BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of PUGET SOUND ENERGY, INC. For a Declaratory Order on the Extra Credits for Apprentice Labor Provision of RCW 19.285.040(2)(h).	No. U-111663 STATEMENT OF FACTS AND LAW BY RENEWABLE NORTHWEST PROJECT AND NW ENERGY COALITION

I. Summary of Issue and Position

Petitioner Puget Sound Energy, Inc. ("PSE") has asked the Washington Utilities and Transportation Commission ("WUTC" or "Commission") to interpret the Washington Energy Independence Act ("the Act") to permit it to retain and count for compliance with the Act's renewable standard ("the RPS") the apprentice labor "extra credit" multiplier associated with renewable generation that it acquired, but from which it has sold the renewable energy credits ("RECs"). In essence, PSE wishes to retain for compliance the "0.2" associated with its use of apprentice labor (*i.e.*, "the labor multiplier") and sell the "1.0" that represents the nonpower attributes of the generation (*i.e.*, the REC)—thereby bifurcating the labor multiplier from the REC.

Renewable Northwest Project ("RNP") and the NW Energy Coalition ("NWEC") have not supported the general concept of bifurcating "extra credit" multipliers from renewable resources or RECs used for compliance with the RPS. The Act anticipates separation of

RECs from power, and contains definitions and mechanisms to accommodate transfer and tracking of RECs. But the Act does not make provision for multipliers as a compliance instrument separable from renewable resources or RECs. Adverse effects on the integrity of the Act and of REC markets could result from reading the multiplier bifurcation concept broadly into the Act.

With that said, RNP and NWEC have carefully considered PSE's specific application of this concept and would not oppose its approval *if*, while approving bifurcation in this narrow circumstance, the Commission can simultaneously foreclose other, more problematic applications of the concept. In the work group discussions in Docket No. UE-110523 where PSE first introduced the bifurcation concept, its potential reach was considerably broader than the circumstance outlined in PSE's Petition for Declaratory Order ("Petition"). In its narrowly focused Petition, PSE argues *only* that it may retain RPS credit for apprentice labor multipliers earned from its generation from eligible renewable resources (that commenced operation after December 31, 2005), following sale of the RECs associated with such generation. PSE does *not* appear to argue that it may transfer the apprentice labor multiplier to another Washington utility that acquires neither the renewable generation nor the RECs; nor does PSE argue that it could bifurcate or transfer a distributed generation multiplier ("DG multiplier"). In fact, we argue that PSE's arguments depend upon a conclusion that the Act prohibits the bifurcation of DG multipliers and the transfer of any isolated multiplier.

If the Commission can open the narrow door presented by PSE (*i.e.*, bifurcation, but not transfer, of the labor multiplier) while clearly foreclosing other, more problematic applications of the bifurcation concept (*i.e.*, bifurcation of DG multiplier; transfer of

multipliers), then RNP and NWEC do not oppose PSE's Petition. We believe that accepting PSE's argument requires the Commission to foreclose those problematic applications. But if the Commission cannot approve PSE's request without foreclosing other applications of the concept, then RNP and NWEC believe that further proceedings are needed to explore the significant adverse effects that approving the general concept of multiplier bifurcation could have on the RPS and REC markets, and whether benefits to PSE outweigh those adverse effects.

II. Argument

A. PSE Confirms that the Act Prohibits Bifurcation of the DG Multiplier.

Interpreting the Act to allow bifurcation of the labor multiplier requires heavy reliance on statutory context. *See* Petition, ¶¶ 25, 28-29. PSE's legal argument rests principally on two sources of statutory context that distinguish the labor multiplier from the DG multiplier. First, PSE argues that the Act's definition of "[n]onpower attributes" (RCW 19.285.030(13)) requires a REC transfer to include all of the environmentally related characteristics of the power, but not any labor-related characteristics. PSE Petition, ¶ 28. Second, PSE points to two provisions that impose a "direct prohibition" against severing the DG multiplier from RECs, with no such express prohibition for the labor multiplier. PSE Petition, ¶ 29 (citing RCW 19.285.040(2)(b)(i) and 19.285.040(2)(f)(i)). *See also* PSE Petition, ¶ 25. In short, PSE asks the Commission to infer from the *express* prohibition against bifurcation of the DG multiplier that the Act *implicitly* allows bifurcation of the labor multiplier.

Whatever the strength of PSE's statutory context argument, the significant point is that the argument is self-limiting: it cannot be accepted without simultaneously

acknowledging that the Act does not allow the DG multiplier to be counted absent ownership of "the distributed generation *and* the associated renewable energy credits." RCW 19.285.040(2)(b)(i) (emphasis added). Nor, as the next section explains, does PSE's legal rationale allow for isolated multipliers to be transferred to other utilities.

B. PSE's Rationale for Bifurcating the Multiplier Precludes Its Transfer.

As with its statutory context arguments, PSE's interpretation of the labor multiplier provision itself is self-limiting: it inherently precludes sale of just the multiplier to a utility that acquires neither the renewable generation (before the REC sale) nor the REC. PSE emphasizes that the labor multiplier provision accrues to a utility that "acquires an eligible renewable resource *or* renewable energy credit" (RCW 19.285.040(h) (emphasis added)). Petition, ¶¶ 17, 22, 30. PSE argues that the labor multiplier accrues to the utility at the time that it acquires the generation from the renewable resource—and before it sells the REC, thereby turning the renewable generation into "null power." *See* Petition, ¶ 30.

Significantly, PSE does not argue that the labor multiplier becomes a separate tradable instrument available for sale to other Washington utilities to fulfill their RPS requirements.[1] Even more significantly, PSE's argument *precludes* that possibility because it requires the qualifying utility that is going to count the multiplier to have acquired either the renewable generation (before the REC sale) or the REC. To agree with PSE's interpretation of RCW 19.285.040(h), one must also agree that the Act does not allow transfer of the labor multiplier separately from either the renewable generation or the REC.

[1] Despite the absence of this argument from the balance of PSE's presentation, we note that in Paragraph 34 PSE describes reporting mechanisms that would track "the transfer of RECs *or* extra apprenticeship credits to third parties" (emphasis added). As we argue, the only transfer of multipliers consistent with the Act and the arguments in PSE's Petition would be bundled *with* the eligible renewable resource generation or the REC. This inconsistency should be clarified and resolved.

C. Bifurcating the Labor Multiplier from the REC Could Be Acceptable If Limited and Carefully Tracked.

1. The statute does not expressly address bifurcation of the labor multiplier.

The primary purpose of the RPS is to encourage utilities to acquire eligible renewable energy. The Act expressly defines RECs as a flexibility mechanism that allows nonpower attributes to be separated from power for compliance with the RPS. There is no express provision for multipliers to be a compliance instrument separable from a REC. Despite the absence of any express definition of the labor multiplier as a separate compliance instrument, PSE interprets the labor multiplier provision (RCW 19.285.040(h)) to implicitly allow use of the multiplier as an independent compliance mechanism. Petition, ¶ 30.

PSE's interpretation of RCW 19.285.040(h) is not the only one, nor perhaps even the most plausible. The labor multiplier provision sets forth circumstances in which "[a] qualifying utility that acquires an eligible renewable resource or renewable energy credit may *count that acquisition* at one and two-tenths times its base value[.]" RCW 19.285.040(h) (emphasis added). In a natural reading of that provision, the multiplier would not exist until and unless the eligible renewable resource or renewable energy credit were "counted" by the utility to comply with the targets in RCW 19.285.040(2)(a). In other words, "that acquisition" could be counted at 1.2 times its base value—but if "that acquisition" is not counted at all (*i.e.*, has a base value of zero), then there would be nothing to multiply by 1.2. By contrast, PSE argues that the Act "does not specify when to perform this [1.2 x] calculation" (Petition, ¶ 30) and, presumably, that the calculation may be performed and the labor multiplier earned when the utility acquires the renewable

generation, rather than when it counts that generation (or the associated REC) for compliance.

Although it is clear that the drafters of the Act did not intend for the multiplier to become a compliance instrument separate from a renewable resource or REC, there is arguably enough ambiguity in RCW 19.285.040(h) for the Commission to select an interpretation that is consistent with PSE's statutory context arguments and the Commission's policy preferences.

2. Adverse policy effects of bifurcation can be mitigated by limiting its scope.

RNP and NWEC have raised policy concerns with the general concept of REC multiplier bifurcation. Allowing utilities to treat incentive multipliers as separate, tradable compliance instruments would introduce confusion in tracking and trading RECs—already a confusing area. Maintaining a REC as a representation of the unified environmental benefits associated with renewable generation, and avoiding double-counting of those benefits, is important to the overall integrity of the REC markets, particularly the voluntary REC market. Introducing such confusion would not be worth the benefit that PSE suggests it could reap from REC sales, because RNP and NWEC believe that it is doubtful that a REC stripped of some of its benefits would be economically valuable in the two primary markets for REC sales (the California RPS market and the voluntary market).[2]

Nevertheless, some of our most significant policy concerns are mitigated by the limited—and inherently self-limiting—nature of PSE's Petition. First, allowing bifurcation of the labor multiplier from the REC disturbs only the purely social, not the environmental,

[2] RNP and NWEC elaborated on this point in Section 3 of its June 20, 2011 position paper. We have attached that paper as Exhibit A to this Statement, as discussed *infra* at pages 8-9.

attributes of the REC. Although we continue to believe that California and voluntary markets will demand that the social benefits remain with the REC (and that PSE must avoid counting the labor multiplier in Washington if it has transferred the social benefits to a REC purchaser), we agree that separated social attributes are conceptually easier to account for than disaggregated environmental attributes, and may be possible to address in bilateral contracts. By contrast, retaining a DG multiplier without a REC would be separating amorphous environmental attributes and would raise a much more problematic risk of double-counting.

Second, requiring the multiplier to stay with the utility that acquired either the renewable generation or the REC eliminates the problem of tracking the transfer of an isolated multiplier that was never intended to be a separate compliance instrument and for which there is no organized tracking system (like the Western Renewable Energy Generation Information System, or "WREGIS," for RECs). For a state that appears unlikely to appoint even a WREGIS administrator, tracking isolated multipliers around the state's investor-owned and public utilities would be a giant administrative chore.

PSE makes a reasonable point that, all things being equal, allowing bifurcation of the labor multiplier from the REC would support one of the express purposes of the Act to provide training opportunities in development of new eligible renewable resources. PSE Petition, ¶¶ 32-33. If the adverse policy consequences can be mitigated in the manner described herein, then bifurcation to promote the labor goals could be consistent with the Act's policy. As PSE points out, careful tracking to avoid double-counting would be necessary to avoid adverse policy consequences. *See* PSE Petition, ¶¶ 10, 27, 34.

3. Clear tracking must include documentation of social attributes in REC sales.

RNP and NWEC appreciate PSE's efforts in Docket No. UE-110523 to create clear, comprehensive templates for RPS compliance reporting to the WUTC. An additional element that would be necessary to ensure that labor multipliers are not being double-counted upon sale of the REC is documentation of what is being sold with the REC and to whom. If purchasers in other states are buying PSE's RECs with the expectation that they include both environmental and social benefits, stakeholders and regulators in both states will need that information in order to monitor possible double-counting. Similarly, if PSE is selling either electricity from an eligible renewable resource or a REC to another qualifying utility in Washington, and that resource or REC includes an apprentice labor multiplier, it is imperative that PSE clearly report whether it retained the apprentice labor multiplier or bundled it with the sale.

In sum, although the Act does not expressly contemplate bifurcation of the labor multiplier, RNP and NWEC believe that the most significant adverse policy consequences of bifurcation could be mitigated by narrowly limiting and carefully tracking bifurcated labor multipliers.

D. Conditions for Issuance of a Declaratory Order Are Satisfied.

RNP and NWEC generally agree that PSE's Petition meets the requirements for a declaratory order, at least one that is expressly limited as described herein. PSE's Petition cannot be resolved without addressing the inextricable issues of DG multiplier bifurcation and transfer of multipliers. But those issues are not just legally unavoidable; the conditions for issuance of a declaratory order are satisfied as to them as well. The RNP/NWEC position paper dated June 20, 2011 (attached as Exhibit A), which was provided to work

group members in Docket No. UE-110523 and discussed in PSE's Petition (¶¶ 11, 32, 38 and fn 2), makes clear that the work group discussions involved utility uncertainty and controversy with respect to the DG multiplier and transfer of multipliers. Although it is not entirely clear from the Petition, PSE may still be planning to transfer multipliers (*see* footnote 1, *supra*), and will be adversely affected if the Commission does not address this issue directly.

If, however, DG multiplier bifurcation and transfer of multipliers cannot be foreclosed by Commission order, then the adverse effects of the requested order on the general public may well outweigh the adverse effects on PSE, and we would request additional process to explore those negative impacts. Approving the concept of bifurcation and leaving ambiguity about its scope will create confusion and disorder in the REC marketplace and among those attempting to plan for and monitor RPS compliance of Washington utilities. We urge the Commission to recognize that it may address the DG multiplier bifurcation and transfer of multipliers issues because they are inextricably intertwined in the legal analysis, and because they are equally significant elements of the uncertainty and controversy that give rise to the Commission's ability to enter a declaratory order. Only if those issues are addressed will a Commission order provide benefits to PSE that outweigh the adverse effects on broader renewable energy markets and policy.

III. Conclusion

The primary purpose of the RPS is to encourage utilities to acquire renewable energy. At the same time, RNP and NWEC wish to support flexible implementation of the Act where adverse effects can be mitigated, and we recognize labor training and economic

development as important complementary goals of the Act. Therefore, RNP and NWEC would not oppose entry of a Commission order that narrowly approves PSE's request to bifurcate the labor multiplier from the REC and use the multiplier toward its own RPS compliance—if such an order simultaneously precludes bifurcation of the DG multiplier and transfer of any multiplier to a utility that acquires neither the renewable generation nor the REC. If those applications of the concept cannot be foreclosed, then the adverse effects of a Commission order on renewable energy markets and policy will be too significant.

If the Commission follows the course we recommend, then we do not believe that further proceedings are necessary. An order could be issued in 30 days. However, if the Commission were to open the door to bifurcation without expressly foreclosing DG bifurcation and transfer of multipliers, then further opportunities for comment are necessary to explore the adverse policy effects of introducing a confusing and unintended new compliance instrument.