have been true without significantly higher consumer rates.

WKPL has the right and the obligation to provide electric power within its service area. It has also a responsibility to ensure continuity of supply. While it may rely on B.C. Hydro to meet its requirements when demand exceeds the limits of its entitlement under the Omnibus Agreement and the lease agreements, this power is much more costly than either its own generation or that purchased from Cominco. It is the responsibility of WKPL as a public utility to supply power to its customers at prices which give it no more than a reasonable rate of return. As the parent of WKPL, Cominco has responsibility for insuring that the utility fulfills its public obligation.

There is no doubt that the generating facilities under consideration are clothed with the public interest, but there is considerable doubt about the extent of that clothing. In 1940 Cominco represented 95% of the use of system generation and subsequently, though WKPL demand increased, Cominco undertook construction and financing of additional generating capacity for its own use in response to defense and industrial requirements. Electric energy is not only essential to the Cominco operations, it is undoubtedly one of the most significant elements in its manufacturing processes.

Inasmuch as Cominco undertook the development of generating facilities at its own risk, the Commission has concluded that, while there is a strong element of the public interest in the generating facilities in the Kootenay/Pend d'Oreille system, it does not extend to the entire system.

In view of the historical development and the responsibility and risk undertaken by Cominco, as well as the significance of electric energy in the manufacturing processes, the Commission concludes that some part of this system must be excluded from the general public interest. This conclusion reflects the Commission's conviction that the public interest must also extend to maintaining the economic health of an industry of such significant importance to the province.

To establish the extent to which WKPL and the public interest associated with its service area should be identified, the Commission regarded the whole system now owned by Cominco, i.e. Plants No. 2 through 6, as a unit. While Plants No. 2, 3 and 4 were transferred to Cominco from WKPL in 1947 at a cost of \$8.5 million, this price and these plants no longer represent an independent part of the whole system. In fact the Kootenay/Pend d'Oreille hydro-electric system maintains its generating capacity by virtue of the Canal Plant Agreement. Entitlements under that agreement are related to the individual plants.

The Commission has decided that it would be appropriate to transfer to WKPL the generating capacity associated with Plants No. 2, 3 and 4 and associated transmission facilities as provided in the Agreement, and to go further and require the immediate acquisition of those plants by WKPL. The Agreement calls for an arbitration procedure to determine the transfer price but this procedure is exposed to the non-arms-length weaknesses inherent in the WKPL/Cominco relationship. The Commission will therefore set the price.

The Commission is of the opinion that the value of Plants No. 2, 3 and 4 and associated transmission facilities is closely related to their operating or functional value within the total Kootenay/Pend d' Oreille system of which they form a part. The price we have determined relates the historic cost and net book value, calculated on a utility accounting basis, to the relative entitlements associated with Plants 2 through 6 under the Canal Plant Agreement. The net book value so calculated is about \$39.2 million.¹ The entitlement associated with Plants 2, 3 and 4 is 136.4 MW out of a total of 515.1 MW. The price to be paid by WKPL is therefore to be no greater than \$10.4 million

$$\left(\frac{136.4}{515.1} \times \$39.2 \text{ million}\right).$$

It is essential that this price be determined now rather than having the sale subject to the future exercise of an option at an undetermined price. It is not in the public interest to issue a Certificate of Public Convenience and Necessity to WKPL on a conjectural basis. By requiring the transfer of the facilities to WKPL not only will a permanent source of power be assured but also the utility will be provided with a firmer base upon which to extend its facilities and develop a more secure source of supply.

The Commission is cognizant of the fact that WKPL's current financial position will likely render WKPL unable to finance the purchase of the plants, as well as refinance

¹Exhibit 44, GHS-15, in the Commission Decision dated March 7, 1980. (WKPL application for rate relief)

its bank loans, without the support of Cominco. For this reason, the Agreement is unacceptable to the Commission without an undertaking by Cominco to facilitate the necessary financing by one or more of the following:

- i) accepting long-term notes bearing reasonable interest;
 - ii) guaranteeing appropriate long-term outside debt instruments;
 - iii) providing additional equity investment;
- or such other means as may be deemed appropriate by Cominco and acceptable to the Commission.

The Commission is also concerned about those aspects of the Agreement which relate to the sale by Cominco of surplus energy to WKPL. The Agreement at present provides for the sale of this power on an interruptible basis. However, since the utility's load is firm, interruptible power is of little or no value to it. Moreover, until Cominco's power requirements reach its own forecast levels, there is no apparent reason why the surplus power should not be made available to WKPL on a firm basis, as long as Cominco is provided with adequate protection for the power requirements of its own industrial operations. The Commission therefore requires, as a condition of exemption, that the Agreement be modified to firm up the sale of surplus power, on the following scale:

1980	606 Gwh	1985	456 Gwh
1981	639 Gwh	1986	350 Gwh
1982	710 Gwh	1987	237 Gwh
1983	566 Gwh	1988	114 Gwh
1984	474 Gwh	1989	0 Gwh

Source: WKPL Exhibit 6 - Tab 3.

Since any surplus not taken by WKPL can readily be sold, stored, or exchanged by Cominco (to B.C. Hydro, Calgary Power, or in the U.S.A.), the Agreement appropriately does not include "take-or-pay" provisions. However, there is a need to provide adequate protection for Cominco's own industrial requirements, and, therefore, appropriate "force majeure" provisions should be included.

The Commission notes that the Agreement provides, in its preamble, that Cominco will support an application by WKPL to expand generating capacity at Brilliant and Waneta. In view of the non-arms-length relationship between the parties and for greater certainty, the Commission believes that a commitment to that effect should be included in the body of the Agreement, and will so order.

The Commission believes that the Agreement must also provide WKPL and its customers with some protection against the loss of low-cost power from the Brilliant and Waneta plants. A commitment must therefore be included whereby Cominco agrees not to transfer its interest in the Brilliant or Waneta plants to any party unless the transfer is first approved by the appropriate regulatory authority.

The Commission is concerned that Provincial regulatory authorities should be able to monitor Cominco's performance under the exemption. For this purpose, a condition of exemption will be that Cominco provide to the appropriate regulatory authority, on a monthly basis, reports containing certain specified information relating to the operations of the Brilliant and Waneta plants.

DECISION

With the approval of the Lieutenant Governor-in-Council as required under Section 101(3) of the Act, the Commission will therefore exempt Cominco from regulation under the Energy Act and approve the Plants and Surplus Energy Agreement, subject to 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 monthly a 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.

COSTS

The Commission has decided to award out-of-pocket costs for the individual Intervenors in the application and the costs relating to the expert evidence provided by Dr. Melody on behalf of the Consumers' Association of Canada. These costs together with the out-of-pocket costs incurred by the Commission will be allocated to West Kootenay Power and Light Company, Limited and to Cominco Ltd. on a 50/50 basis after approval of the amount of such costs by the Commission.

DATED at the City of Vancouver, in the Province of
British Columbia, this 30th day of May, 1980.

Norman R. Gish, Chairman

R. John Ludgate, Deputy Chairman

Donald B. Kilpatrick, Commissioner

J. David King, Commissioner

Franklin E. Walden, Commissioner