BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of	)	DOCKET UE-191023
	)	
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	COMMENTS OF THE ALLIANCE OF WESTERN ENERGY CONSUMERS ON SECOND DRAFT CLEAN ENERGY IMPLEMENTATION PLAN RULES
	)	
Relating to Clean Energy Implementation Plans and Compliance with the Clean Energy Transformation Act.	)	
	)	

I. INTRODUCTION

1 Pursuant to the Washington Utilities and Transportation Commission's ("Commission") August 13, 2020 Notice of Opportunity to File Written Comments in the above-referenced docket, the Alliance of Western Energy Consumers ("AWEC") submits these comments on the Commission's second draft rules governing Clean Energy Implementation Plans ("CEIP") and Integrated Resource Plans ("IRP").

II. COMMENTS

A. The second draft of the CEIP rules continue to violate the Administrative Procedure Act.

2 In its comments on the initial draft of the CEIP rules, AWEC identified the clear legal infirmities with the rules as they relate to the adjudicative process. Specifically, AWEC noted that CETA requires the Commission to approve, reject, or approve with conditions a CEIP only "after a hearing," which triggers the APA's requirements for adjudicative proceedings.[1/]

[1/] AWEC Comments ¶¶ 2-8 (June 2, 2020); RCW 19.405.060(1)(c); RCW 34.05010(1).

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3 Despite these clear and unambiguous requirements, the second draft of the rules continue to allow for consideration of a CEIP at an open meeting and submission of "comments" by "interested persons."[2/] To be sure, the new draft of the rules now allow for the *possibility* of an "adjudicative hearing," but do they do not require one. [3/] This is justified by a statement in the stakeholder comment matrix that "[a]n open meeting is a hearing under the APA. Further, additional process is not needed."[4/] There are several problems with this conclusion.

4 First, an open meeting is very definitely *not* "a hearing under the APA." The Commission's open meetings are governed by the State's Open Public Meetings Act, not the APA.[5/] The Open Public Meetings Act specifies that it does not apply to "[m]atters governed by chapter 34.05 RCW, the Administrative Procedure Act."[6/] It also specifically does not apply "to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group."[7/] A "hearing," as distinguished from an "open meeting," is a requirement of an adjudicative proceeding that includes at least the possibility that "all parties [have] the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence …."[8/] None of these procedural avenues are even potentially available at an open meeting.

5 This is a distinction the Commission itself has recognized in the past. In Avista's 2012 general rate case, Avista sought to file a letter in the record of the adjudicative proceeding

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2/ WAC 480-100-645(1)-(2).
3/ WAC 480-100-645(2).
4/ CEIP Comment Matrix at 30.
5/ RCW 42.30.
6/ RCW 42.30.140(3).
7/ RCW 42.30.140(2).
8/ RCW 34.05.449(2).

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clarifying a statement made by Commission Staff at an open meeting that occurred after Avista's rate application was filed, but before the prehearing conference.[9/] Public Counsel argued against inclusion of this letter on the basis that:

> "Avista's rate filing was not an adjudicative proceeding at the time of the open meeting. Citing RCW 34.05.413(5), Public Counsel argues that the notice of prehearing conference … began the adjudicative proceeding, and with it, the record in this matter. Statements made at the open meeting, unless presented by a party after the issuance of the notice of prehearing conference, are not a part of the record upon which the Commission bases its decision."[10/]

The Commission concluded that "Public Counsel is correct; the adjudicative process did not commence until the Commission issued the Notice of Prehearing Conference after the … open meeting …. The statement Avista references is not a part of the record in this proceeding."[11/]

6 The Commission's own procedural rules even recognize the distinction between an open meeting and a hearing. Tracking the APA, WAC 480-07-300(1) (included under Part III: Adjudicative Proceedings) specifies that "[a]n adjudicative proceeding for purposes of this chapter is a proceeding in which *an opportunity for hearing is required by statute* …" (emphasis added). The Commission's open meetings, by contrast, are subject to WAC 480-07-900, which is included under Part IV: Other Commission Proceedings (i.e., proceedings other than rulemaking and adjudicative proceedings) and specifies that these meetings are conducted "under chapter 42.30 RCW, the Open Public Meetings Act."[12/]

7 Second, even if an open meeting were a "hearing" under the APA, the issue is not what constitutes a hearing, but what requirements are triggered when a hearing is mandated by

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[9/] Docket Nos. UE-120436/UG-120437, Order 04, 2012 Wash. UTC LEXIS 456 (June 1, 2012).
[10/] Id. at *4.
[11/] Id. at *5.
[12/] WAC 480-07-900(1).

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statute, as one is with respect to the CEIP review and approval process. The importance of the requirement for a hearing is not that a hearing be held *per se*, but that this requirement in statute triggers the definition of an "adjudicative proceeding,"[13/] meaning that *all* of the requirements pertaining to adjudicative proceedings must be met, not just the holding of a hearing: "an adjudicative proceeding is not limited to the formal hearing itself, but also contemplates other stages of proceedings affecting the rights of an individual under the administrative scheme."[14/] Thus, the Commission must hold a prehearing conference.[15/] It must rule on petitions to intervene.[16/] It must provide for pleadings, motions, and settlement.[17/] It must allow for the taking of evidence and cross examination.[18/] It must adhere to the *ex parte* rules.[19/] It must prepare an official record.[20/] And it must enter an order that "include[s] a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record."[21/] It must, in other words, act in a quasi-judicial function.

8 Furthermore, it is not the case that "additional process is not necessary" for CEIP review. For one, additional process is necessary because it is required by law, as explained above and in previous comments; but it is also the case that applying the adjudicative requirements to the CEIP is perfectly reasonable. The CEIP is not like the IRP, where utilities project their load/resource balance 20 years into the future and identify generic resources that

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13/ RCW 34.05.010(1).
14/ Hutmacher v. Bd. of Nursing, 81 Wn. App. 768, 771-72 (1996).
15/ RCW 34.05.431.
16/ RCW 34.05.443.
17/ RCW 34.05.437.
18/ RCW 34.05.449; 34.05.452.
19/ RCW 34.05.455.
20/ RCW 34.05.476.
21/ RCW 34.05.461(3).

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may be used to meet any resource deficit and that may impact rates following additional processes, including procurement and a rate case. The CEIP must identify *specific* energy efficiency, demand response, and renewable energy targets, and it must identify the *specific* actions the utility intends to take to make progress toward CETA's clean energy requirements.[22/] It must also identify the cost impact of these actions on customers to calculate the incremental cost of compliance. These are detailed requirements that will have a directly attributable cost impact for customers. The CEIP is not substantively different from a filing to change rates and it should be subject to no less scrutiny or evidentiary burden.

9 This raises another deficiency with the draft rules, which is that they lack specificity regarding how CEIP investments will be included in customer rates. When CETA passed, AWEC assumed that the CEIP would be a utility rate filing, but there is nothing in the rules indicating that it will be. If it is not a rate filing, the draft rules do not specify how the investments identified in the CEIP will be reviewed and approved for inclusion in customer rates. If they will only be included the next time a utility files a rate case, this complicates the calculation of the incremental cost of compliance, as there is no incremental cost of compliance until customers see a cost increase, which may be lower than identified in the CEIP if utilities take regulatory lag on investments. On the other hand, if utilities will be allowed to defer CEIP investments until their next rate case, the rules should specify this. And again, if the basis for a deferral is that these investments were reviewed and approved in the CEIP and made in

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[22/] RCW 19.405.060(1)(a)(i) & 1(b)(iii).

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furtherance of CETA, then that further justifies treating the CEIP as an adjudicative proceeding, as the prudence of these resource decisions will be largely determined in that proceeding.

10 Consequently, the Commission must modify its rules to require an adjudicative process for review of the CEIP. To be sure, the Commission could still place the CEIP on the open meeting agenda, and invite comments from stakeholders who do not wish to participate in the adjudicative process, but that process cannot be in lieu of an adjudicative process and must instead be in addition to it. AWEC recommends that the rules specify that the process for review of a CEIP be conducted consistently with Part III, Subpart A of the Commission's Procedural Rules at WAC Chapter 480-07.

11 Additionally, for the same reasons, and as already discussed in AWEC's previous comments, the Commission should eliminate the extensive stakeholder input and review process the rules provide prior to the filing of a CEIP.[23/] Elimination of this process would also diminish the concerns stakeholders have raised regarding the cost of participating in these stakeholder processes. This stakeholder review process is more appropriate for the Clean Energy Action Plan ("CEAP"). Because the CEIP must be informed by the CEAP,[24/] the stakeholder review process associated with the CEAP will provide sufficient input into the general direction and means of achieving CETA compliance, which will be implemented through the CEIP.

[23/] AWEC Comments ¶ 4 (June 2, 2020).
[24/] RCW 19.405.060(1)(b)(i).

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B. The Commission likely lacks the authority to require stakeholder funding; however, if the rules continue to provide for extensive pre-filing public review of CEIPs, and the Commission nevertheless authorizes stakeholder funding to participate in this review process, it should do so on a nondiscriminatory basis.

12 The Commission asks whether it has "the authority to require utilities to provide funding to support equity participation such as intervenor funding or direct payments to advisory group members." As no Washington law specifically authorizes such payments, the question is whether the Commission has the authority to require them anyway under its general grants of authority. RCW 80.01.040(3) authorizes the Commission to "[r]egulate 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 …." Additionally, RCW 80.28.020 provides that:

> "Whenever the commission shall find, after a hearing had upon its own motion, or upon complaint, that the rates or charges demanded, exacted, charged or collected by any … electrical company … for … electricity … services… are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of the law, or that such rates or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine the just, reasonable, or sufficient rates … to be thereafter observed and in force, and shall fix the same by order."

Based on these statutes, AWEC is dubious that the Commission has the authority to require utilities to provide stakeholder funding for participation in CETA advisory groups. First, such payments would need to be included in customer rates to trigger Commission jurisdiction over these payments; AWEC does not see how the Commission could require the utilities' shareholders to fund these payments. Second, to include them in customer rates, the Commission would need to find (again, through an adjudicative proceeding) that the utilities'

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rates are unjust and unreasonable without the inclusion of these payments. Further, the Commission would need to find that these payments relate to "electricity services" the utilities provide.

13 Of course, the utilities could voluntarily agree to provide funding; however, any such agreement would not invalidate the other statutory requirements that apply to the utilities' rates. Namely, they must be just and reasonable, and neither unjustly discriminatory or unduly preferential.[25/] These requirements would likely prohibit providing preferential funding for certain stakeholder organizations over others and including the costs of funding those stakeholder organizations in the rates of customers that do not benefit from their advocacy. Accordingly, if the Commission determines that it nevertheless has the legal authority to order utilities to provide stakeholder funding, or the utilities voluntarily agree to provide it, this funding should be provided on a nondiscriminatory, non-preferential basis. That is, any organization that demonstrates it has an interest in the CETA stakeholder processes should be eligible for such funding. AWEC also recommends that this funding be limited to non-profit organizations and not be available to individuals or for-profit entities.

14 AWEC receives intervenor funding for its participation in proceedings before the Oregon Public Utility Commission ("OPUC"). This funding is provided under an Intervenor Funding Agreement ("IFA") between the utilities and AWEC and the Oregon Citizens' Utility Board ("CUB"). The IFA is, in turn, authorized by ORS 757.072, which allows a utility to "enter into a written agreement with an organization that represents broad customer interests in

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[25/] RCW 80.28.020, 80.28.090, 80.28.100.

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regulatory proceedings …." Accordingly, the Oregon statute authorizing intervenor funding limits which organizations are eligible to receive this funding, unlike in Washington where no such statute exists.

15 In Oregon, AWEC's demonstration of the necessary interest in a proceeding is met because it can only receive intervenor funding in cases in which it has intervened as a party (and thus demonstrated a substantial interest in the proceeding). That would be different for a stakeholder advisory group where no intervention is necessary. Additionally, in Oregon, AWEC is "precertified" under the IFA, meaning that it is eligible to request intervenor funding in any case that meets the requirements of the IFA. Other organizations can request "case certification," meaning that they can receive funding for a specific case if they meet certain criteria. One option for the Commission to consider would be to "precertify" organizations as eligible to receive funding for the CETA stakeholder processes by demonstrating that they have a substantial interest in one or more such processes and that their interests are not already met by another precertified organization. For efficiency purposes, the Commission could also require organizations with aligned interests to identify a single representative eligible for funding.

16 Another important component of the Oregon intervenor funding statute and the IFA is that the costs of intervenor funding are recoverable from customers, and the IFA specifies that they are recoverable from the specific customer classes the organization receiving the grant represents. Thus, AWEC's intervenor funding grants are charged directly to large customer rate schedules, while CUB's intervenor funding grants are charged directly to residential customer rate schedules. AWEC believes this is an important component of the IFA because it ensures that an organization receiving intervenor funding is financially accountable to the customers it

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represents. That would be a more difficult goal to achieve if the Commission approves funding for CETA stakeholder processes because there are likely to be organizations that have an interest in these processes but do not represent any specific customer class. If the Commission believes it is infeasible to allocate the costs of each organization's participation to individual customer classes, it could decide that all funding is recoverable from all customer classes based on a particular rate spread. Again, though, this would only be legally defensible if all organizations with a demonstrated interest in CETA advisory groups are eligible for funding, rather than a specified subset of organizations.

17 To receive payment of a grant, AWEC provides an accounting of all of its expenses, certified by its Chief Executive Officer, to the OPUC. This includes legal and expert bills. All of this information is provided confidentially pursuant to a protective order issued by the OPUC. This requires the OPUC to have a staff member dedicate a substantial amount of time to auditing the information AWEC (and CUB) provides and tracking the requests and payments made under the IFA. Once AWEC's payment request is approved, the OPUC issues an order and the utility has 30 days to pay the grant, which is made out directly to AWEC.

C. The social cost of greenhouse gas should only be included as a planning adder and not as a cost adder associated with dispatch when calculating the incremental cost of compliance.

18 Based on the Commission's statements in the comment matrix attached to the second draft of the rules, AWEC understands that the Commission believes the social cost of greenhouse gas should not be included as a dispatch adder in the baseline against which the incremental cost of compliance is calculated, but that it should be included as a planning adder,

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consistent with RCW 19.280.030(3).[26/] AWEC agrees with this interpretation, but notes that the rules themselves have not substantially changed from the first draft with regard to how the social cost of greenhouse gas is treated. AWEC recommends that the rules provide greater clarity so that there is no confusion as to how the incremental cost baseline is to be calculated.

III. CONCLUSION

19 AWEC appreciates the Commission's continued efforts on an extremely complicated rulemaking that is made more difficult by the expedited deadline for their finalization. AWEC believes the Commission has made substantial progress on the rules between the first and second drafts. Nevertheless, AWEC believes that the draft rules continue to require refinement in the areas identified above, and specifically recommends that the final rules require an adjudicative proceeding for review of the CEIP and include additional clarity regarding how the social cost of greenhouse gas figures into the incremental cost baseline.

Dated this 11th day of September, 2020.

Respectfully submitted,

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26/ CEIP Comment Matrix at 82.