BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

I. INTRODUCTION

1 Pursuant to the Washington Utilities and Transportation Commission's ("Commission") October 14, 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 proposed rules governing Clean Energy Implementation Plans ("CEIP") and Integrated Resource Plans ("IRP").

2 AWEC appreciates the work the Commission has put into this complex rulemaking. While AWEC continues to have concerns with the complexity of the rules and the amount of process they require, AWEC focuses these comments on its most significant concerns with the proposed rules; namely, the treatment of the incremental cost of compliance, the process for review and approval of the CEIPs, and the elimination of coal-fired resources from utility rates.

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II. COMMENTS

A. The Commission should substantially revise the proposed rules governing the incremental cost of compliance.

3 AWEC has significant concerns with the proposed rules' implementation of the incremental cost of compliance. The proposed rules misapply the statutory requirements for calculating the incremental cost and, by imposing a retroactive verification process, effectively nullify the incremental cost as a means of alternative compliance with the Clean Energy Transformation Act ("CETA"). This also contravenes the legislature's intent in providing for an alternative compliance mechanism to mitigate the potential rate impacts from achieving CETA's carbon neutral and carbon free requirements.

1. The proposed rules' calculation of the incremental cost of compliance does not yield results that are consistent with CETA's requirements.

4 RCW 19.405.060(3)(a) specifies that an "investor-owned utility must be considered to be in compliance with the standards under RCW 19.405.040(1) and 19.405.050(1) if, over the four-year compliance period, the average annual incremental cost of meeting the standards or interim targets … equals a two percent increase of the investor-owned utility's weather-adjusted sales revenue … above the previous year …." The proposed rules include a formula for calculating this incremental cost, but a test of that formula demonstrates that it yields an "average annual incremental cost" far higher than two percent. For example, assume a utility has weather-adjusted sales revenue of $1 million each year over a four-year period. In each of those years, a "two percent increase … above the previous year" is $20,000; the total allowable spend under the incremental cost for the four-year period is $80,000; and the "average annual incremental cost" over the four-year period is also $20,000. Under the formula in the proposed

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rules, however, the total allowable spend under the incremental cost for the four-year period is $200,000, and the "average annual incremental cost" over the four-year period is $50,000, or 5% of weather-adjusted sales revenue.

5 A second example, where the annual incremental cost is added to weather-adjusted sales revenue each year, would yield $1 million in weather-adjusted sales revenue for the first year and $20,000 for the incremental cost; $1,020,000 for the second year and $20,400 in incremental cost; $1,040,400 for the third year and $20,808 in incremental cost; and $1,061,208 for the fourth year and $21,224.16 in incremental cost. Under this scenario, the "average annual incremental cost" over the four-year period is $20,608.04,[1/] with a total allowable spend under the incremental cost for the four-year period of $82,432.16. The formula in the proposed rules, however, would yield an "average annual incremental cost" over the four-year period of $51,010.04, and a total allowable spend under the incremental cost for the four-year period of $204,040.16.

6 The formula proposed in the draft rules, therefore, yields a substantially higher incremental cost threshold for claiming alternative compliance, and the results from the formula bear no relationship to how the incremental cost is described in statute. AWEC freely admits that the statutory language governing the incremental cost of compliance is ambiguous, but it is clear in its requirement that the incremental cost be identified in some way as two percent of weather-adjusted sales revenue. The formula in the proposed rules does not yield two percent of anything. It, therefore, does not faithfully implement the statutory language and should be

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[1/] ($20,000 + $20,400 + $20,808 + $21,224.16) / 4 = $20,608.04.

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revised. AWEC supports the interpretation provided in Avista's and PacifiCorp's September 11, 2020 comments.

2. A retrospective review of the utilities' actual incremental cost of compliance risks nullifying this legislatively approved alternative compliance method.

7 In addition to artificially increasing the incremental cost, the draft rules will gut the protections of this alternative compliance mechanism by requiring the utilities to demonstrate on a retrospective basis that they actually invested up to the incremental cost threshold.[2/] This requirement will put utilities in an untenable position of taking the risk that projections of weather-adjusted sales revenue and incremental investment costs will be different than actuals and that, if they differ in a manner that results in the utility investing less than the incremental cost threshold, this difference may result in financial penalties to utility shareholders. Given that reliance on the incremental cost as an alternative compliance mechanism is voluntary, this retrospective true-up mechanism for the incremental cost will act as a strong disincentive for utilities to use this legislatively enabled alternative compliance pathway, to the financial detriment of their customers.

8 To ensure a meaningful and effective incremental cost alternative compliance mechanism, AWEC recommends not only that the calculation be remedied as described above, but also that the retrospective review of actual incremental costs be eliminated. Instead, utilities should be allowed to rely on the incremental cost on a projected basis alone. This is not materially different from many ratemaking structures the Commission uses today. Just as utilities identify a resource need in their Integrated Resource Plans, which the Commission

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[2/] Proposed WAC 480-100-660(5).

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acknowledges if it finds the plan to be reasonable overall, the utilities could forecast their incremental cost of compliance in a CEIP, which the Commission could approve if it finds the forecasts to be reasonable. One option from that point would be for the Commission to treat this approval of the CEIP and the forecasts of incremental cost as dispositive, with no subsequent review of these forecasts. As an alternative, it could further mirror the IRP and general rate case process in which the utility's forecast of incremental cost is not fully approved until the utility files its CEIP compliance report (similar to how the prudence of a resource is not fully and finally determined until a rate case). Crucially, however, if the Commission chose to reserve final judgment on a utility's forecast of incremental cost in its CEIP until the compliance report, that judgment would not be based on what actually occurred, but on whether the utility's forecasts and assumptions were reasonable at the time it made them in the CEIP, just as a utility's prudence is determined based on what it knew when it made the investment decision. This process would insulate utilities from the risk of penalties for projections differing from actuals due to causes beyond their control and would, consequently, better ensure the incremental cost is available as an alternative compliance mechanism.

B. The Commission should provide additional clarity regarding the requirements for initiating an adjudicative proceeding, and should remove the option for a brief adjudicative proceeding.

9 AWEC appreciates the movement the Commission has made in further ensuring the legally mandated adjudicative process for CEIP review. The proposed rules now specify that a CEIP will be set for public comment and an open meeting, at which time, "[o]n the commission's own motion or at the request of any person who has a substantial interest in the subject matter of the filing, the commission will initiate an adjudication, or if appropriate a brief

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adjudicative proceeding, to consider the filing."[3/] AWEC sees some ambiguity in this language that the Commission should clarify through its adoption order, and recommends that the Commission remove the allowance of a brief adjudicative proceeding, as the Administrative Procedure Act ("APA") does not authorize this alternative process.

1. The Commission should clarify the requirements for requesting an adjudicative proceeding for review of a CEIP.

10 AWEC interprets the proposed rules' requirement that a person have a "substantial interest" in the CEIP as a threshold for requesting an adjudication to be the same "substantial interest" necessary to justify intervention as a party to an adjudicative proceeding.[4/] Under this standard, AWEC has traditionally been found to have the requisite "substantial interest" in proceedings that impact, or have the potential to impact, utility rates. AWEC, therefore, requests that the Commission clarify whether it intended the term "substantial interest" in the proposed rule to have the same meaning as has been ascribed to it when ruling on petitions to intervene. If that is not the Commission's intention, then AWEC respectfully requests that the Commission modify the rules to clarify the meaning of this term.

11 Second, AWEC reads the proposed rules to require nothing more than that a stakeholder demonstrate that it has a substantial interest when requesting an adjudication, at which point the Commission will initiate an adjudicative process. In other words, assuming AWEC has the requisite substantial interest, it need do no more than request an adjudication to be assured that one will be opened. It need not: (1) identify areas of concern with a CEIP or

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[3/] Proposed WAC 480-100-645(2).
[4/] See WAC 480-07-355(3).

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what it intends to investigate; (2) demonstrate the extent to which it participated or did not participate in the prefiling stakeholder processes established in the proposed rules; or (3) provide any other information whatsoever in support of its request. If that is the intent of the proposed rule, AWEC would appreciate confirmation of this interpretation in the adoption order. If that is not the intent, then the rules must be modified to specify precisely what is required, other than a showing of "substantial interest" to open an adjudicative proceeding. As AWEC has already stated in previous comments, any additional requirements would likely violate the APA, as the law requires that the CEIPs be subject to an adjudicative process.[5/]

2. The APA does not allow the Commission to hold a brief adjudicative proceeding to consider a CEIP.

12 With respect to the proposed rules' allowance for a brief adjudicative proceeding, "if appropriate," AWEC's understanding of the requirements of such proceedings is that they would not be allowed for consideration of the CEIP. Therefore, the rules should remove this option, as there is no circumstance in which it would be "appropriate" to hold a brief adjudicative proceeding to consider a CEIP.

13 The APA provides for brief adjudicative proceedings if four conditions are met:

> (a) The use of those proceedings in the circumstances does not violate any provision of law;
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> (b) The protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties;
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> (c) The matter is entirely within one or more categories for which the agency by rule has adopted this section and RCW 34.05.485 through 34.05.494 [governing brief adjudicative proceedings]; and

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[5/] AWEC Comments ¶¶ 2-8 (June 2, 2020); AWEC Comments ¶¶ 2-11 (Sept. 11, 2020).

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> (d) The issue and interests involved in the controversy do not warrant use of the procedures of RCW 34.05.413 through 34.05.479 [governing full adjudicative proceedings].[6/]

As the Washington Court of Appeals concluded in the only case interpreting the APA's provisions governing brief adjudicative proceedings, "[a]n agency may not substitute brief adjudication for the presumptively-required full adjudication unless all of the conditions of RCW 34.05.482 are satisfied."[7/]

14 At least two, and arguably all, of the above-referenced conditions are not satisfied with respect to review and approval of a CEIP. First, CEIP review is not "entirely within one or more categories for which the agency by rule has adopted" a brief adjudicative process.[8/] With respect to the Commission, these categories are contained in WAC 480-07-610(2) and are:

> (a) Challenges to commission notices of intent to deny, in whole or in part, applications for authority that are not protested;
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> (b) Contested applications for temporary authority;
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> (c) Proceedings that could lead to suspension, cancellation, or revision of authority for failure to maintain tariffs, pay fees, or file required documents;
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> (d) Formal complaints that do not require notice and an opportunity to participate to persons other than the parties and the commission can best resolve in a brief adjudication including, but not limited to, complaints the commission initiates to determine whether a company is providing service subject to commission regulation without commission authority;
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> (e) Contested penalty assessments under RCW 80.04.405, 81.04.405, or 19.122.150, or consideration of requests for mitigation of the penalty;
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> (f) Applications for authority to provide auto transportation service to which a company properly objects; and

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6/ RCW 34.05.482(1).
7/ Arishi v. Wash. State Univ., 196 Wn. App. 878, 896 (2016).
8/ RCW 34.05.482(1)(c).

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(g) Requests by solid waste collection companies pursuant to WAC 480-07-520(6) for interim rates subject to refund.

Review of a CEIP is wholly unrelated to any of these categories, and certainly does not fit "entirely" within any one of them.

15 Nor can the Commission rely on the statement in WAC 480-07-610(2) that "[c]ategories of proceedings suitable for brief adjudication include, but are not necessarily limited to" the above-quoted categories. This is because the statute "plainly requires agencies who wish to use brief adjudication to adopt a rule identifying the categories of matters for which it adopts the simplified procedures …."[9/] A catch-all statement is not a "categor[y]" of proceedings from which it can be determined whether review of a CEIP is "entirely" within. Moreover, even if the catch-all phrase "include, but are not necessarily limited to" were allowed by the APA, the categories of proceedings the Commission lists in WAC 480-07-610(2) are strikingly dissimilar to a CEIP. These categories are limited to relatively minor contested actions, cases with a narrow interest limited only to the named parties, or cases for temporary relief. The CEIP, by contrast, is the primary vehicle for a utility to plan and demonstrate compliance with CETA, a sweeping statute affecting broad policy interests that the legislature itself has declared to include "immediate significant threats to our economy, health, safety, and national security," and "transformational change in the utility industry."[10/] The means of complying with CETA is not a minor, limited, or temporary process.

[9/] Arishi, 196 Wn. App. at 896.
[10/] RCW 19.405.010(3), (5).

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16 Second, for the same reasons, it is not the case that "[t]he protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties."[11/] The CEIP's impact is far broader than on the utility and Commission (which are typically the "named parties" in an adjudicative proceeding); it will impact all customer classes as well as economic and environmental policy interests. The proposed rules themselves appear to undermine the applicability of this condition for brief adjudicative proceedings by allowing anyone with a "substantial interest" in the CEIP, not just the named parties, to request an adjudication.

17 Finally, and again for similar reasons, the "issue and interests involved in the controversy" absolutely "warrant use of [a full adjudicative proceeding]."[12/] Given the sweeping and substantial legislative findings in CETA, AWEC suspects the legislature would agree.

18 Consequently, the CEIP review process does not meet the narrow requirements necessary for a brief adjudicative proceeding. There is, consequently, no circumstance in which holding such a process would be "appropriate" as the proposed rules currently state. AWEC recommends that the reference to brief adjudicative proceedings be stricken from the final rules.

19 AWEC closes this section by reiterating that it continues to oppose the lengthy and involved stakeholder processes in the proposed rules, which will be costly and time consuming to participate in, potentially undermine the subsequent adjudicative proceeding, hinder the utilities' flexibility to quickly respond to changing technologies and market dynamics, and, overall, is likely to yield insufficient benefits to justify the investment of resources.

[11/] RCW 34.05.482(1)(b).
[12/] RCW 34.05.482(1)(d).

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C. CETA requires only the elimination of coal-fired resources from customer rates; the proposed rules' attestation requirement unlawfully amends CETA and will unnecessarily increase costs for customers.

20 As AWEC has previously argued in comments in this docket,[13/] CETA's requirement that "each electric utility must eliminate coal-fired resources from its allocation of electricity" by December 31, 2025 is a ratemaking requirement, not a physical delivery requirement.[14/] "Allocation of electricity" is a defined term under the statute and means, "*for the purposes of setting electricity rates*, the costs and benefits associated with the resources used to provide electricity to an electric utility's retail electricity consumers that are located in this state."[15/] The statute requires no more than that the costs and benefits included in customer rates – i.e., the return on and return of, as well as the power cost revenues – of a coal-fired resource are eliminated.

21 The proposed rules, however, require a utility to attest that it "did not use any coal-fired resource … to serve Washington retail electric customer load."[16/] There is simply no support in the statute for this requirement, and imposing it in these rules would effectively amend CETA's requirements. It is well settled that "[a]dministrative agencies may not modify or amend a statute by regulation."[17/]

22 The proposed rules' attestation requirement will be particularly problematic for the multi-jurisdictional utilities the Commission serves. For instance, the interjurisdictional allocation of costs among the six states PacifiCorp serves is governed by an interjurisdictional

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13/ AWEC Comments ¶ 18 (Feb. 28, 2020).
14/ RCW 19.405.030(1)(a).
15/ RCW 19.405.020(1) (emphasis added).
16/ Proposed WAC 480-100-650(3)(a).
17/ State ex rel. Living Servs. v. Thompson, 95 Wn.2d 753, 759 (1981).

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allocation protocol that is negotiated and agreed to by representatives of each of these states (known as the MSP Workgroup), then ratified by each state Commission. The current allocation method is governed by the 2020 Protocol, which includes a Washington-specific methodology, known as the Washington Inter-Jurisdictional Allocation Methodology ("WIJAM"), the approval of which is pending before the Commission in PacifiCorp's ongoing general rate case.[18/] Even if the Commission approves the WIJAM, however, the 2020 Protocol contains several unresolved issues that are to be negotiated over the next two years. These issues include resource planning and the assignment of new resources to each state, and the allocation of net power costs among the states.

23 If PacifiCorp is required, in contravention of statute, to attest that it does not use coal-fired resources to serve Washington load, rather than simply removing the costs and benefits of these resources from customer rates, it will significantly complicate the ability to reach a six-state resolution on these unresolved issues in the MSP Workgroup and will put Washington representatives in this Workgroup at a disadvantage in those negotiations. It may, for instance, be impossible to fully integrate Washington into a system-wide allocation method; it may require Washington to assume a larger share of new capacity resources than it otherwise would, thus unnecessarily increasing rates; and it may limit the ability of Washington customers to fully utilize PacifiCorp's transmission system which, ironically, could also compromise Washington's ability to access lower cost renewable resources on the east side of PacifiCorp's system – one of the primary benefits of the WIJAM and the further integration of Washington

[18/] Docket No. UE-191024.

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into a larger system.[19/] The implications of the proposed rules' attestation requirement for coal-fired resources, in other words, are significant and, given that they are unsupported by CETA's statutory language, should be eliminated.

III. CONCLUSION

24 AWEC appreciates the Commission's work in preparing the proposed rules and looks forward to engaging in the CEIP review process.

Dated this 12th day of November, 2020.

Respectfully submitted,

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[19/] AWEC notes that the proposed rules require a utility to attest that it did not "use" coal-fired resources to serve Washington retail customers. As the Commission's November 5, 2020 Notice in this docket demonstrates, the word "use" is ambiguous and, thus, it is not currently clear what a utility must do to ensure it can meet the attestation requirement in the proposed rules and, thus, the implications for multi-jurisdictional utilities are also currently uncertain. AWEC will comment on this issue in response to the November 5, 2020 Notice.

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