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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of)	
)	
AVISTA CORPORATION)	DOCKET NO. UE-000080
)	
For a Ruling on the Regulatory Treatment)	
of the Gain on the Proposed Sale of the)	BRIEF OF AVISTA CORPORATION
2.5% Share of the Centralia Power Plant)	
Acquired by Avista Corporation from)	
Portland General Electric to be Sold to)	
TECWA Power, Inc.)	
_____)	

I. INTRODUCTION

In this proceeding Avista Corporation ("Avista" or "Company") requests that the Commission issue a ruling on the regulatory treatment of the gain on the proposed sale of the Company's 2.5% share of the Centralia Power Plant ("Plant"). This 2.5% share of the Plant was acquired by Avista from Portland General Electric ("PGE") on December 31, 1999, and the Company has contracted to sell this 2.5% share to TECWA Power, Inc. ("TECWA") contemporaneously with the sale of the Company's original 15% share of the Plant. TECWA is a Washington corporation and a subsidiary of TransAlta Corporation, headquartered in Calgary, Alberta, Canada.

The Company's Brief is organized as follows: First, the Brief provides an overview of Avista's recent purchase of the 2.5% share of the Plant from PGE, including an explanation of how

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this 2.5% share of the Plant is being operated pending the sale to TECWA. Secondly, the Brief outlines why the Company believes that chapter 80.12 RCW, the statutory provisions requiring a utility to obtain an order from the Commission for the sale of facilities, is not applicable to the sale

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of the 2.5% share of the Plant. Finally, with respect to the gain of approximately \$4.28 million related to the sale of the 2.5% share, the Brief explains why Avista believes that the record supports a decision by the Commission to assign the gain exclusively to the Company's shareholders. The asset at issue has not been "necessary or useful" by Avista in any way in "the performance of its duties" to its customers.

II. OVERVIEW OF THE TRANSACTION

A. Purchase by Avista of PGE 's 2.5% Share of the Centralia Power Plant

In an agreement dated May 5, 1999, Avista agreed to purchase the 2.5% share of the Centralia Power Plant owned by PGE. (Stipulation of Facts, ¶ 5 & Ex. C). The reasons for PGE's decision to sell its share of the Plant to Avista were provided in the sales agreement as follows: "PGE wishes to avoid (1) investment in the emission control equipment and (2) the risk of not recovering such investment in the event the sale to TECWA does not close." (Stipulation of Facts, Ex. C, p. 1). PGE was not willing to proceed with the sale to TECWA because of its concern over recovery of the costs associated with the installation of emission control equipment. Thus, in order for the sale of the entire plant to TECWA to proceed, Avista agreed to purchase PGE's 2.5% share. Avista purchased the 2.5% share with the intention to immediately resell that portion of the plant to TECWA.

On May 6, 1999, the day following Avista's agreement to purchase the PGE portion of the Plant, Avista and the other co-owners of the Centralia Power Plant executed an agreement ("TECWA Agreement") to sell the Centralia Power Plant to TECWA. (Stipulation of Facts, ¶ 3 & Ex. A). The TECWA Agreement provides that "[t]he parties are aware that PGE has entered into an agreement to sell its 2.5% interest to Avista." (Stipulation of Facts, Ex. A, § 15.1). The TECWA Agreement further provides that upon closing of the sale of PGE's interest to Avista, "the

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parties to this Agreement shall thereafter look to Avista as the Seller with respect to said 2.5% interest." (Id.).

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The eight co-owners of the Centralia Power Plant and their respective ownership interests, prior to the sale by PGE to Avista, were as follows:

<u>Company</u>	<u>% Ownership</u>	<u>Company</u>	<u>% Ownership</u>
Pacificorp	47.5%	Snohomish PUD	8.0%
Avista Corp	15.0%	Puget Sound Energy	7.0%
City of Seattle	8.0%	Grays Harbor PUD	4.0%
City of Tacoma	8.0%	Portland General Electric	2.5%

On June 3, 1999, PGE filed an application with the Oregon Public Utilities Commission ("Oregon Commission") seeking approval to sell its 2.5% share to Avista. (Stipulation of Facts, ¶ 6 & Ex. D). On August 19, 1999, PGE filed a second application with the Oregon Commission seeking approval for the sale of its 2.5% share to TECWA in the event that the Oregon Commission did not approve the sale to Avista. (Stipulation of Facts, ¶ 6 & Ex. E). On November 29, 1999, the Oregon Commission issued an order rejecting the proposed sale by PGE to TECWA, and approving the proposed sale to Avista. (Stipulation of Facts, ¶ 6 & Ex. F).

Additionally, on October 12, 1999, PGE filed an application with the Federal Energy Regulatory Commission ("FERC") for approval to sell its share of any FERC jurisdictional facilities associated with the Centralia Power Plant to Avista. (Stipulation of Facts, ¶ 7 & Ex. G). On December 20, 1999, FERC issued an order approving PGE's sale to Avista. (Stipulation of Facts, ¶ 7 & Ex. H).

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On November 1, 1999, the Centralia co-owners filed a joint application with FERC for approval to sell their respective ownership shares of Centralia to TECWA. On January 13, 2000, FERC issued an order approving the sale of the Centralia Power Plant to TECWA, including approval of Avista's sale of the 2.5% share purchased from PGE. (Stipulation of Facts, ¶ 3 & Ex. B).

On December 31, 1999, the ownership of PGE's 2.5% share of the Centralia Power Plant was transferred to Avista. Avista agreed to assume PGE ' s contracts pertaining to the Centralia Power Plant under an Assignment and Assumption Agreement. (Stipulation of Facts, ¶ 8 & Ex. I).

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To date, Avista has paid \$3.5 million to PGE related to the purchase of the 2.5% share of the Centralia plant and has accounted for this payment as non-utility property in Account No. 121. The payment related to the 2.5% share of the Centralia Plant is not recorded as plant in service and is not included in the Company's results of operations calculations. The Avista/PGE sale agreement also requires Avista to make a second payment to PGE in the amount of \$1.1 million conditioned on the closing of the sale of the entire Centralia Power Plant to TECWA.

B. Treatment of the 2.5% Share of Centralia Pending the Sale to TECWA

After the closing of the sale of its 2.5% share to Avista, PGE agreed to retain the entire electric power output from the 2.5% share of the Plant pending the closing of the sale to TECWA. (Stipulation of Facts, ¶ 9 & Ex. J). This Assignment of the Generation Output of the 2.5% share of the Plant from Avista to PGE was filed with, and approved by FERC, effective December 31, 1999. (Stipulation of Fact, ¶ 9 & Ex. K).

Under this assignment agreement, PGE continues to make all dispatch decisions related to this portion of the Plant and receives all of the power output associated with the 2.5% share. (Stipulation of Facts, ¶ 9 & Ex. J). Avista has not, and will not, receive any of the power output associated with the 2.5% share pending the sale to TECWA, and therefore, Avista has not used any of the output from this portion of the Plant to serve its customers. PGE is paying for the fuel and operation and maintenance expenses associated with the 2.5% share pursuant to the Assignment Agreement. Accordingly, none of the ownership or operating costs are being charged to Avista's customers and none of the costs are reflected in Avista's results of operations.

III. THE COMMISSION'S JURISDICTION

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The authority of the Commission to regulate practices of utilities under chapter 80.01 RCW does not require Avista to seek prior approval from the Commission for the Company's proposed sale of PGE's 2.5% share of the Plant. The transfer of property is addressed in a separate chapter of the Washington Code, chapter 80.12 RCW. Specifically, RCW 80.12.020 and 80.12.040 establish conditions under which prior approval from the Commission is required for the purchase and sale of property. In this regard, Staff has misinterpreted Avista's position on the issue of Commission jurisdiction.¹ (See In the Matter of the Avista Corporation for Authority to Sell Its Interest in the Coal-Fired Centralia Power Plant, Docket No. UE-991255, Brief of Commission Staff, pp. 32-33 (January 28, 2000)). Avista has not sought prior approval of this sale because Avista believes that these statutes do not apply to the purchase or sale of this property under the facts of this case. Moreover, the cases cited by Staff are distinguishable from the facts here. (Id. at 33).

RCW 80.12.020 is the statute requiring a utility to obtain prior approval from the Commission for the sale of its facilities "which are necessary or useful in the performance of its duties to the public." However, a careful examination of this statute, together with prior Commission decisions related to utility "plant in service," "rate base," and "used and useful" property, will show that, for this particular transaction, the asset at issue has not been "necessary or useful" in any way in "the performance of its duties" to its customers, and an order from the Commission should not be required for the Company to make the sale. The statute provides, in pertinent part:

¹ Staff also notes that "the PGE Acquisition was made by Avista Corporation as the utility." (See In the Matter of the Avista Corporation for Authority to Sell Its Interest in the Coal-Fired Centralia Power Plant, Docket No. UE-991255, Brief of Commission Staff, p. 33 (January 28, 2000)). The purchase of PGE's 2.5% share of the Plant via an Avista subsidiary would have subjected Avista to regulation under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 –79z-6 ("PUHCA").

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No public service company shall sell . . . properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public . . . without having secured from the commission an order authorizing it so to do.

RCW 80.12.020 (emphasis added). Whether the 2.5% share of the Plant is viewed from either an actual use or financial perspective, this portion of the Plant is not "necessary or useful" in any way by Avista in "the performance of its duties" to its customers.

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First, from the actual use perspective, Avista is not receiving any of the power from the 2.5% share of the Plant, pending the sale to TECWA. PGE continues to make all dispatch decisions related to this portion of the Plant and receives all of the power output. Thus, Avista has not used any of the output from this portion of the Plant in "the performance of its duties" to its customers. Furthermore, the 2.5% share of Centralia is not "necessary" in Avista's performance of its duties to its customers. The Company has continued to serve its customers' loads, subsequent to the purchase of the 2.5% share of the Plant, without any of the output from that portion of the Plant.

From a financial perspective, Avista has accounted for the payment to PGE for the purchase of the 2.5% share of the Plant as non-utility property in Account 121. The definition of Account 121 Non-utility Property in the FERC Uniform System of Accounts is as follows:

This account shall include the book cost of land, structures, equipment, or other tangible or intangible property owned by the utility, but not used in utility service and not properly includible in account 105, Electric Plant Held for Future Use. (emphasis added).

The 2.5% share of the Plant has been properly accounted for in Account 121. The Plant is not used in utility service and is not being held for future use. Furthermore, PGE is paying for the fuel costs and operation and maintenance expenses associated with the 2.5% share until the sale of the Plant to TECWA closes. Therefore, none of the ownership or operating costs are being charged to Avista's customers and none of the costs are included in the Company's results of operations calculations.

In fact, the 2.5% share of the Plant was never intended to be used to serve Avista's customers. Avista signed an agreement to purchase the PGE portion of the Plant on May 5, 1999, with the full intention to resell it to TECWA. On the following day, May 6, 1999, Avista signed the TECWA Agreement to sell the 2.5% share to TECWA along with its original 15% share of the Plant.

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Furthermore, it would be improper for Avista to account for the 2.5% share of the Plant in Account 101, Electric Plant in Service. The definition of Account 101 Electric Plant in Service in the FERC Uniform System of Accounts is as follows:

This account shall include the original cost of electric plant, included in accounts 301 to 399, prescribed herein, owned and used by the utility in its electric utility operations . . . (emphasis added).

While the 2.5% share of the Plant is owned by Avista, it is undisputed that the 2.5% share of the Plant is not used by Avista in its electric utility operations and therefore does not meet the test of being owned and used. This asset is clearly different than other assets owned by the Company that are being used to serve its customers as is the original 15% share of the Plant that is included in Avista 's rate base.

Prior decisions by the Commission support the conclusion that the 2.5% share of the Plant is not necessary or useful. For example, the Commission has found that "[r]ate base is the company's net plant in service which is used and useful to the ratepayers at any given point in time." (WUTC v. Washington Water Power Co., Docket No. U-88-2380-T, Third Supplemental Order, p. 8 (Oct. 19, 1989)). The investment at issue in Docket No. U-88-2380-T was the Company's investment in a new natural gas pipeline lateral with Pacific Gas Transmission (PGT), which had resulted in a major reduction of natural gas costs to the Company. The new PGT lateral was being used by the Company to serve customers, but had not yet been addressed in a rate case to include the investment in rate base. The Commission deemed that the Company's investment in the PGT lateral was included in rate base through its determination that, "[t]he PGT lateral was transferred to 'plant in service' as of December 1986, and was included in the company's calculations of its return on rate base from that point onward." (Id.).

In the case of the Company's investment in the 2.5% share of the Plant, the investment is not

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included in "net plant in service," is not included in "the Company's calculations of its return on rate base," and is not "used and useful to ratepayers." The 2.5% share of the Plant is not being used in any way to serve customers and should not be deemed in any way to be a part of rate base. If the sale to TECWA does not occur and the Company were to propose that the 2.5% share of the plant be used to serve Avista's retail customers, we would expect the Commission to examine the prudence of this portion of the plant prior to allowing it into rate base.

In the Commission's order in Docket No. U-86-02, related to PacifiCorp's proposal to include the Wyodak Scrubbers in rate base, the Commission determined that "[u]ntil the plant is placed in service, it does not belong in rates." (WUTC v. Pacific Power & Light Co., Docket No. U-86-02, Second Supplemental Order, p. 24 (Sept. 1986)). Again, with regard to Avista's 2.5% share of the Plant, this share was not purchased by Avista with the intent to serve Avista's customers and, in fact, has not been used in any way to serve Avista's customers. None of the costs of the Plant have been charged to Avista's customers or included in results of operations calculation, and therefore, the 2.5% share of the Plant should not be considered to be "necessary or useful," for which an order from the Commission would be required for the sale to occur.

Therefore, with respect to RCW 80.12.020, the Company's 2.5% share of the Plant is not included in net plant in service, is not included in the Company's results of operations calculations, is not used and useful, and is not necessary in Avista's performance of its duties to its customers. Thus, the Company believes that RCW 80.12.020 is not applicable in this instance and that an order from the Commission is not required under this statute for the Company sell this portion of the Plant.

With regard to RCW 80.12.040, no prior approval of the acquisition or sale of the 2.5% share is required, because there is no transaction with another public service corporation whose rates are regulated in Washington, unless the Commission declares TECWA to be a public service

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corporation, in which case the closing would not occur in any event.²

² TECWA intends to seek FERC approval to own and operate the Centralia Plant as an Exempt Wholesale Generator (EWG) pursuant to 15 U.S.C. § 79z-5a. On October 15, 1999, the Commission issued an order granting Avista's request that Centralia be eligible to be a wholesale facility operated by an EWG. (In the Matter of the Application of Avista Corporation for Authority to Sell its Interest in the Coal-Fired Centralia Power Plant, Docket No. UE-991255, Order Re: Exempt Wholesale Generator Status (October 14, 1999)). See also TECWA Application for a Declaratory Order before this Commission in Docket No. UE-991993.

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Staff has suggested that the Commission has jurisdiction to require Avista to obtain approval prior to the sale citing as authority two recent Commission decisions: GTE-Bell Atlantic, Docket No. UT-981367 and Scottish Power, Docket No. UE-991627. (In the Matter of the Avista Corporation for Authority to Sell Its Interest in the Coal-Fired Centralia Power Plant, Docket No. UE-991255, Brief of Commission Staff, p. 33 (January 28, 2000)). However, neither of these decisions is dispositive on the issues here. For example, in Scottish Power, the issue was whether the Commission had jurisdiction over PacifiCorp 's planned merger with Scottish Power PLC. (In the Matter of the Application of PacifiCorp and Scottish Power PLC, Docket No. UE-981627, Second Supplemental Order: Commission Decision and Order Regarding Jurisdiction (March 1999)) (Scottish Power Order). In Scottish Power, PacifiCorp and Scottish Power agreed to a merger in which Scottish Power would acquire indirect ownership and control of PaficiCorp through an exchange of stock. (Id. at 2-3). The Commission noted that:

. . . the legal and practical results of the proposed transaction include transferring to Scottish Power ownership and control of . . . PacifiCorp 's facilities and properties, including those facilities and properties necessary and useful to PacifiCorp 's performance of its duties as a public utility.

(Id. at 3). The Commission held it had jurisdiction "whenever the control of a plainly jurisdictional public utility changes through a corporate transaction for the transfer of the whole or a controlling interest in the company." (Id. at 9). Thus, there was never a question that the facilities and property being transferred were "necessary or useful" to the company 's public duties as a utility. The Commission reached a similar result for similar reasons in GTE-Bell Atlantic. (In the Matter of the Application of GTE Corporation and Bell Atlantic Corporation for an Order Disclaiming Jurisdiction or, in the Alternative, Approving the Merger, Docket No. UT-981367 Fourth Supplemental Order Approving and Adopting Settlement Agreement, Granting Application, Subject to Conditions

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((December, 1999)) (GTE-Bell Atlantic). Thus, the "merger cases" relied upon by Staff are distinguishable from the facts here. The asset at issue in this proceeding has not been "necessary or useful" by Avista in any way in "the performance of its duties" to its customers.

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If the Commission should determine that approval of the sale of the 2.5% share of the Plant to TECWA by Avista is necessary, the Company requests that the Commission issue an order approving Avista's sale of the 2.5% share to TECWA.

IV. ASSIGNMENT OF THE GAIN TO SHAREHOLDERS

If the sale to TECWA occurs as contemplated by the TECWA Agreement, there will be a net gain realized by Avista of approximately \$4.28 million dollars for Avista's 2.5% share of the Plant. Avista believes that the entire amount of the gain associated with the sale of the 2.5% share should accrue only to shareholders and that no allocation of the gain should be made to customers.

While there was much debate in the Centralia Sale Docket as to the appropriate disposition of the gain related to the sale of the Company's 15% share of Centralia that has been used to serve customers, it should be even more clear in this case that the gain related to the sale of the 2.5% share should be assigned to shareholders.

The gain should be assigned to shareholders for at least the reasons provided below. Because some of the reasons have been explained in detail earlier in this Brief, those reasons will be identified here with only a brief description to spare the reader from having to read the same discussion again.

1. The 2.5% share was purchased by Avista with the full intention to resell it to TECWA and to retain the gain.
2. The 2.5% share has never been part of Avista's rate base.
3. The 2.5% share is not included in plant in service.
4. The 2.5% share is not included in the Company's results of operations calculations.
5. Customers have paid no depreciation related to the Company's investment in this portion of the Plant.

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6. Customers have paid no rate of return to the Company related to its investment in this portion of the Plant.
7. PGE continues to make all dispatch decisions and continues to receive all of the energy from the 2.5% share, pending the sale to TECWA. Because Avista does not receive any power from the 2.5% share of the Plant, it has not been used in any way to serve Avista's retail customers.
8. PGE is paying for all fuel and operation and maintenance expenses associated with the 2.5% share of the plant. Therefore, the Company's retail customers are paying none of the fixed or variable costs associated with owning and operating the 2.5% share of the plant.
9. The 2.5% share is not "used and useful" and is not "necessary" in Avista's performance of its duties to its customers.
10. Avista placed its own shareholders' capital at risk in the purchase of the 2.5% share of Centralia. If the sale to TECWA does not occur and the Company were to propose that the 2.5% share of the plant be used to serve Avista's retail customers, we would expect the Commission would examine the prudence of this portion of the plant prior to allowing it into rate base. No prudence review has been conducted by the Commission related to Avista's purchase of this portion of the Plant, and therefore, shareholders are at risk for its full investment in this portion of the plant.
11. As the Company explained in its application in this Docket, the Staff of the Idaho Public Utilities Commission has advised the Company that it is Staff's position that the PGE portion of the plant has never been used to serve Idaho's ratepayers and has not been in Idaho ratebase, and that any gain on the sale would accrue to

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shareholders.

12. Other co-owners of the Centralia Project had the same opportunity to put their own capital at risk in purchasing all or a portion of PGE's 2.5% share of the Project. These parties, however, waived their rights of first refusal to purchase this portion of the Project.

For the above reasons, the Company requests that the Commission issue a ruling in this proceeding to assign all of the gain associated with Avista's sale of the 2.5% share of the Plant to shareholders.

V. CONCLUSION

In Avista's application in the Centralia Sale Docket, dated August 6, 1999, the Company stated on page 3, with regard to the purchase of the PGE portion, that: "as that 2.5% share has never been part of Avista's ratebase and/or its jurisdictional facilities, this application does not seek approval for the sale of that share." Thus, the Company's purchase and resale of the 2.5% share of Centralia should not be a new issue for the parties in this case. During the hearings in the Centralia Sale Docket the Commission Staff raised concerns related to whether the 2.5% share constituted "jurisdictional" facilities, but did not address this issue in its written testimony.

It is important that the Company be aware of all conditions related to the sale, including any conditions applicable to the 2.5% share acquired from PGE, in making its final decision related to consummation of the sale of Centralia to TECWA. The Company believes that it is necessary in this proceeding to issue a ruling on the regulatory treatment of the gain on the 2.5% share of the Plant.

If the Commission should determine that approval of the sale of the 2.5% share to TECWA by Avista is necessary, the Company requests that the Commission issue an order approving the sale. In any event, the Company requests that the Commission issue a ruling in this proceeding to assign

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all of the gain associated with Avista's sale of the 2.5% share of Centralia to shareholders.

Avista seeks expedited treatment and respectfully requests that the Commission issue its ruling as quickly as possible so that the Company can be in possession of all relevant information regarding the regulatory treatment of the proposed sale of the Centralia Project.

DATED this 25th day of February, 2000

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