Comments of the Renewable Northwest Project
Docket No. UE-061895

Submitted by:
Ann English Gravatt
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The Renewable Northwest Project (RNP) submits these comments in response to the Washington Utilities and Transportation Commission ("WUTC" or "Commission") August 23 notice of the opportunity to submit written comments. These comments are in response to the proposed rules ("proposed rules" or "CR-102") to implement the Energy Independence Act, RCW 19.285, *et seq.*, filed by the WUTC with the Office of the Code Reviser on August 21.

I. Introduction

This is the fourth set of comments filed by RNP in this docket. Given that, we have tried to limit our responses here to the remaining issues we believe the Commission must consider before finalizing its proposed rules.

Due to the concern about the need to finish a rulemaking by the end of 2007, the Commission chose to tightly focus these rules on issues that must be decided this year. We supported that approach, given that there are five years until the renewable standard is in effect. That said, the resulting rules are rather skinny, with a great deal left to a case-by-case consideration by the Commission. While we appreciate brevity, we do think some issues will require future consideration by the Commission, either in a separate policy guidance proceeding, subsequent rulemaking, or an adjudication.

Finally, we appreciate the work by the Commission and the Staff on these rules. We look forward to continuing to work together to implement this significant law in Washington.

II. WAC 480-109-007 Definitions.

A. Annual Retail Revenue Requirement.

The proposed definition of annual retail revenue requirement fails to ensure compliance with the requirement that the utility must be spending 4% of its *annual* retail revenue requirement, in order to trigger the cost cap. We believe that any definition that does not explicitly take into account increases in costs from year to year is not consistent with the law. The law clearly ties the cost cap to an individual year: "A qualifying utility shall be considered in compliance with an **annual** target in RCW 19.285.040(2) for a **given year** if the utility invested four percent of its total **annual** retail revenue

requirement on the incremental costs of eligible renewable resources . . ."[1] The law refers to "annual" meaning the amount changes from year to year. If the intent were to require use of the then-existing retail revenue requirement for a given utility, it would have been unnecessary to add the word "annual."

Obviously, revenue and revenue requirement can increase from year to year due to load growth and other factors that would not necessitate higher rates and the attendant need for a rate revision, but would result in increased revenues to the utility. Foregoing regular review of the revenue requirement could have the perverse effect of allowing a financially healthy, growing utility to rely on a decade old revenue requirement to establish its cost cap. Continuing to rely on a test year sales volume, or other stale data, is not consistent with the "annual" requirement. The proposed rules fail to comply with this annual requirement.

We recognize that there has been a great deal of concern about establishing any definition of revenue requirement that would impact existing Commission practice. We appreciate that concern. In May, we offered an approach that would meet the spirit of the law's requirement that the cost cap be set at 4% of the retail revenue requirement *of a given year* by allowing a proxy for adjustment of the retail revenue requirement based on annual adjustments to the utility's test year sales to reflect changes from the test year to the compliance year. (*See* RNP Comments, May 18, 2007, page 4.) The Commission must ensure that, in reviewing a utility's reliance on the cost cap, that it has computed its revenue requirement as it would be computed for the year in which it relies on the cost cap or a fair proxy based on sales and costs for that year.

We request that the Commission adopt one of the alternatives we proposed in our May comments. *Id*. In the alternative, the Commission should delete the definition from the proposed rules and initiate a subsequent proceeding to address this issue, as well as potentially other issues related to the "cost cap" in RCW 19.285.050.

III. **WAC 480-109-020 Renewable Resources.**

We support the proposed rules in this section related to compliance with the renewable energy standard by the statutorily-imposed dates. In RNP's July comments, RNP provided a detailed legal analysis to support the interpretation of the statute that required utility compliance "by January 1" of each target year. (*See* RNP July Comments at 2 to 13.) In particular, RNP asserted that the plain meaning of the words to "use" or "acquire" eligible renewable resources and/or RECs by January 1 can not be modified by rule. While the utility is permitted to rely on subsequent year RECs pursuant to the statute, the only way to give meaning to that provision and all of the other provisions of the statute was to permit the utility to rely on future RECs that were acquired by January

[1] Moreover, under rules of statutory construction, there is no support for interpreting the same word, "annual", differently within the same statutory subsection. In other words, a utility has an "annual target" for each year (i.e. 3% by January 1, 2012, through January 1, 2015, then 9%, etc.) and it likewise has a corresponding "annual retail revenue requirement" for each of those years.

1 of the target year. RNP appreciates that the Commission's new draft rules correctly support this construction of the Act.[2]

While on its face, the Draft Rule correctly tracks the statutory requirements, RNP is concerned that the September 20 Summary of Written Comments is not accurate. For example, in the "Response" column to comments on WAC § 480-109-020, it states that the utility must have in its possession by January 1 of each year, "(c) MWhs from utility owned renewable generating assets that were produced *in the previous year*, or (d) MWhs from utility owned renewable generating assets that are expected to be produced in the current or *following year*." (Emphasis added.) Likewise, in the "Response" column in the row for WAC § 480-109-020(1), the "Response" recognizes that in order to meet the January 1 compliance deadline for the initial year of compliance (2012), a utility must have all RECs or MWhs needed for 2012 on the first day of that year and therefore, utilities "will have to take steps in the preceding year to meet the January 1, compliance date." However, the "Response" goes on to note that there is "one exception" to this rule, i.e. if a utility relies on MWhs from its own renewable generating assets that are expected to be produced in the current or following year."

RNP agrees, in part, with these statements. A utility can rely on MWhs from its own generating resources, including MWhs that will be produced in the target year. RNP believes, however, that the "Response" misstates two additional elements of the compliance requirements. First, if a utility chooses to rely on MWhs of production from the years prior or subsequent to the compliance year, the utility must establish its ownership of the RECs associated with those MWhs in order for that production to count towards the compliance. The Act only permits RECs from prior and subsequent years to count towards the targets, not simply MWhs. *See* RCW 19.285.040(2)(e). Second, so long as the utility acquires the RECs, it is not limited to relying on its owned eligible resnewable resources; it may also rely on RECs from contracted for energy production (from an eligible renewable resource) to satisfy the target.

RNP does not believe any changes to the draft rules are required to clarify these two points from the Summary.

IV. **WAC 480-109-030 Alternatives to the renewable resource requirement**.

A. <u>Reliance on alternatives requires an adjudication</u>.

We reiterate our request in July that the rules should provide parties the right to an adjudication anytime a utility relies on an alternative compliance mechanism. (*See* RNP July Comments pages 7-8.) When a utility chooses to use one of these "off ramps," fewer MWs of renewables will be acquired then the standard requires. While the Act

[2] In the July comments, RNP also proposed that the Commission adopt rules at this time to deal with unexpected underperformance of resources upon which the utility had relied to demonstrate compliance with the annual targets. Based on the September 20 Summary of Written Comments, we understand the Commission believes this is not an issue that needs to be resolved in this rulemaking but may be addressed at some future date.

provides for three alternative compliance mechanisms, these mechanisms are intended to be exceptions to compliance with the statute, not the norm. Given this, when a utility is submitting that they have a good reason for not complying with the standard but is instead is relying on an alternative compliance mechanism, the Commission can expect that interested parties will want the opportunity to analyze this assertion. The Commission's notice and comment process in WAC 480-109-030(2) limits parties' ability to test the analysis and assertions upon which the utility relies. In written comments, therefore, the interested party may be required to assert deficiencies in the analysis and to seek a hearing to support the asserted deficiencies. Rather than creating an efficient administrative process, the Commission's proposed rules create an inefficiency.

Further, the rules provide little guidance on how the cost cap and other alternative compliance mechanisms will be interpreted or applied. Some parties have suggested resolution of these issues will be better accomplished in the context of particular filings where the actual facts will inform the process. We believe, therefore, that at this time, given the lack of detail in the draft rules on important issues related to compliance, the notice and comment procedures are not sufficient, and an adjudication, with opportunity for discovery and cross examination, is necessary.

B. <u>The Term "System Cost" Should Replace "Portfolio Cost"</u>.

The proposed rules provide that the incremental cost is determined by the levelizied delivered portfolio cost of the eligible renewable with the equivalent cost of the nonrenewable resource. First, the term "portfolio cost" is not defined in the rules. The intent of the proposed language appears to be to examine the difference in total system costs between the eligible renewable and the substitute resource, in the context of the utility's full portfolio of existing resources expected to be in place over the study horizon. Assuming that the foregoing describes what was intended, the use of the term "portfolio" may be misconstrued as it is commonly used to represent sets of resource additions a utility is considering in its Integrated Resource Plan. Substituting the term "system" for "portfolio" may avert any misunderstanding in what is meant. RNP recommends using the term "system cost" to avoid confusion. If the proposed language is meant to capture something different than system costs, the specific meaning needs to be clarified. Given the stage of the rulemaking, RNP recommends either that "system" cost replace "portfolio" or that the proposed rule be deleted and additional consideration be given to the calculation of "incremental cost" in a future proceeding.

We also note an omission. The rule excludes "portfolio" in the language referring to the substitute resource. As corrected, the rule should read as follows:

> "The incremental cost of an eligible renewable resource is the difference between the levelized delivered portfolio cost of the eligible renewable resource and the levelized delivered <u>portfolio</u> cost of an equivalent amount of reasonably available nonrenewable resource."

C. Date Should Be Included In No Load Growth Provision.

Finally, in (3)(b) we recommend the addition of the effective date of the law as required by the statute. RCW 19.285.040(2)(d) provides, *inter alia*, that "after December 7, 2006" the utility did not invest in new or incremental purchases of nonrenewable resources (except spot purchases) without acquiring offsetting renewable energy credits. The date was omitted in the rules.

To conform to the plain language of the statute, the rule should read as follows:
(3) A utility may demonstrate all of the following:

(b) After December 7, 2006, all new or renewed ownership or purchases of electricity from nonrenewable resources other than daily spot purchases were offset by equivalent renewable energy credits.

We assume the omission of the date is an inadvertent error that can be corrected at this time. If the omission was intentional and is intended to introduce a substantive change, this rule should be withdrawn[3] and a new rulemaking undertaken to add the compliance alternative in 3(b), one that conforms to the statutory requirement.

V. WAC 480-109-040 Annual reporting requirements.

As discussed above, we support the Commission's proposed rules related to compliance with the renewable energy standard. Section (1)(b) of the Draft Rule correctly requires the utility to provide information about its past activity regarding compliance in recognition of the fact that the report is due six months after the utility is statutorily required to have met the compliance target.

RNP is concerned however that Section (1)(d) of draft rule may cause confusion. Specifically, the draft rule refers to a requirement that the annual report filed by the utility should refer to "*the steps the utility is taking* to meet the renewable resource requirements for the current year." The rule also states that "[t]his description should indicate whether the utility *plans* to use or acquire its own renewable resources, or *plans* to use an alternative compliance mechanism." (Emphasis added.) The italicized language, stated in the present tense, could suggest to a utility that it could be continuing to make "plans" to comply at the time of filing of the June report, long after the January 1 deadline by which the utility already had to be in compliance for the year in which the report is filed. It might also mean that the utility should report on its plans for compliance for the following January 1. RNP believes that either section (d) must be deleted or the provisions should be clarified to state that the plans being made during a current year are to allow the utility to meet the next January 1 target.

[3] The plain meaning of the words after "December 7, 2006" cannot be modified by rule.

Finally, RNP does not agree with the statement included in the Summary that the June 1, 2013 report would "be the first report to deal with both conservation and renewables." It appears that the logic for this conclusion is that RCW 19.285.070(1) requires a utility to report "on its progress in the preceding year in meeting" the statutory targets. As the Summary correctly recognizes, a utility "will have to take steps in the preceding year [2011] to meet the January 1, compliance date." Because 2012 compliance requires 2011 actions, the 2012 report should include information about compliance with the renewable targets. Therefore, RNP disagrees with the statement in the summary that there is no basis for reporting on renewables in 2012 or target years.

VI. Conclusion

Thank you for consideration of these final written comments in the rulemaking proceeding. We do plan to attend and testify at the October 24 hearing.