

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of)	DOCKET NO. UE-991993
TECWA Power, Inc., for a)	
Declaratory Order)	RESPONSE OF COMMISSION STAFF
_____)	

TECWA Power, Inc. (Petitioner) is a Washington corporation attempting to acquire the Centralia generation plant and related transmission facilities (Electric Facilities) through ownership of TransAlta Centralia Generation, LLC (TransAlta Centralia). If the acquisition closes, TransAlta Centralia will operate the Electric Facilities as an “exempt wholesale generator” (EWG) under 15 U.S.C. § 79z-5a.

Petitioner seeks an order from the Commission declaring that TransAlta Centralia is not subject to regulation by the Commission as a public service company since it will operate only as an EWG. Alternatively, Petitioner asks the Commission to restrict any regulation to matters affecting public safety or such other limited regulation as the Commission believes necessary under the circumstances.

Staff’s response to the Petition for Declaratory Order is twofold. First, the Commission has the discretion to decline to issue a declaratory order because the Petition fails to demonstrate an actual controversy or uncertainty which adversely effects Petitioner, in violation of RCW 34.05.240(1). Second, if the Commission chooses to issue a declaratory order, it should conclude that it does not have jurisdiction over TransAlta Centralia for any purpose, whether limited to safety or otherwise.

ARGUMENT

1. Petitioner has Failed to Satisfy the Provisions of RCW 34.05.240 which Require an Actual Controversy and Uncertainty Adversely Affecting Petitioner

RCW 34.05.240 states that any person may petition the Commission for a declaratory order only if all of the following can be demonstrated.

1. That uncertainty exists which necessitates resolution.
2. That there is actual controversy arising from that uncertainty so that a declaratory order will not merely be an advisory opinion.
3. That the uncertainty adversely affects the petitioner.
4. That the adverse effect of that uncertainty on the petitioner outweighs any adverse effects on others or on the public.

Petitioner has failed to satisfy these requirements. First, the sellers of the Electric Facilities include Avista Corporation, Puget Sound Energy, and PacifiCorp. Each of these sellers has been granted a determination by the Commission satisfying the requirements of 15 U.S.C. § 79z-5a that allowing the Electric Facilities to be operated as an “eligible facility” will benefit consumers, is in the public interest, and does not violate state law. (Petition for Declaratory Order, Exs. 1-3.) However, each of those determinations is conditioned strictly upon the sale of the Electric Facilities being approved ultimately by the Commission in consolidated Docket Nos. UE-991255, UE-991262, and UE-991409. That approval has not yet been granted, may never be granted, or may be granted but with conditions unacceptable to the sellers such that the sale never closes. TransAlta Centralia, therefore, is not now and may never become an EWG. No actual controversy now exists, therefore, that would make a declaratory order anything more than an

advisory opinion which prematurely and unnecessarily examines the Commission's jurisdiction.

Petitioner argues that there is an actual controversy between federal and state law if Petitioner is found to be subject to Commission regulation. (Petition at 5.) However, that is the very jurisdictional issue Petitioner wishes the Commission to decide. It cannot be used to bootstrap the Petition into meeting the "actual controversy" requirement of RCW 34.05.240.

Second, Petitioner states that it would be adversely affected over and above the interests of others or the public because of the added financial risk that Commission regulation would impose on its fiscal operations of the Electric Facilities. (Id.) There is no adverse effect on Petitioner created by Commission jurisdiction, however. For example, if Petitioner is subject to Commission securities and affiliated interest regulation, it need only satisfy certain filing requirements. RCW 80.08.040; RCW 80.16.020. No Commission approval is necessary that would make Petitioner's securities unmarketable or its affiliated interest transactions uneconomic, as alleged.

Moreover, any Commission rate regulation of Petitioner need not be onerous. Banded rates (RCW 80.28.075) and special contracts (WAC 480-08-335) would be available to Petitioner. These mechanisms have been successfully used by other utilities to meet competition in a manner that is practical and efficient.

Finally, Petitioner should not be heard to complain if it must submit to Commission regulation. That was a risk it took when it decided to purchase the Electric Facilities. Any affect it may have on Petitioner is no more "adverse" than the affect on any other company subject to Commission jurisdiction, nor does it outweigh the interest of the public which the Commission's jurisdiction, if it exists, is designed to protect.

For these reasons, Petitioner has failed to meet the requirements of RCW 34.05.240. The Commission can decline to issue a declaratory order, if it so chooses. Its' authority to exercise that discretion is contained in RCW 34.05.240(5)(d) and WAC 489-09-230(6)(b).

2. The Commission Does Not Have Jurisdiction Over TransAlta Centralia for Any Purpose

Should the Commission decide to issue a declaratory order, it should determine that it does not have jurisdiction over TransAlta Centralia for any purpose. The relevant facts are as follows.

1. If the sale of the Electric Facilities closes, TransAlta Centralia will be an exempt wholesale generator. All of its energy sales, therefore, must be exclusively at wholesale, which is defined as a sale for resale. 15 U.S.C. § 79z-5a(a)(2)(A). 16 U.S.C. § 824(d). None of its sales of electricity can or will be at retail to end-users.
2. TransAlta Centralia's wholesale sales will be subject to rate regulation by the Federal Energy Regulatory Commission (FERC).¹ 16 U.S.C. § 824(d). In fact, FERC has already approved TransAlta's market-based rates for application after the sale closes. 89 FERC ¶ 61,272 (December 16, 1999).
2. The Electric Facilities consist of the generation plant and associated transmission facilities which connect the plant to the interstate power grid of the Pacific Northwest. These interconnecting transmission facilities are included in the definition of "eligible facilities" for purposes of TransAlta Centralia's generation plant. 15 U.S.C. § 79z-5a(a)(2).

There are three essential reasons under these facts why the Commission does not have jurisdiction over TransAlta Centralia. First, Petitioner fears application of RCW 80.28.120 because the statute defines a "public service company" to include every electric company which

¹ TransAlta Centralia will become a "public utility" after the sale closes because it will operate facilities in interstate commerce subject to FERC jurisdiction. 16 U.S.C. § 824(e); 16 U.S.C. § 824(b)(1). Under 16 U.S.C. § 824(d)(a), therefore, its rates will be subject to regulation by FERC.

sells energy at “wholesale or retail” (Petition at 3-4.) However, RCW 80.28.120 applies only to electric companies which own, operate, or manage a plant or system for the “distribution and sale” of electricity. TransAlta Centralia will own and operate eligible facilities consisting of only a generation plant and associated transmission facilities to support sales of electricity that are made exclusively at wholesale. Its facilities do not constitute a “distribution system” similar to the systems operated by Avista Corporation, Puget Sound Energy, and PacifiCorp which sell electricity at retail, but also sell at wholesale to each other or other publicly-owned utilities. Jurisdiction over TransAlta Centralia, therefore, does not come by way of RCW 80.28.120.

Second, even if the language of RCW 80.28.120 characterized TransAlta Centralia properly, its application to TransAlta Centralia is preempted by the Federal Power Act which provides exclusive authority to FERC to regulate the rates for wholesale sales of electric energy.²

Mississippi Power & Light Co. v. Mississippi ex rel Moore, 487 U.S. 354, 371-372 (1988).

Indeed, the United States Supreme Court has emphasized that the Federal Power Act expressed Congress’ intent to draw a “bright line” easily ascertainable between state and federal jurisdiction.

What Congress did was to adopt the test developed in the Attleboro line which denied state power to regulate a sale at wholesale to local distributing companies’ and allowed state regulation of a sale at local retail rates to ultimate consumers.’ [Citation omitted.]

This conclusion has been consistently reaffirmed in subsequent cases. In Panhandle Eastern Pipeline Co. v. Public Service Commission of Ind., 332 U.S. 507, which considered the reach of 1(b) of the Natural Gas Act, the Court said that the line of the statute was thus clear and

² Petitioner claims that RCW 80.28.120 was enacted in 1911. In fact, the statutory language at issue was enacted in 1933. Laws of 1933, Chapter 165, § 34. This still predates enactment of the Federal Power Act in 1935, however, as well as the Energy Policy Act of 1992.

complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise.

Fed. Power Comm'n v. Southern California Edison, 376 U.S. 205, 214- 215 (1964). The provisions of RCW 80.28.120, therefore, are ineffective with respect to the wholesale sales of TransAlta Centralia as an EWG.

Third, TransAlta Centralia will arguably be an “electric company” because it will own and operate an “electric plant” as defined by RCW 80.04.010. However, the Commission’s jurisdiction applies only to the rates, services, and practices of electric companies providing any utility service or commodity “to the public” for compensation. RCW 80.01.040(3). Similar statutory language exists in RCW 80.28.120 which limits that statute’s application not only to distribution companies, but also to sales of electricity to “the public for hire” Moreover, decisions of the state Supreme Court have read into these utility statutes a jurisdictional requirement that the business be dedicated to a public use.

A corporation becomes a public service company, subject to regulation by the department of public service, only when, and to the extent that, its business is dedicated or devoted to a public use. The test to be applied is whether or not the corporation holds itself out, expressly or impliedly to supply its service or product for use by the public as a class or by that portion of it that can be served by the utility; or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.

Inland Empire Rural Electrification, Inc. v. Dept. of Public Service, 199 Wash. 527, 537, 92 P.2d 258 (1939).

TransAlta Centralia does not meet this “public use” test. None of its sales will be to the public. Its sales will be only to distribution utilities for resale to consumers and, presumably,

many of those utilities and consumers will not even be located in this state. TransAlta Centralia, therefore, is not a “public service company” subject to Commission jurisdiction even if, technically speaking, it is an “electric company” operating an “electric plant” in Washington.

Finally, Petitioner states that if the Commission has jurisdiction over TransAlta Centralia it should limit such regulation to matters of public safety or other limited issues. The issue of Commission electric jurisdiction is, however, an all or nothing affair. This contrasts with its regulation of natural gas where the Commission has safety jurisdiction over companies that transport gas but are not otherwise public service companies. RCW 80.28.210.

Moreover, as an EWG, TransAlta Centralia is exempt from the Public Utility Holding Company Act of 1935 (PUHCA). 15 U.S.C. § 79z-5a(e). This exemption does not trigger Commission jurisdiction into areas that would have been covered by PUHCA absent the exemption. In fact, many issues with respect to financing and other relationships between an EWG, holding companies, and affiliates continue to be regulated but are regulated by FERC. 15 U.S.C. § 79z-5a(h).

For the reasons stated above, and only if the Commission chooses to issue a declaratory order, the Commission should conclude that it does not have jurisdiction over the operations of TransAlta Centralia should the sale of the Electric Facilities close.³

DATED this 21st day of January, 2000.

Respectfully submitted,

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³ This conclusion rests upon the facts stated in the Petition for Declaratory Order. Should those facts change in any material way (e.g., TransAlta Centralia sells power directly at retail to large industrial consumers), or should the applicable legal parameters change with industry restructuring, the Commission can institute a classification proceeding under RCW 80.04.015 to determine if TransAlta Centralia then comes under Commission jurisdiction.