

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

In the Matter of the Application of )	
Avista Corporation for a Ruling )	DOCKET NO. UE-000080
On the Regulatory Treatment of the )	
Gain on the Proposed Sale of the )	
2.5% Share of the Centralia Power )	INDUSTRIAL CUSTOMERS
Plant Acquired by Avista )	OF NORTHWEST UTILITIES
Corporation From Portland General )	OPENING BRIEF
Electric to be Sold to TECWA )	
Power, Inc. )	
_____ )	

On January 21, 2000, Avista Corporation (“Avista”) filed an application (“Application”) with the Washington Utilities and Transportation Commission (“WUTC” or “Commission”), which requested that the Commission issue a ruling regarding the regulatory treatment of the gain from the sale of its recently acquired 2.5% share of the Centralia Power Project (“Centralia”). Pursuant to the Prehearing Conference Order, dated February 11, 2000, the Industrial Customers of Northwest Utilities (“ICNU”) submits this Opening Brief.

ICNU opposes Avista’s attempt to obtain extraordinary treatment of the gain from the sale of 2.5% of its 17.5% share of Centralia. The WUTC has jurisdiction over Avista’s proposed sale of any portion of its ownership share of Centralia. The Commission should treat the gain resulting from the sale of Avista’s newly acquired 2.5% interest in Centralia in the same manner as it treats Avista’s gain from the sale of its 15% share of Centralia in Docket No. UE-991255. Accordingly, the entire gain from the sale of all of Avista’s interest in Centralia

should be allocated to ratepayers.

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## BACKGROUND

Avista purchased Portland General Electric's ("PGE") 2.5% undivided share of Centralia, effective December 31, 1999. Docket No. UE-000080, Stipulation of Facts, dated February 10, 2000 ("Stipulation") at 3. Avista's purchase from PGE gives the company an undivided ownership interest in Centralia of 17.5%. Id. at 2. Along with the other co-owners, Avista plans to sell its entire interest in the Centralia to TECWA Power, Inc. ("TECWA"). Id. at 2-3. TECWA is a Washington-based subsidiary of Trans Alta Corporation located in Calgary, Alberta. Id. at 2.

On August 6, 1999, Avista filed an "Application To Sell the Centralia Power Plant," in Docket No. UE-991255. The August 6 Application "[did] not seek approval for the sale of the share of Centralia that Avista acquired from PGE," based on the fact that the "2.5% share has never been a part of Avista's ratebase and/or its jurisdictional facilities." Re Avista Corp., WUTC Docket No. UE-991255, Application to Sell the Centralia Power Plant at 3.

On January 21, 2000, Avista filed its Application in this Docket requesting a ruling on the regulatory treatment of the gain from its sale to TECWA of the 2.5% share of Centralia that Avista purchased from PGE. If the TECWA sale proceeds as planned, Avista's net gain from the sale of the 2.5% interest alone will be approximately \$4.28 million. Stipulation at 4. Moreover, Avista claims that "if the Commission should determine that approval of the sale of the 2.5% share to TECWA by Avista is necessary, then . . . the Commission [should] approve the sale and assign the gain related to the 2.5% share to [Avista's] shareholders." Application

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at 4.

### **ISSUES PRESENTED**

1. Does the Commission have jurisdiction to approve Avista's sale of the 2.5% share of Centralia that it acquired from PGE?
2. If the Commission has jurisdiction over the sale, how should the \$4.28 million gain from the sale be allocated among shareholders and customers?

Avista's jurisdictional arguments and proposed allocation of the gain are without merit. The Commission should exercise jurisdiction over the transaction and allocate all of the gain to customers.

### **ARGUMENT**

#### **A. The Commission Has Jurisdiction Over The Application**

Avista argues that its sale of the 2.5% share of Centralia is not subject to the Commission's jurisdiction, because "that share has never been part of Avista's ratebase and/or its jurisdictional facilities." Letter from Thomas D. Dukich to the WUTC, dated January 21, 2000 ("Dukich Letter"). The Commission should reject Avista's jurisdictional arguments because the 2.5% share of Centralia is utility property, the sale of which is subject to the Commission's jurisdiction.

The Washington Legislature has delegated broad authority to the Commission to regulate public utilities, including electric companies. Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wash.2d 656, 666, 911 P.2d 1301, 1306 (1996). Washington law requires the Commission to:

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Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to, electrical companies . . .

RCW 80.01.040(3)

Further, the Commission “is charged with administering pervasive regulatory schemes that affect almost every phase of the activity of the businesses under its authority.” Tanner, 128 Wash.2d at 682, 911 P.2d at 1314. The Commission’s mandate to protect the public interest is, therefore, limited not by form, but by substance; *i.e.*, if the utility’s proposed action may negatively impact the public interest, then the Commission has broad authority to regulate it. *See Re PacifiCorp and Scottish Power*, WUTC Docket No. UE-981627, Second Supplemental Order at 8-9 (Mar. 16, 1999) (foreign utility’s failure to as yet acquire a controlling interest in the stock of the regulated company did not preclude the WUTC from asserting jurisdiction over it when future rates could be adversely impacted); *see also US West Comm’n, Inc. v. WUTC*, 134 Wash.2d 74, 102-103, 949 P.2d 1337, 1351-52 (1997) (Commission has authority to impute classified advertising revenue of unregulated affiliate to carrier in determining rates).

The Commission must assert jurisdiction over Avista’s proposed sale of the 2.5% share of Centralia in order to protect the public interest. Avista is an investor-owned public utility engaged in the business of supplying electric power within the state of Washington. Application at 2. Under RCW 80.12.020, a public utility must obtain the approval of the Commission in order to sell any “property or facilities whatsoever, which are necessary or useful

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in the performance of its duties to the public.” RCW 80.12.020; WAC 480-143-120. The Commission must deny any application for the sale of utility property that is not consistent with the public interest. WAC 480-143-170.

RCW 80.12.020 applies to the sale of the 2.5% share of Centralia, due to the fact that Centralia is “useful” to Avista’s function as a public utility in Washington. The Washington Supreme Court has defined the term “useful”, as used in the public utility statutes, as meaning “capable of being put to use for service in Washington.” People’s Org. for Wash. Energy Resources v. WUTC, 101 Wash.2d 425, 430, 679 P.2d 922, 925 (1984). By this standard, the 2.5% share of Centralia is useful because, absent the sale of Centralia, it can be put to use to serve customers.

Avista chose to purchase the 2.5% share as a utility, and not through an affiliate. Accordingly, Avista’s sale of any portion of Centralia is subject to the Commission’s jurisdiction. Mr. Ely’s testimony at hearing is instructive on this point.

Q: Is the sale from PG and E [sic] going to Avista, or is it going to a subsidiary of Avista.

A. It’s not going to a subsidiary. It’s going to Avista Corps [sic].

Q: Which is not the regulated portion of Avista; is that correct?

A. Technically it is. Technically, Avista Corps [sic] is the utility, because under the Public Utility Holding company Act, we cannot have subsidiaries holding utility property.

UE-991255, Tr. at 216-217. Mr. Ely admits that the 2.5% share of Centralia constitutes utility

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property, and that is being directly held by the regulated utility. As such, the sale of this utility property is subject to the Commission's jurisdiction.

**B. The \$4.28 Million Gain From the Sale of Avista's 2.5% Interest in Centralia Should Be Awarded to Shareholders**

In Docket No. UE-991255, ICNU and Staff both argued that all of the gain from the sale of Avista's share of Centralia should be awarded to customers because: 1) customer's bore the risk of Centralia; and 2) allocating the gain to customers was necessary to offset the risk of higher future power costs. UE-991255, ICNU Post Hearing Brief at 8-10; UE-991255, Brief of Commission Staff at 5. Rather than repeat those arguments, ICNU incorporates by reference the arguments made in the briefs in Docket No. UE-991255.

Avista, in its role as a regulated utility service provider, acquired PGE's 2.5% share of Centralia. Application at 4. Since Avista is seeking approval to divest itself of all of its interest in Centralia in Docket No. UE-991255, it should not be permitted to segregate portions of its ownership share of Centralia for different regulatory treatment. Therefore, the Commission should apply the same allocation of gain to the 2.5% share of Centralia that it applies to Avista's sale of its 15% share of Centralia in Docket UE-991255.

The gain from the sale of the 2.5% share of Centralia should be allocated to ratepayers for the following reasons:

1. Allocation of the gain to ratepayers is necessary to offset the risk of increased power costs resulting from the sale of Centralia. UE-991255, Ex. T-400, Elgin Direct at 13:12-17.
2. Allocation of the gain to ratepayers would create an inappropriate

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incentive for a utility to leverage utility assets to obtain shareholder gain.

3. Unless the gain is allocated to customers, the sale would not be in the public interest. UE-991255, Brief of Commission Staff at 10.
4. Ratepayers have borne the risk of Avista's 15% share of Centralia, which made the purchase of the 2.5% share possible. Therefore, as a matter of equity, ratepayers should receive the gain.

Two of these reasons deserve further explanation. First, ratepayers should receive the gain because the gain was created by virtue of Avista's underlying ownership of Centralia. That ownership position gave Avista access to information, unavailable to the general public, which permitted Avista to purchase PGE's 2.5% share at book value. The \$4.28 million gain on the sale indicates that book value was substantially below market. Since ratepayers bore the risk on the assets that made the purchase of the asset possible, ratepayers should receive the benefits of the sale. Furthermore, if this sale is not completed to TECWA, Avista probably will seek to put its 2.5% share of Centralia in rate base and treat it in the same manner as its 15% share of Centralia. At the hearing, Mr. Ely admitted that this was a distinct possibility. UE-991255, Tr. at 217-218.

Second, the gain should be allocated to customers because regulated assets should not be commingled with unregulated assets. To allow a utility to own an undivided interest in a generating plant and treat part of the interest as regulated and part of the interest as unregulated would create undesirable opportunities for self-dealing. For example, a sale of the asset could be structured such that most of the gain was attributable to the unregulated assets. In the past, the Commission has exercised its regulatory authority to prevent potential self-dealing where utility



property is sold to an unregulated affiliate. WUTC v. Puget Sound Power and Light (Cause No. 85-53), 74 P.U.R. 4th 536 (May 16, 1986).

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## CONCLUSION

When Avista elected to purchase utility property, that property became subject to the Commission's jurisdiction. Arguably, Avista could have avoided the Commission's jurisdiction if Avista had transferred the 2.5% share to a non-regulated affiliate. However, since Avista elected to treat the 2.5% share of Centralia as a utility asset, the proposed sale, as well as the proposed allocation of the gain must be in the public interest.

The Commission should exercise jurisdiction over this sale and deny Avista's proposal to distribute the \$4.28 million gain to shareholders. Moreover, the Commission should treat the gain in the same manner as the gain for all of the companies who are selling their interest in Centralia. As a result, the gain should be credited to ratepayers in Avista's pending rate case.

DATED this 25th day of February, 2000.

Respectfully submitted

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