

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of

CITY OF SPOKANE

For an Order Declaring that the City of
Spokane Waste to Energy Facility is not
“baseload electric generation” under RCW
80.80.010(4) and WAC 480-100-405(2)(a)

DOCKET _____

City of Spokane’s Petition for Declaratory
Order

I. INTRODUCTION

1. Pursuant to RCW 34.05.240(1), RCW 80.80.060(3), and WAC 480-07-940(1), the City of Spokane (“City”) submits this petition to the Washington Utilities and Transportation Commission (“Commission”) for an order declaring that (i) the Spokane Waste to Energy (“WTE”) facility is not “baseload electric generation” under RCW 80.80.010(4) and WAC 480-100-405(2) and (ii) neither Chapter 80.80 RCW, specifically RCW 80.80.060(1), nor Chapter 480-100 WAC, specifically WAC 480-100-405(1), precludes Avista Utilities (“Avista”) from entering into a contract with a term of 15 years for the WTE facility.

2. The City did not design and develop WTE for the purpose of generating electric power; rather, the City designed and operates the WTE facility to meet its obligations to responsibly manage solid waste generated within the City. This included recognizing that it was impossible to site additional solid waste landfill facilities locally without risking the Spokane Valley-Rathdrum Prairie Aquifer, which is the region’s designated sole-source drinking water supply. In addition, from a social responsibility perspective, the City chose to process its own municipal solid waste locally rather than shipping that waste to other locations for landfilling.

3. Further, the United States Environmental Protection Agency (“EPA”) has documented that compared to landfilling, municipal solid waste combustors save approximately 1.0 ton of GHGs per ton of municipal solid waste combusted on a life-cycle basis. Declaration of Chris Averyt in Support of City of Spokane’s Petition for Declaratory Order (“C. Averyt Decl.”) at ¶¶ 6–7.

4. The City and Avista are negotiating a new power purchase agreement (“PPA”) for the electrical output of the WTE facility. Declaration of Marlene Feist in Support of City of Spokane’s Petition for Declaratory Order (“M. Feist Decl.”) at ¶ 7. They currently operate under a PPA with a term of five years.¹ *Id.* at ¶ 6. To maximize the certainty and value of the WTE facility for its residents, virtually all of whom are Avista ratepayers, the City now wishes to enter into a PPA with Avista for a term of 15 years. *Id.* at ¶ 7. A 15-year PPA would not alter the status quo—other than changing the parties’ contractual relationship from a series of five year contracts to a single 15-year contract—but would significantly benefit City residents, many of whom are Avista ratepayers, in an amount that the City estimates to be \$7.5 to \$10 million over the life of the contract. *Id.* at ¶¶ 7–9.

5. A question has arisen as to whether RCW 80.80.060(1) or WAC 480-100-405(1) would preclude Avista from entering into a 15-year contract for the WTE facility because of the definition of “baseload electric generation” in RCW 80.80.010(4) and WAC 480-100-405(2)(a). Pursuant to RCW 34.05.240(1), RCW 80.80.060(3), and WAC 480-07-930(1), the Commission has authority to determine whether the WTE facility is “baseload electric generation,” and should issue a declaratory order because:

¹ The PPA is actually for a term of one day less than five years. For simplicity’s sake, however, the parties refer to the contract as a five-year PPA.

- i. The City faces uncertainty as to whether the term limit of five years for contracts with “baseload electric generation” under Chapter 80.80 RCW applies to the WTE facility;
- ii. An actual controversy exists because the City cannot enter into a contract with a 15-year term with Avista unless the Commission determines that the WTE facility is not subject to the five year term limit;
- iii. This uncertainty adversely affects the City because the City cannot maximize the value of the WTE facility for its citizens’ benefit unless it enters into a PPA for a term of 15 years;
- iv. No measureable adverse effects to others or the general public will arise from a ruling by the Commission that the WTE facility is not “baseload electric generation” under Chapter 80.80 RCW, in part because the City’s WTE facility is the only existing municipal WTE facility in Washington state; and
- v. This petition complies with the requirements of WAC 480-07-930.

6. The City is the second largest city in the state of Washington and is the county seat of Spokane County. The City’s full name and mailing address are:

City of Spokane
Attn: Mike Ormsby, City Attorney
Marlene Feist, Public Works Director
808 W. Spokane Falls Blvd.
Spokane, WA 99201

The City’s representatives in this proceeding are:

Elizabeth Thomas
Benjamin A. Mayer
K&L Gates LLP
925 4th Ave, Suite 2900
Seattle, WA 98104
Phone: 206-623-7580

Fax: 206-623-7022
liz.thomas@klgates.com
ben.mayer@klgates.com

7. The following rules or statutes may be brought into issue by this petition: Chapter 80.80 RCW; RCW 80.80.010(4); RCW 80.80.060(1); RCW 80.80.060(3); RCW 34.05.240; Chapter 480-100 WAC; WAC 480-100-405(1); WAC 480-100-405(2)(a); and WAC 480-07-930.

II. BACKGROUND AND STATEMENT OF FACTS

A. The Purpose and Intent of Chapter 80.80 RCW, Greenhouse Gas Emissions—Baseload Electric Generation Performance Standard.

8. The emissions performance standard established by Chapter 80.80 RCW was intended to curb GHG emissions from certain electric generating facilities that rely on fossil fuels, such as coal and natural gas. RCW 80.80.005 (the “greenhouse gases emissions performance standard will work ... for fossil-fueled thermal electric generation facilities”). The WTE facility is not fueled by fossil fuels. As a product of its solid waste disposal process, the WTE facility generates electricity using municipal solid waste, not coal or natural gas. C. Averyt Decl. at ¶ 4.

9. To accomplish the goal of reducing GHG emissions from fossil-fueled generation resources, Chapter 80.80 RCW, among other things, establishes a five-year limitation on contracts for “baseload electric generation” “power plants” that do not comply with the emissions performance standard. RCW 80.80.060(1); RCW 80.80.010(4), (16)(b), & (19); WAC 480-100-405(1), (2)(a), (2)(d), & (2)(g). While the WTE facility does generate power as a byproduct of managing municipal solid waste, it was not designed with the primary objective of being a baseload electric generation facility. In fact, the WTE facility does not operate as a

baseload electric generator as that term is defined in statute.

10. Chapter 80.80 RCW was not intended to restrict solutions for waste disposal that would reduce human impacts to the environment and also happen to recover energy, or to diminish a municipality's ability to maximize the benefits of such a facility for its citizens. Indeed, the Legislature found that the statute would "increase efficiency, thus resulting in benefits to Washington's economy and businesses[.]" RCW 80.80.005(1)(g). The WTE facility achieves these goals.

B. The Commission Has Authority to Determine Whether the WTE Facility is "Baseload Electric Generation."

11. The Commission has the authority to determine whether a facility qualifies as "baseload electric generation" for purposes of Chapter 80.80 RCW. RCW 34.05.240(1); RCW 80.80.060(3); WAC 480-07-930(1). In making that determination, the Commission must "consider the design of the power plant and its intended use based upon the electricity purchase contract, if any, permits necessary for the operation of the power plant, and any other matter the commission determines is relevant under the circumstances." RCW 80.80.060(3).

12. "Baseload electric generation" is "electric generation from a power plant that is designed and intended to provide electricity at an annualized plant capacity factor of at least sixty percent." RCW 80.80.010(4); WAC 480-100-405(2)(a). As discussed below, the WTE facility was designed and intended as a solid waste disposal plant. The generation and sale of electricity was always and has remained secondary to that function. In addition, the facility has a net capacity factor of less than sixty percent.

13. "'Power plant' means a facility for the generation of electricity that is permitted as a single plant by a jurisdiction inside or outside the state." RCW 80.80.010(19); WAC 480-100-405(2)(g). As discussed herein, the WTE facility is permitted and regulated as a solid waste

disposal facility that includes an energy recovery component.

C. The Purpose and Intent of the WTE Facility is to Manage Solid Waste.

14. The primary design and intent of the WTE facility was and is to dispose of municipal solid waste as a volume reduction process and to avoid impacts to local groundwater associated with landfilling that waste. M. Feist Decl. at ¶¶ 11–19. The facility was first contemplated when the 1984 Spokane County Solid Waste and Moderate Risk Waste Management Plan (“WMP”) recommended, “[b]ased on both cost and environmental considerations,” the development of the WTE facility “as a major element in the County-wide solid waste management system,” and the phasing out existing landfills. *Id.* at ¶¶ 12, 14, and 16.

15. The facility is part of a comprehensive regional solid waste system that encourages recycling and composting to meet state and local objectives to reuse and recycle wastes. *Id.* at ¶ 22. It is one of many approaches used in the Spokane region to accomplish the WMP’s goals and objectives to, among other things, “[m]anage solid waste in a cost-effective manner that promotes, in order of priority, waste reduction, reuse, and recycling” and “[e]nsure adequate processing and disposal capacity.” *Id.*

16. In the 1980s, the City determined that its existing landfills jeopardized the Spokane Rathdrum aquifer, the sole source of drinking water for the region. *Id.* at ¶ 14. To combat this threat, the City needed a solid waste management solution and siting a new landfill over a sole-source aquifer was not an acceptable one. *Id.* The WTE facility was the solution. *Id.* at ¶¶ 12 and 18. It replaced landfills, including the Northside Landfill in Spokane, that were Superfund cleanup sites. *Id.* at ¶ 18.

17. The City also chose to manage its own solid wastes locally, rather than burdening other communities with it. *Id.* at ¶ 20. The City deliberately decided against long-hauling or

transporting by rail all its municipal solid wastes to the Roosevelt Landfill in Klickitat County about 200 miles southwest of Spokane. *Id.* This decision continues to ensure that not only do the City and its residents manage their own solid wastes and do not harm other communities; it also avoids the GHG emissions that would result from trucking or shipping by rail municipal solid wastes from Spokane to the Roosevelt Landfill. C. Averyt Decl. at ¶ 8.

D. The Generation and Sale of Electric Output is Secondary to the Waste Disposal Process.

18. The generation and sale of electrical output is secondary to the waste disposal function at the WTE facility. M. Feist Decl. at ¶ 19. Local needs for power generation did not motivate the facility design. *Id.* at ¶ 25. In fact, Avista, the local utility, did not purchase power from the WTE facility for its first 20 years of operation. *Id.* at ¶ 26.

19. The generation of power at the WTE facility is simply a byproduct of the waste management process in the Spokane region. *Id.* at ¶ 25. The inclusion of power generation had nothing to do with needs for electric power resources, and everything to do with solid waste volume reduction and disposal. *See id.* at ¶¶ 12, 14, 19, and 25. Indeed, “the sale of electricity was always intended to offset the cost of incinerating garbage.” *Id.* at ¶ 25. “Electric sales cover[ed] the cost of bond payments on the facility.” *Id.*

20. The WMP discusses the WTE’s performance in terms of the tons per year of municipal solid waste it is able to process, rather than capacity factor. *Id.* at ¶ 23. In addition, Avista’s current contract for purchase of the WTE’s electrical output is for “as generated” power, not “baseload” or “firm” power and requires no backup resources if the City takes the facility offline. *Id.* at ¶¶ 6–7.

21. The WTE facility’s peers are landfills, not power plants. The facility is permitted by the Spokane Regional Health District (“SRHD”) as a solid waste disposal site that includes an

energy recovery component. *See id.* at ¶ 27. SRHD regulates the facility under WAC 173-350-240, solid waste handling standards for energy recovery and incineration facilities. *See id.* The Spokane Regional Clean Air Agency (“SRCAA”) regulates the facility’s air emissions under chapter 173-401 WAC. *See id.* at ¶¶ 28–29.

22. These facts show that the WTE facility was not “designed and intended to provide electricity at an annualized plant capacity factor of at least sixty percent;” rather, it was designed and intended to manage solid waste.

E. The WTE Facility Promotes GHG Reduction.

23. According to two separate EPA-sponsored life-cycle emissions models, municipal solid waste “combustors actually reduce the amount of GHGs in the atmosphere compared to landfilling.” C. Averyt Decl. at ¶ 7. “The savings [on a life-cycle basis] are estimated to be about 1.0 ton of GHGs saved per ton of [municipal solid waste] combusted.” *Id.* In other words, GHG emissions are lower with the WTE facility in operation than they would be without it.

24. The WTE facility also avoids GHG emissions by generating steam for use on site and electricity for sale from waste heat created during the waste management process without fossil fuels, such as coal or natural gas, and by recovering ferrous and non-ferrous metals. *Id.* at ¶ 8. The recovery of metals at the WTE facility allows for the reuse of those materials and avoids additional energy consumption to create new metals from virgin ores. *Id.*

F. The WTE Facility Has An Average Net Capacity Factor of Less Than 60 Percent.

25. The WTE facility’s average net capacity factor is less than 60 percent. *Id.* at ¶ 9. The nameplate capacity of the facility’s steam turbine generator is 30 MW but its nominal rated

output is 25.9 MW (25,900 kW). *Id.* at ¶ 10.² Over the last twelve years, the average annual net electrical output, *i.e.*, the amount of electricity sold to Avista, has been 128,905 MWh (128,905,000 kWh). *Id.* This represents an average net capacity factor of 56.8 percent (using the 25.9 nominal unit rating). *Id.*

26. The WTE facility’s operations are entirely constrained by and dependent upon solid waste fuel availability. *Id.* at ¶ 4. In industry practice, baseload electric generation is not fuel constrained. *Id.* at ¶ 11. Baseload generation owners typically stockpile or store both primary fuel (for example, natural gas) and backup, alternate fuel (for example, #3 diesel) to ensure continuous availability and reliability. *Id.* The WTE facility, on the other hand, does not store fuel on site for backup generation and has no backup or alternative fuel. *Id.* at ¶ 4. Indeed, the facility routinely curtails its electrical generation in winter, when incoming solid waste supplies do not support normal operation. *Id.* at ¶ 5.

G. The City and Avista’s Five-Year PPAs for the WTE Facility.

27. The City and Avista have entered into a series of PPAs for the WTE facility with five-year terms. M. Feist Decl. at ¶ 6. The current PPA began on January 1, 2018, and ends on December 30, 2022. *Id.*

28. The PPA is for as delivered power:

The City shall sell and deliver, and Avista shall purchase and receive, at the Point of Delivery the total amount of electric power that is generated by the Project (less Facility Service Power), and delivered by the City to Avista at the Point of Delivery during the Delivery Term (the “**Delivered Net Output**”). . . . The City shall deliver to Avista, and Avista shall receive, at all times all the Delivered Net Output.

² The WTE steam turbine generator name plate is 30 MW. The unit is usually operated at a 0.86 power factor which results in 25.9 MW of instantaneous energy output and up to 4.1 MVA (mega volt-ampere reactive) output. *Id.* at ¶ 10 n.1.

Id. at ¶¶ 5–6 (PPA, Section 4(a)). Accordingly, the City retains no obligation to provide replacement power generation to Avista for baseload operation when the WTE facility is offline.

29. In addition, the PPA requires no minimum output. Section 4(a) provides in part:

Notwithstanding any other provision of this Agreement, the City has no obligation to generate or sell or deliver, and Avista has no right to purchase or receive, any specified minimum amount of Delivered Net Output at any time during the Term, and the City’s sole obligation with respect to the sale and delivery of any output of the Plant and any power supply whatsoever under this Agreement is to sell to Avista all Delivered Net Output on the terms and subject to the conditions of this Agreement.

Id.

H. A 15-Year PPA Would Benefit the City’s Residents.

30. The City estimates that a 15-year PPA for the WTE facility would generate significantly more revenue, on the order of an additional \$7.5 to \$10 million over the 15-year term, for its citizens (also Avista ratepayers) as opposed to maintaining the status quo of a series of five-year PPAs. *Id.* at ¶ 7. The alternative available to the City is to enter into five-year PPAs for a total of 15 years. The City, however, would prefer to maximize the value of the WTE facility for its residents through a 15-year PPA and feels obligated to pursue that length of contract for its citizens’ benefit.

31. Notably, Avista’s alternative to purchasing power from the City would be to purchase from other suppliers — which based on Avista’s avoided cost calculation, would result in comparable payments to other providers. *See* M. Feist Decl. at ¶ 9. Thus, Avista’s ratepayers outside the City are neutral as to whether Avista purchases from the City or another supplier.

III. ARGUMENT

A. The WTE Facility is not a Baseload Electric Generation Power Plant.

32. The statutory GHG emissions performance standard, and the associated five-year limit on certain power purchase agreements, applies only to facilities that fall within the definition of “baseload electric generation.” That term means “electric generation from a power plant that is designed and intended to provide electricity at an annualized plant capacity factor of at least sixty percent.” RCW 80.80.010(4).

33. The evidence summarized above demonstrates that the WTE facility was designed and intended as a waste disposal and reduction facility to manage municipal solid waste in the Spokane region in a way that promotes waste reduction, reuse, and recycling and that provides adequate processing and disposal capacity. Accordingly, the electricity generation capacity factor is dependent solely upon the actual supply of municipal solid waste that is available to be combusted, and is not determined by a predetermined fuel supply, fuel storage, and alternative backup fuel supply plan, as is the case for baseload electric generation in industry practice. The facility design criteria were intended to reduce solid waste volume, to protect the region’s sole-source aquifer, and to avoid harm to other communities associated with landfilling. It continues to perform those core functions to this day. Thus it was not “designed and intended to provide electricity” at any particular annualized plant capacity factor.

34. Moreover, the facility has an annualized net capacity factor of less than 60 percent, and is permitted as a solid waste disposal plant with an energy recovery component.

B. WAC 480-106-050(4)(a)(iii) Does Not Apply Because the WTE Facility is not Baseload Electric Generation and its Generating Capacity Exceeds Five MW.

35. Under the Commission’s Public Utility Regulatory Policies Act of 1978 (“PURPA”) rules, PPAs with qualifying facilities of five MWs or less are restricted to five-year

terms if the facility does not meet the GHG emissions standard in RCW 80.80.040. WAC 480-106-050(4)(a)(iii). For the reasons already discussed, the standard in RCW 80.80.040 does not apply to the WTE facility because it is not “baseload electric generation.” In addition, the WTE facility has a nameplate capacity that exceeds five MWs. Accordingly, by its terms, WAC 480-106-050(4)(a)(iii) does not apply.

C. CETA’s Alternative Compliance Provisions Support a 15-Year PPA for the WTE Facility.

36. Finally, through the Clean Energy Transformation Act (“CETA”), the Legislature has signaled that WTE is part of the near-term solution to the problem of climate change. For the 15-year period from January 1, 2030, to December 31, 2044, CETA authorizes a jurisdictional utility such as Avista to use WTE electricity to satisfy up to 20 percent of its obligation to use GHG-neutral electricity. RCW 19.405.040(1)(b)(iv). Through this provision, CETA effectively recognizes the WTE facility as a GHG-neutral facility.

37. Chapter 80.80 RCW should not be used to disturb CETA’s intent. Instead, the two statutes should be construed “so that the integrity of both will be maintained.” *Anderson v. Dussault*, 181 Wn.2d 360, 368, 333 P.3d 395 (2014) (citation omitted). That is possible here, as long as Chapter 80.80 RCW is correctly read to exclude WTE from the definition of “baseload power generation” under RCW 80.80.010(4). Prohibiting a contract with a term of 15 years, on the other hand, would frustrate CETA’s intent that WTE be eligible as an alternative compliance option for the entire period and would result in undesirable financial outcomes for the citizens of Spokane.

38. To the extent that CETA and Chapter 80.80 RCW are inconsistent, CETA should take precedence because it is the more recent and more specific statute — only CETA expressly addresses WTE, and specifically authorizes its use over a period of 15 years. *ETCO, Inc. v. Dep’t*

of Labor & Indus., 66 Wn. App. 302, 306, 831 P.2d 1133 (1992) (“Where two statutes dealing with the same subject matter are in apparent conflict, established rules of statutory construction require giving preference to the more specific statute, and to the latter adopted statute.”) (citations omitted).

IV. APPROPRIATENESS OF THE DECLARATORY ORDER

39. The Commission can enter a declaratory order in this proceeding. Pursuant to RCW 34.05.240(1) and WAC 480-07-930, the Commission may enter a declaratory order upon a showing that five criteria are met. All five of those criteria have been met, as follows.

A. The City Faces Uncertainty That Necessitates Resolution.

40. The City desires to enter into a 15-year PPA with Avista to obtain a benefit for its citizens (many of whom are Avista ratepayers) worth approximately \$7.5 to \$10 million over the life of the contract. M. Feist Decl. at ¶ 7. The potential application of the five-year limitation on purchases of power from certain “baseload electric generation” plants has complicated those negotiations and made uncertain the City’s ability to maximize the value of the WTE facility for the benefit of its residents and its ability to count on Avista as the purchaser of the facility’s electrical output for the next 15 years. *Id.* at ¶¶ 7–10. This uncertainty necessitates resolution by the Commission so that the City can move forward with Avista on a PPA with a term of 15 years for the WTE facility.

B. An Actual Controversy Exists.

41. There is an actual controversy because Avista has advised the City that it will not enter into a PPA with a term of 15 years unless the Commission determines that the WTE facility is not “baseload electric generation” under Chapter 80.80 RCW. *Id.* at ¶ 10. A Commission order

will not be a mere advisory opinion because the parties intend to enter into a 15-year PPA if the Commission declares that the WTE facility is not “baseload electric generation.” *Id.*

C. The Uncertainty Adversely Affects the City.

42. The City is adversely affected by the existing uncertainty about the status of the WTE facility because the City cannot enter into a PPA with a term of 15 years with Avista unless the Commission issues an order declaring that the facility is not “baseload electric generation” under Chapter 80.80 RCW. *Id.* The City’s citizens (many of whom are Avista ratepayers) are adversely affected by the uncertainty because they cannot receive the full benefit of the WTE facility unless the City and Avista can enter into a contract with a term of 15 years.

D. A Declaratory Order Will Not Result in Adverse Effects.

43. There will be no adverse effects on others or the general public from a Commission order declaring that the WTE facility is not “baseload electric generation” under Chapter 80.80 RCW. First, the only change in the status quo will be that the City and Avista will enter into a single PPA with a term of 15 years, rather than a series of five-year PPAs for a total of 15 years. *Id.* The facility will continue to operate as it does today and as it would under a series of five-year contracts. *See id.* Second, there are no other municipally-owned and -operated WTE facilities in Washington that would be impacted by the order. *Id.* at ¶ 4.

E. This Petition Complies with WAC 480-07-930.

44. This Petition complies with the Commission’s rules for petitions for declaratory orders at WAC 480-07-930.

V. RELIEF REQUESTED

45. The City requests that the Commission enter an order declaring that:
- i. The WTE facility is not “baseload electric generation” under RCW 80.80.010(4) and WAC 480-100-405(2)(a); and
 - ii. Neither Chapter 80.80 RCW, specifically RCW 80.80.060(1), nor Chapter 480-100 WAC, specifically WAC 480-100-405(1), precludes Avista from entering into a contract with a term of 15 years for the WTE facility.

K&L GATES LLP

By: s/ Elizabeth Thomas
Elizabeth Thomas, WSBA No. 11544
Benjamin A. Mayer, WSBA No. 45700
K&L Gates LLP
On Behalf of the City of Spokane
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
liz.thomas@klgates.com
ben.mayer@klgates.com