

BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION

|                                     |   |                          |
|-------------------------------------|---|--------------------------|
| In the Matter of TECWA Power, Inc., | ) |                          |
|                                     | ) |                          |
| Petitioner,                         | ) | No. _____                |
|                                     | ) |                          |
|                                     | ) | PETITION FOR DECLARATORY |
|                                     | ) | ORDER                    |

Petitioner alleges:

1. Petitioner is TECWA Power, Inc., a Washington corporation, a wholly-owned subsidiary of TransAlta Corporation, a Canadian federal corporation.
  2. Petitioner is the contract purchaser of the Centralia Generating Plant pursuant to that certain Centralia Plant Purchase and Sale Agreement (“PSA”) dated as of May 6, 1999, by and among Petitioner as the “Buyer,” and PacifiCorp, Puget Sound Energy, Inc (“Puget”), Avista Corporation (“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 said plant to the electric power grid of the Pacific Northwest are collectively referred to hereinafter as the “Electric Facilities”.
  3. 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. 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.
- Three of the Sellers (PacifiCorp, Avista and Puget) have included the Electric Facilities as part of their rate-bases in the state of Washington subject to Commission jurisdiction and have, consequently, filed applications with the Commission for approval of the sale. Docket Nos. UE 991262 (PacifiCorp), UE 991255 (Avista) and UE 991409 (Puget) have been assigned to those proceedings. The relevant contract, other factual material, and orders filed in those dockets are hereby incorporated by this reference.
- Petitioner intends to have the LLC own and sell power from the Electric Facilities as an “exempt wholesale

generator” (“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 Puget have each procured a determination from the Commission (subject to subsequent approval of the sale) 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.” *Id.* Exhibits 1-3 attached hereto are copies of said determinations. In like fashion, conditional eligible facility determinations are being sought by the Sellers from each state regulatory commission where some fraction of the Electric Facilities is rate-based. 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].”

6. 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.

7. Relevant Washington state statutes permit the Commission to regulate “public service companies” but do not explicitly address the regulation of an Exempt Wholesale Generator created by federal law:

(a) RCW 80.12.010 defines “public service company”, but the definition is circular and unhelpful: “The term ‘public service company,’ \* \* \*, shall mean every company now or hereafter engaged in business in this state as a public utility and subject to regulation as to rates and service by the Utilities and Transportation Commission \* \* \*.”

(b) RCW 80.04.010 provides a more expansive definition of public service

company:

“Public service company’ includes every electrical company \* \* \*.”

“‘Electrical company’ includes any \* \* \* person \* \* \* operating \* \* \* any electric plant for hire within this state.

“‘Electric plant’ includes all real estate, fixtures and personal property operated \* \* \* to facilitate the generation \* \* \* of electricity for light \* \* \* or power for hire; and any \* \* \* apparatus \* \* \* to be used for the transmission of electricity for light \* \* \* or power”,

but fails to define the key term, “for hire”.

(c) RCW 80.28.120 purports to define “for hire”, by drawing no distinction between wholesale and retail, or between general and selective sales of electricity regulation: “Every \* \* \* electrical company owning, operating or managing a plant or system for the distribution and sale of \* \* \* electricity to the public for hire shall be held to be a public service company as to such plant or system and as to all \* \* \* electricity distributed or furnished therefrom, *whether such \* \* \* electricity be sold wholesale or retail or be distributed wholly to the general public* or in part as surplus \* \* \* to manufacturing or industrial concerns or to other public service companies or municipalities for redistribution \* \* \*” (emphasis added), but this statute was adopted in 1911, long before the Congress enacted Part II of the Federal Power Act in 1935 (governing wholesale energy sales), or the Energy Policy Act of 1992, which added the concept of an EWG. Since its adoption, Part II of the Federal Power Act has been consistently interpreted to preempt state jurisdiction over wholesale sales. *See Mississippi Power & Light Co. v. Mississippi ex rel Moore*, 487 US 354, 371-372 (1988) and *Utah v. FERC*, 691 F2d 444 (10<sup>th</sup> Cir. 1982). And Washington’s Supreme Court has long deemed it necessary for there to be a holding-out to the general public in order to make one a public service company subject to the state’s regulatory regimen. *See Inland Empire Rural Electrification, Inc. v. The Department of Public Service*, 199 Wash 527, 92 P 2d 258 (1939).

8. If the LLC is deemed to be a public service company the regulation could be pervasive.

Numerous sections of the RCW provide that “public service companies” are required to obtain approvals

from, or make filings with, the Commission in connection with various business activities. *See* RCW 80.12.020 (Commission order required to transfer any part of “necessary or useful” facilities); RCW 80.040.080 (requirement to file annual reports); RCW 80.04.130 and .150 (rate charges subject to regulation); RCW 80.04.280-.380 (regulation of stock sales to employees, budgets, and depreciation reserves); RCW 80.04.520 (regulation of leaseholds); RCW Ch. 80.08 (regulation of securities); RCW Ch. 80.16 (regulation of affiliated interests); RCW 80.24 (imposition of regulatory fees); RCW Ch. 80.28 (imposition of duties with regard to rates and service).

9. None of the foregoing provisions specifically addresses the regulatory status of an entity that owns and operates a federally certified wholesale generating facility and which makes exclusively wholesale sales from such facility to a select clientele. Thus, as required by RCW 34.05.240(1):

(a) An uncertainty necessitating resolution exists, in that the foregoing statutes do not clearly state whether or not an EWG is subject to regulation by the Commission;

There is an actual controversy because there is conflict between federal and state law if the LLC is found to be subject to pervasive state regulation. The Federal Power Act assigns exclusive control of wholesale sales by an exempt wholesale generator to the Federal Energy Regulatory Commission, while the Washington code submits a public service company to intense scrutiny by, and obligation to, the state Utilities and Transportation Commission;

The uncertainty of the question adversely affects Petitioner because of the additional financial risk which state regulation of the LLC would impose on petitioner’s fiscal operation of the Electric Facilities. (One code provision for example, RCW 80.08.040, would render the LLC’s securities potentially unmarketable if not submitted for Commission scrutiny prior to issuance; another, RCW 80.28.020, would submit the LLC’s power–pricing practices to rate control.)

The adverse affect of uncertainty on Petitioner of the question of state regulation outweighs any adverse effect on others or on the general public that may likely arise from the order Petitioner requests, for the reason that the Commission has a device for protecting its jurisdiction – investigation and assertion of jurisdiction under RCW 80.04.015 – should the facts or law change, notwithstanding its order on this petition.

10. The only sales made by the LLC will be wholesale sales. So long as the LLC is an EWG, and is, therefore, engaged exclusively in the business of selling electric energy at wholesale, there will be no cognizable ratepayer benefit to be protected by the Commission's regulation of its business activities.

WHEREFORE, Petitioner prays for an order alternatively which, by virtue of its status as an exempt wholesale generator, as may be determined by the Federal Energy Regulatory Commission under 15 USC § 79z-5a(c) (or successor legislation), and only so long as it is so determined, either (1) exempts TransAlta Centralia Generation LLC from regulation in the state of Washington as a public service company, or (2) limits such regulation to matters affecting public safety or to such other limited regulation as is meted under the circumstances.

DATED: This 21<sup>st</sup> day of December, 1999.

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By \_\_\_\_\_  
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Of Attorneys for Petitioner