

MAR 17 2000

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of) DOCKET NO. UE-991993
)
 TECWA Power, Inc.) DECLARATORY ORDER
)
 for a Declaratory Order) ORDER DECLARING COMMISSION HAS
) NO JURISDICTION OVER TRANSALTA
) CENTRALIA GENERATION LLC

A. PROCEDURAL BACKGROUND

1 On December 22, 1999, TECWA Power, Inc., filed with the Commission a petition for declaratory order pursuant to RCW 34.05.240 and WAC 480-09-230. The Petition attaches three Commission orders conditionally approving Exempt Wholesale Generator (“EWG”) status in the Applications of Avista Corporation d/b/a Avista Utilities (“Avista”), Pacific Power & Light Company (“PacifiCorp”) and Puget Sound Energy (“PSE”) to sell their interests in the Centralia coal-fired power plant, coal mine, and associated facilities to TECWA Power Inc. (“TECWA”), the petitioner in this docket.¹ These proceedings were consolidated on November 23, 1999.²

2 On January 7, 2000, the Commission gave notice of receipt of the petition for declaratory order, and gave interested persons the opportunity to submit statements of fact and law in response to that petition. A letter of support for the petition from Operating Engineers Local 612 (“Local 612”) was filed with the Commission on January 20, 2000. The letter states that Local 612 supports this petition insofar as it seeks a declaratory order limiting the Commission’s regulation of TransAlta Centralia Generation LLC to matters affecting public safety. A response of Commission Staff was filed with the Commission on January 21, 2000. In its response the Commission Staff first argues that 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 affects the Petitioner; second, Staff argues that if an order is entered, it should conclude that the Commission does not have jurisdiction over TransAlta Centralia for any purpose, whether limited to safety or otherwise.

¹ Order re Exempt Wholesale Generator Status, *In re the Matter of the Application of Avista Corporation for Authority to Sell Its Interest in the Coal-Fired Centralia Power Plant* (October 14, 1999); Order re Exempt Wholesale Generator Status, *In re the Matter of the Application of PacifiCorp for an Order Approving the Sale of its Interest in (1) the Centralia Steam Electric Generating Plant, (2) the Rate Based Portion of the Centralia Coal Mine, and (3) Related Facilities; for a Determination of the Amount of and the Proper Rate Making Treatment of the Gain Associated with the Sale, and for an EWG Determination* (October 14, 1999); Order re Exempt Wholesale Generator Status, *In re the Matter of the Application of Puget Sound Energy, Inc. for (1) Approval of the Proposed Sale of PSE’s Share of the Centralia Power Plant and Associated Transmission Facilities, and (2) Authorization to Amortize Gain over a Five-Year Period* (October 14, 1999).

² Order of Consolidation; Prehearing Conference Order, *Avista/PacifiCorp/PSE Applications to Sell Centralia Power Plant*, Docket Nos. UE-991255, UE-991262 and UE-991409 (November 23, 1999).

3 On January 28, 2000, the Commission gave notice that it would enter a declaratory order or provide notice that it will not enter a declaratory order and state the reasons for that action by March 21, 2000.

4 The Commission entered a final order in the consolidated application cases on March 6, 2000.³ The Commission found in Finding of Fact 25 in the Centralia order:

Allowing TECWA, Inc. to purchase and operate the Centralia Facilities as an EWG will benefit consumers and is in the public interest. Under these conditions, allowing the purchaser to operate the Centralia Facilities as an EWG would not violate state law.

5 The Commission concluded in Conclusion of Law 9 in the Centralia order:

Under, 15 U.S.C. § 79z-5a(c), the proposed transaction allowing the Centralia Facilities to be a wholesale facility operated by an EWG: (1) will benefit consumers; (2) is in the public interest; and (3) does not violate state law.

B. FACTUAL FOUNDATION

6 The petitioner asks us to base our declaration of the law on the factual allegations included in this section.

7 Petitioner is TECWA, a Washington corporation which is a wholly-owned subsidiary of TransAlta Corporation, a Canadian federal corporation. Petitioner is the contract purchaser of the Centralia Generating Plant pursuant to that certain Centralia Plant Purchase and Sale Agreement (“PSA”) dated May 6, 1999, by and among Petitioner as the “Buyer,” and PacifiCorp, PSE, Avista, Public Utility District (“PUD”) No. 1 of Snohomish County, PUD No. 1 of Grays Harbor County, the City of Seattle, the City of Tacoma and Portland General Electric Company, as the “Sellers.” The plant and associated transmission lines connecting the plant to the electric power grid of the Pacific Northwest are collectively referred to as the “Electric Facilities.”

8 Under the terms of the purchase contract, Petitioner will acquire the Electric Facilities by acquiring TransAlta Centralia Generation LLC (“the LLC”), a Washington limited liability company, which, at time of closing, will own the Electric Facilities.

9 Petitioner intends to have the LLC own and sell power from the Electric Facilities as an EWG under Section 32 of the federal Public Utility Holding Company Act of 1935, as amended, 15 USC § 79z-5a. Toward that end, PacifiCorp, Avista, and PSE have each procured a determination from the Commission satisfying Section 32 eligibility conditions that allowing the Electric Facilities “to be an eligible facility (1) will benefit consumers; (2) is in the public interest; and (3) does not violate state law.”

³ Second Supplemental Order, *Avista/Pacificorp/PSE Applications to Sell Centralia Power Plant*, Docket Nos. UE-991255, UE-991262 and UE-991409 (March 6, 2000). Hereinafter *Centralia*.

- 10 As the facility eligibility requirements are satisfied, the LLC will then apply to the Federal Energy Regulatory Commission (“FERC”) for an order (or orders, as it deems appropriate) certifying it as an exempt wholesale generator. In order to obtain this approval, by the terms of Section 32, the LLC must certify to the FERC that it is “engaged . . . exclusively in the business of . . . selling electricity at wholesale [from an eligible facility].”⁴
- 11 Upon closing (and as a condition of closing under the PSA), the LLC will be authorized by FERC to own the Electric Facilities as an “eligible facility” and to sell the electricity generated and transmitted therefrom as an EWG exclusively at wholesale. The rates, terms and conditions of such wholesale sales are subject to FERC review pursuant to Section 205 of the Federal Power Act, 16 USC § 824d. Petitioner will control the Electric Facilities by virtue of owning a controlling interest in the LLC. Petitioner wishes to issue securities and enter into debt agreements on behalf of the LLC and to sell, encumber or otherwise transfer interests in the LLC, in whole or in part, free from regulation of the LLC by the Commission as a public service company, so long as the LLC is an EWG.

C. COMMISSION DECISION

- 12 This Petition is filed pursuant to RCW 34.05.240 and WAC 480-09-230 for a declaratory order that the LLC, under the circumstances pleaded, will not be subject to regulation as a public service company by the Commission. Under those circumstances, the LLC will be authorized by FERC to own the Electric Facilities as an “eligible facility” and to sell the electricity generated and transmitted therefrom as an EWG exclusively at wholesale. The rates, terms and conditions of such wholesale sales are subject to FERC review pursuant to Section 205 of the Federal Power Act, 16 USC § 824d.
- 13 The Commission has already determined in the Centralia order that, under, 15 U.S.C. § 79z-5a(c), the proposed transaction allowing the Centralia Facilities to be a wholesale facility operated by an EWG: (1) will benefit consumers; (2) is in the public interest; and (3) does not violate state law.
- 14 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-5(a)(2)(A); 16 U.S.C. § 824(d). TransAlta Centralia’s wholesale sales will be subject to rate regulation by the FERC⁵. Commission jurisdiction is therefore preempted by the Federal Power Act, which

⁴ On January 13, 2000, the FERC approved the sale to TECWA. *Pacificorp*, 90 F.E.R.C. ¶ 62,018 (2000).

⁵ On December 16, 1999, the FERC approved TransAlta Centralia’s market-based rates to be charged after the sale closes. *Allegheny Energy Unit 1 and Unit 2, LLC*, 89 FERC ¶ 61,272 (1999).

provides exclusive authority to the FERC to regulate the rates for wholesale sales of electric energy.⁶ The Commission judged the propriety of this outcome when we found that the proposed transaction allowing the Centralia Facilities to be a wholesale facility operated by an EWG: (1) will benefit consumers; (2) is in the public interest; and (3) does not violate state law. It is an appropriate outcome for this facility.

15 Finally, the Petitioner has asked us to determine that if the Commission has jurisdiction over TransAlta Centralia, that jurisdiction should be limited to matters of public safety. Also, Local 612 has told the Commission that it supports this petition insofar as it seeks a declaratory order limiting the Commission's regulation of TransAlta Centralia Generation LLC to matters affecting public safety. The issue of Commission electric jurisdiction is, however, an all or nothing matter. This contrasts with our regulation of natural gas where the Commission has safety jurisdiction over companies that transport gas but are not otherwise public service companies. 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 the FERC. 15 U.S.C. § 79z-5a(h). The Commission concludes, based on the facts stated in the Petition for Declaratory Order, that it does not have jurisdiction over the operations of TransAlta Centralia should the sale of the Electric Facilities close.

D. ORDER

16 THE COMMISSION DECLARES That TransAlta Centralia Generation is exempt from regulation in the state of Washington as a public service company.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DATED at Olympia, Washington and effective this 16th day of March 2000.


MARILYN SHOWALTER, Chairwoman


RICHARD HEMSTAD, Commissioner


WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES: This is a final Order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this Order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

⁶ *Mississippi Power & Light Co. v. Mississippi ex rel Moore*, 487 U.S. 354 (1988).