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IN THE MATTER OF  
THE UTILITIES COMMISSION ACT  
S.B.C. 1980, c. 60, as amended  
and  
IN THE MATTER OF  
A CONTRACT DISPUTE BETWEEN  
WEST KOOTENAY POWER AND LIGHT  
COMPANY, LIMITED  
and  
B.C. TIMBER LTD.

DECISION

December 19, 1984

BEFORE :

J.D.V. Newlands, Deputy Chairman  
D.B. Kilpatrick, Commissioner  
R.J. Ludgate, Commissioner

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## INTRODUCTION

This Decision concludes matters which have been outstanding from a decision of the Commission in September 1983 dealing with an Application by West Kootenay Power and Light Company, Limited ("WKPL") for a general redesign of its existing rate structure. The hearing of the rate design issues included matters involving a dispute between WKPL and its major industrial customer, B.C. Timber Ltd. ("B.C. Timber")<sup>(1)</sup> over certain provisions of a proposed power supply agreement. There were several matters at issue in the dispute, one of which, "force majeure" had been the subject of a decision of the Commission in September 1982.

Briefly, WKPL had assumed the rights and obligations of Cominco Ltd. ("Cominco") in a power supply agreement between Cominco and B.C. Timber. In taking over the agreement WKPL had removed a "force majeure" provision which had existed in the Cominco/B.C. Timber agreement. The Commission Decision of September 1982 directed that the "force majeure" provision be restored, with certain modifications described in the Decision, and the entire matter was to be reviewed at a "forthcoming rate design hearing".

The matters in dispute were duly heard as part of the Rate Design Hearing. The Commission, however, in the October 5, 1984 Decision which followed, concluded that the issues involved in "force majeure" were sufficiently distinct from those of Rate Design to warrant a separate Decision.

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(1) As of April 1984, B.C. Timber became Westar Timber Ltd. For ease of reference to the hearing material, this Decision continues to refer to B.C. Timber.

## ISSUES

The issues to be resolved between the parties to the proposed agreement are as follows:

1. The inclusion, and terms, of a "force majeure" provision,
2. Termination provisions, and
3. The application of the general terms and conditions of the WKPL tariff where the proposed agreement fails to make specific provision.

### 1. Force Majeure

"Force majeure" clauses of the nature discussed here are a "standard" feature of industrial contracts in British Columbia.

Evidence was introduced showing the extent of the provisions as they exist between B.C. Timber and other suppliers of energy and power. Indeed, the provision was apparently satisfactory to both Cominco and B.C. Timber under the preceding agreement. In the current dispute WKPL opposes extending the right of "force majeure" to its major industrial customer, the primary reason being to protect utility income from a loss of revenue should B.C. Timber finds itself in a position to invoke "force majeure". The loss of revenue is unpredictable and in the event of loss the fixed charges of the Utility would have to be recovered from other classes of service, its shareholders or both. B.C. Timber represents a significant part of WKPL's total load and the problem of unpredictability of revenue is therefore compounded.

A complicating factor is the common use in British Columbia of "force majeure" provisions which allow the party claiming a "force majeure" to include factors such as "difficulties with workmen", "strikes", "other labour difficulties" and "lockouts". "Force majeure" clauses with such broad applicability can make forecasting by utilities of their industrial loads and related revenues a difficult task with uncertain results.

Force majeure is also important to industrial customers such as B.C. Timber and indeed any of the industrial customers of WKPL. While the impact of "force majeure" conditions between B.C. Timber and WKPL is on a relatively large scale, such rights, while having less impact on WKPL, would be equally significant to a smaller industrial customers. The Commission accordingly concludes that if such rights are to be available to a large customer those rights must extend to other industrial customers.

After full consideration of the evidence in this hearing and the findings of the Commission in September 1982 the Commission has concluded that it is appropriate that a "force majeure" provision be included in the agreement between WKPL and B.C. Timber. The provision must be reciprocal and provide equivalent rights to both parties.

The Commission further concludes that such rights must be extended to all industrial customers of WKPL. The clauses which exist in the contract approved by the decision of September 1982, appear to meet these requirements.

The insertion of these clauses or these rights into the relationship between WKPL and its industrial customers will require WKPL to forecast the impact of "force majeure" conditions in its market. The Commission concludes that this problem can be resolved by the establishment of a "strike adjustment provision" in the forecasting of sales revenue by WKPL in a manner similar to that employed by natural gas utilities under the jurisdiction of the Commission.

## 2. Termination

WKPL seeks a five-year termination notice which it submits is not inconsistent with the operation of major enterprise such as that of B.C. Timber. B.C. Timber argues that it is unreasonable to have a term longer than one year, since there are no specific obligations on WKPL in respect of power purchases and the contract for supply from B.C. Hydro expired in March, 1984.

The Commission concludes that it is in the best interest of both parties that the terms of service and the contract be stable for reasonable periods of time, and that it is not unreasonable that B.C. Timber should be able to project power purchases from WKPL on more than a year to year basis. In the present circumstances, however, and in the absence of specific commitment by WKPL to long-term contracts with B.C. Hydro, other suppliers or to additional generating capacity of its own, the Commission does not agree that five years is a reasonable term. The Commission accordingly concludes that a two-year termination notice is appropriate and will so order. This will provide a degree

of certainty to WKPL without unduly prejudicing B.C. Timber's rights to make such adjustments to its power supply as may be in its best interest. The two-year term will allow WKPL to extend its planning activity with respect to future sources of supply and the Commission expects that WKPL will take steps to improve its supply position with B.C. Hydro or other sources or through additional generation. Whichever of these alternatives is adopted, it may be appropriate at that time to change this provision to reflect a longer period of notice of termination than two years.

### 3. Terms and Conditions

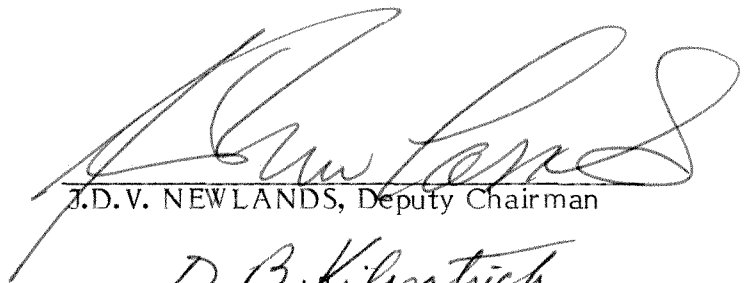
A dispute exists between WKPL and B.C. Timber related to application of the general terms and conditions of WKPL's filed Tariff in the event the contract is silent on a particular issue. B.C. Timber argued that the contract must be the only document defining the Agreement between the parties and that it was important to the Company's operating management responsible for compliance that all requisite terms and conditions be defined in one document.


WKPL maintained that it is essential to have its filed terms and conditions as a backstop to prevent protracted negotiation on a missing or overlooked element. Neither party could point to a specific matter that the proposed contract does not cover. The Commission has, in the past, accepted negotiated industrial contracts as the filed tariffs for service. In the current matter the Commission can see no detriment to either party in adhering to that practice.

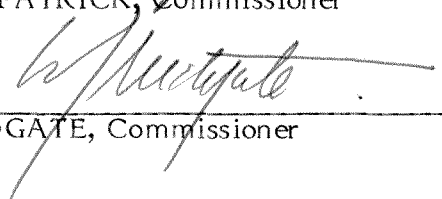


The Commission therefore concludes and will so order, that the final Agreement should contain all of the pertinent terms and conditions and that "fall-back" reference to the Applicant's general tariff provisions is neither necessary nor appropriate.

DATED at the City of Vancouver in the Province of British Columbia,  
this 19<sup>th</sup> day of December, 1984.

  
J.D.V. NEWLANDS, Deputy Chairman

  
D.B. KILPATRICK, Commissioner

  
R.J. LUDGATE, Commissioner



BRITISH COLUMBIA  
UTILITIES COMMISSION

ORDER

NUMBER G-81-84

PROVINCE OF BRITISH COLUMBIA

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF the Utilities Commission  
Act, S.B.C. 1980, c. 60, as amended

and

IN THE MATTER OF an agreement between  
West Kootenay Power and Light Company, Limited  
and B.C. Timber Ltd. for the supply of power

BEFORE: J.D.V. Newlands, )  
Deputy Chairman; )  
D.B. Kilpatrick, ) December 19, 1984  
Commissioner; and )  
R.J. Ludgate, )  
Commissioner )

O R D E R

WHEREAS evidence related to certain contractual  
matters in dispute between West Kootenay Power and Light  
Company, Limited ("WKPL") and B.C. Timber Ltd. (now Westar  
Timber Ltd.) was heard in a public hearing; and

WHEREAS the Commission has considered the matters  
in dispute and issued a Decision dated December 19, 1984.

NOW THEREFORE the Commission orders as follows:

1. "Force majeure" provisions are to be included in the Agreement between West Kootenay Power and Light Company, Limited and B.C. Timber Ltd. Such provisions shall be equivalent to those contained in the existing agreement approved by a Decision of the Commission dated September 10, 1982.
2. WKPL must extend such "force majeure" conditions, in principle, to all industrial customers.
3. A two-year termination notice shall be incorporated into the said Agreement, subject to modification under the conditions described in the Decision.

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BRITISH COLUMBIA  
UTILITIES COMMISSION

ORDER

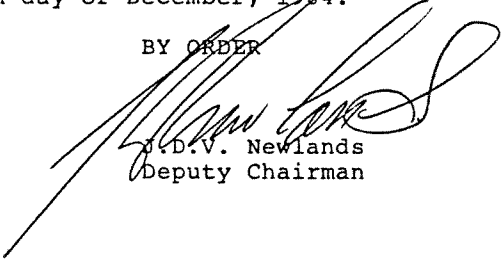
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4. The general terms and conditions which apply to the provision of service shall be those set forth in the said Agreement.

DATED at the City of Vancouver, in the Province of  
British Columbia, this 19th day of December, 1984.

BY ORDER



J.D.V. Newlands  
Deputy Chairman