

# MEMORANDUM

October 23, 2008

TO: Mark Sidran, Chairman  
Patrick Oshie, Commissioner  
Philip Jones, Commissioner

FROM: Dick Byers, Project Lead on Greenhouse Gases Emissions Performance Standard – RCW 80.80, Docket UE-080111

SUBJECT: Rulemaking to adopt regulations to implement the requirements of RCW 80.80.060 regarding electrical company compliance with the greenhouse gases emissions performance standard contained in RCW 80.80.040.

RE: Adoption Hearing, October 23, 2008, at 10:00 AM

---

On February 5, 2008, the Washington Utilities and Transportation Commission (Commission) filed with the Code Reviser a Pre-proposal Statement of Inquiry (CR-101) to adopt rules to implement the requirements of RCW 80.80.060 regarding electrical company compliance with the greenhouse gases emissions performance standard contained in RCW 80.80.040. The Commission is required by RCW 80.80.060(5), (8) and (9) to adopt rules by December 31, 2008. The proposed rules published by the Commission August 20, 2008, are the subject of this hearing.

## **Background**

On May 7, 2007, Governor Gregoire signed into law Engrossed Substitute Senate Bill 6001 (codified as RCW 80.80). Among other things, the new statute establishes a greenhouse gas emissions performance standard (EPS) in RCW 80.80.040 and requires in RCW 80.80.060(2) the Commission to enforce the EPS with respect to investor-owned electrical companies. The EPS applies to long-term financial commitments that the statute defines as:

- (a) Either a new ownership interest in baseload electric generation or an upgrade to a baseload electric generation facility; or
- (b) A new or renewed contract for baseload electric generation with a term of five or more years for the provision of retail power or wholesale power to end-use customers in this state.

“Baseload electric generation” is defined as:

Electric generation from a power plant that is designed and intended to provide electricity at an annualized plant capacity factor of at least sixty percent.

”Power plant” is defined as:

A facility for the generation of electricity that is permitted as a single plant by the energy facility site evaluation council or a local jurisdiction.

RCW 80.80.040(10) directs the Department of Ecology (Ecology) and the Energy Facility Site Evaluation Council (EFSEC) to adopt rules necessary to implement and enforce the EPS by June, 30, 2008. However, RCW 80.80.060(8) directs the Commission to adopt rules for enforcement of the EPS with respect to jurisdictional electrical companies.

RCW 80.80.060(5) provides that an electrical company may apply to the Commission outside of a general rate proceeding for determination of whether a long-term commitment complies with the EPS:

Upon application by an electrical company, the commission shall determine whether the company's proposed decision to acquire electric generation or enter into a power purchase agreement for electricity complies with the greenhouse gases emissions performance standard established under RCW [80.80.040](#), whether the company has a need for the resource, and whether the specific resource selected is appropriate.

The Commission is directed to adopt procedural rules for such a determination:

The commission shall adopt rules to provide that the schedule for a proceeding under this subsection takes into account both (a) the needs of the parties to the proposed resource acquisition or power purchase agreement for timely decisions that allow transactions to be completed; and (b) the procedural rights to be provided to parties in chapter [34.05](#) RCW (part IV), including intervention, discovery, briefing, and hearing.

RCW 80.80.060(8) directs the Commission to adopt rules for enforcement of the EPS with respect to jurisdictional electrical companies generally, and specifically to adopt “procedural rules for approving costs incurred by an electrical company under subsection (4) of this section.” Subsection (4) of the section provides:

Upon application by an electric utility, the commission may provide a case-by-case exemption from the greenhouse gases emissions performance standard to address: (a) Unanticipated electric system reliability needs; or (b) catastrophic events or threat of significant financial harm that may arise from unforeseen circumstances.

Ecology adopted rules establishing the greenhouse gases emissions performance standard and the related calculations and verification methods at the end of June 2008. Ecology's jurisdiction extends to all existing and new power plants located in Washington State. We understand Ecology will, as part of its enforcement of air permits, require any baseload electric power generation facility in Washington to meet the EPS, whether the facility is owned by a Commission-regulated electrical company, public utility, or a non-utility generator.

EFSEC also adopted rules at the end of June that mirror the Ecology rules. EFSEC's jurisdiction extends to all electric power facilities that require (or optionally request) a state-level site certification agreement (SCA). EFSEC, as part of its development of SCAs and transfers/amendments to SCAs, is required to ensure that baseload electric power generation facilities under its jurisdiction in Washington meet the EPS.

Thus, in view of Ecology's and EFSEC's respective jurisdictions, the Commission will not be the sole reviewer of an electrical company's compliance with the EPS in many circumstances.

New power plants, or transfers of ownership and upgrades that trigger the EPS, will likely require review by Ecology, EFSEC, or both, if the plant is otherwise within the jurisdiction of either agency. In most circumstances, a *facility* located in Washington that supplies power under a contract to an investor-owned utility will be either grandfathered or fall within Ecology or EFSEC jurisdiction for transfers of ownership or upgrades that require review of the facility's permits.<sup>1</sup> The proposed rules require an electrical company to include the results of Ecology or EFSEC review in its filing with the Commission as evidence of compliance with the EPS in these circumstances.

However, change to a power sales contract that does not involve change to a facility's permits would likely not trigger jurisdictional review by Ecology or EFSEC. Nonetheless, the statute requires that new power sales contracts 5-year or more in duration comply with the EPS.<sup>2</sup> Consequently, the Commission will likely be the sole agency to review and determine EPS compliance for some power purchase contracts that qualify as long-term financial commitments and that are entered into by investor-owned electric utilities.

The tools available to the Commission to enforce compliance with the EPS by jurisdictional electrical companies include: 1) a prudence disallowance for rate recovery

---

<sup>1</sup> NOTE: The statute's application to facilities, or contracts served by facilities, located outside Washington is as yet unresolved.

<sup>2</sup> Indeed, facilities lose their grandfathered status once they "are the subject of long-term financial commitments" which includes such power sales contracts.

based on violation of the statute; and 2) penalties related to violation of the proposed rules that require compliance with the EPS (see proposed WAC 480-100-400(1)).

### **Commission Process**

The following depicts the key milestones and developments in our inquiry and rulemaking to date:

- Inquiry Initiated February 5, 2008
- Initial Comments on Discussion Draft March 31, 2008
- Notice of Second Discussion Draft July 9, 2008
- Workshop August 5, 2008
- Notice of Proposed Rules August 20, 2008
- Comments on Proposed Rules September 22, 2008
- Adoption Hearing October 23, 2008

Commission staff also participated in the rulemaking process at Ecology to fulfill the requirement in RCW 80.80.060(7) which directs the Commission to “consult with the department to apply the procedures adopted by the department to verify the emissions of greenhouse gases from baseload electric generation under RCW [80.80.040](#).” The proposed rules adopt the verification and measurement procedures adopted by Ecology.

Two rounds of discussion drafts were undertaken to address stakeholder comments during the inquiry phase and to incorporate references to regulations adopted by the Ecology at WAC 173-407 on June 19, 2008.

In summary, we describe the four proposed rules we recommend for adoption as follows, with statutory authority noted:

#### **WAC 480-100-405 (RCW 80.80.060(2))**

Requires electrical companies to comply with the EPS and allows companies to prove compliance either in a general rate case, or as part of single purpose review as authorized under RCW 80.80.060(5) and WAC 480-100-405. This rule also includes definitions applicable to all four new rules.

#### **WAC 480-100-415 (RCW 80.80.060(5))**

Allows electrical companies to seek a determination from the Commission outside of a general rate case whether a new power source complies with the EPS. The rule sets out the information electrical companies are required to file in such an application – including whether the power facility has already been reviewed for EPS compliance by Ecology or EFSEC. The rule affirms that Commission review will follow the procedural

rules in WAC 480-07 and that any such review will *not* address whether and how costs of the proposed resource may be recovered in rates.

**WAC 480-100-425 (RCW 80.80.060(4))**

Allows electrical companies to seek case-by-case exemptions from the EPS to address unanticipated electric system reliability needs, catastrophic events, or threat of significant financial harm that may arise from unforeseen circumstances. The rule specifies the information electrical companies must file in such an application. The rule states that a utility may propose recovery of any costs associated with such an application in a general rate case.

**WAC 480-100-435 (RCW 80.80.060(6))**

Allows electrical companies to create deferral accounts for costs incurred in connection with long-term financial commitments for baseload electric generation resources. In accordance with the statute, the accounts authorized under this rule may include operating and maintenance costs, depreciation, taxes and cost of invested capital, but for no more than 24 months. The rule requires that any company creating such an account notify the Commission within 10 business days and report quarterly documenting the balances in the account. Finally, the rule and the statute affirm that creation of such an account does not constitute approval of the recovery through rates of any of the costs deferred.

**Comments Received**

We received comments on September 22, 2208, from Puget Sound Energy (PSE) recommending that two changes be made in the proposed rules.

- 1) PSE recommends that the following language be deleted from proposed WAC 480-100-405(1)

Electrical companies bear the burden to prove compliance with the greenhouse gases emissions performance standard under the requirements of WAC 480-100-405 or as part of a general rate case. For electrical companies that fail to carry their burden of proof, the Commission may disallow recovery of some or all costs in rates, impose penalties, or take such other action as is consistent with law.

PSE contends that requiring electrical companies to bear the burden of proving compliance with the greenhouse gases emissions performance standard is contrary to RCW 80.80. According to PSE, RCW 80.80 “places the burden for determining compliance or noncompliance with the EPS on the Washington State Department of Ecology ("Ecology") and the Commission.” In support of its recommendation, PSE points to three provisions of RCW 80.80.060.

"[T]he commission shall determine whether the company's proposed decision to acquire electric generation...complies with the greenhouse gases emissions performance standard...".

RCW 80.80.060(5)

"The commission shall consult with the department to apply the procedures adopted by the department to verify the emission of green house gases...".

"The department [of Ecology] shall report to the commission whether baseload electric generation will comply with the greenhouse gases emission performance standard...".

RCW 80.80.060(7)

According to PSE, these statutory provisions demonstrate that it is the electrical company's responsibility to file an application seeking a determination of whether a proposed acquisition meets the EPS, and Ecology and the Commission, working together, must determine whether the proposed acquisition complies with the law. PSE offers further:

This statute [RCW 80.80] is distinguishable from statutes governing a general rate proceeding, for example, which explicitly places the burden of proof on the applicant utility. Unlike RCW 80.04.130(4), RCW 80.80 is silent with regard to burden of proof. Additionally, the burden of proof is already on a utility to show that any long-term financial commitment is prudent.<sup>2</sup> Such burden is appropriate in a prudence determination because the utility is in the best position to conduct due diligence, review alternatives and determine the best course of action with regard to acquiring a resource. In the case of RCW 80.80, Ecology is in the best position to determine that any baseload electric generation complies or does not comply with emission standards and its own procedures. Further, the Commission's duty to consult with Ecology effectively removes the utility from any specific review, analyses and verification of baseload electric generation emissions, such that placing the burden of proof on the utility would be inappropriate. [footnotes omitted]

2) Definition of "new ownership interest."

PSE recommends the proposed definition of this term at WAC 480-100-405(2)(e) be modified to read:

"New ownership interest" means the acquisition by an electric utility of more than 50 percent of the assets, or more than 50 percent of the equity interests in the owner of the assets, of a baseload power plant or a cogeneration facility or the electrical generation portion of a cogeneration facility. In no event shall any direct

or indirect change in ownership of an electric utility constitute a new ownership interest.

According to PSE, the word "ownership" as used in the term "new ownership interest" means that the provisions of RCW 80.80 apply to changes in a controlling interest of a generation asset, rather than a minority interest. PSE contends that the 5 percent ownership threshold included in the rule adopted by Department of Ecology and proposed in the Commission's rule will "create a substantial administrative burden on all parties and does not reflect the intent of RCW 80.80." PSE recommends that the Commission change the proposed definition of "new ownership interest" to comply with its interpretation of the scope and intent of RCW 80.80.

## **Discussion**

### ***Burden of Proof***

While it is true that RCW 80.80 is not explicit about burden of proof – it neither assigns, nor precludes assignment of the burden to utilities<sup>3</sup> – the statute is explicit that electrical companies are prohibited from acquiring new resources that fail to comply with the EPS. RCW 80.80.060(1). It is also explicit that the Commission is required to review electrical company resource acquisitions (in a general rate case or special single-issue proceeding) and determine whether the utility has complied with the law. The Commission is directed to adopt rules necessary to implement review of new resource acquisitions for compliance with the law and to do so in a manner protecting the procedural rights of all parties.

Being clear in the proposed rule that the burden to prove compliance with the EPS rests with the utility is reasonable for a number of reasons:

- The statute makes specific reference to Commission review in the context of general rate cases, proceedings in which PSE concedes it bears the burden of proof. It is also reasonable to clarify the utility's burden as the moving party in any special single issue proceeding to determine compliance.
- Compliance with the law is a characteristic of prudent utility management. PSE concedes it bears the burden to prove its resource choices are prudent.

---

<sup>3</sup> While the EPS is not included in RCW 80.28, it is but one of the many requirements placed on public service companies not included in that chapter. Other such requirements include compliance with RCW 19.285 (the Energy Independence Act), RCW 80.60 net metering, RCW 19.280 (IRPs), and RCW 19.29A.090 (Green Power). Determining utility compliance with these public service company obligations rests mainly, if not entirely with the Commission, yet as with RCW 80.80, none of these statutes is explicit about "burden" of proof.

- Utilities - not Ecology or the Commission - will possess the information necessary to prove compliance with the EPS (some of which may be qualified for confidential treatment under RCW 80.04.095).

*Staff Recommendation: Leave the proposed language at WAC 480-100-405(1) as is.*

### ***Definition of Ownership Interest***

The statute provides no specific definition of ownership interest. Nonetheless, PSE's proposal seems at odds with the express terms of the statute. If the intent was to limit the scope to controlling interests, the statute could have just said "new ownership." PSE's proposal to limit the scope of the term cannot be squared with the statute. On the other hand, leaving the term "ownership interest" undefined leaves the door open for arguments that any change in interest, no matter how small, triggers the statutory requirements. We share PSE's concern that this could lead to administrative burden. Contrary to PSE's assertion, setting a threshold actually furthers administrative efficiency and is more consistent with the term used in the statute than is PSE's proposal.

PSE's proposal does raise an issue not addressed by the definition proposed in the CR-102: does change in ownership of the utility that has an ownership interest in a power resource constitute a change in "ownership interest" for purposes of the statute? The purpose of the statute is to regulate utility actions, not utility ownership. Consequently, we think the final sentence in PSE's proposal is a reasonable and constructive clarification.

*Staff Recommendation: Leave the proposed definition as is with the clarifying addition that "A direct or indirect change in ownership of an electric utility does not constitute a new ownership interest in baseload electric generation."*

### **Conclusion**

Staff believes the proposed rules benefit the public interest by fulfilling the Commission's obligation under RCW 80.80.060 to adopt rules necessary for efficient enforcement of Washington's greenhouse gases emissions performance standard. The proposed rules affirm that a utility must prove that new baseload generation power resources it acquires comply with the EPS. The rules will facilitate the process for determining utility compliance by making clear what information must be filed for review by the Commission. In addition, the rules make clear what information must be filed with the Commission if a utility seeks a determination of compliance outside of a general rate case, or seeks an exemption from the EPS under specified circumstances.

Staff recommends the Commission adopt the rules as proposed, with clarification to the definition of "ownership interest."



Summary of Written Comments On Proposed Rules (CR102)  
WAC 480-100 Part VII - Greenhouse Gas Emissions  
Docket UE-080111

ISSUE	INTERESTED PERSON	COMMENTS	STAFF RESPONSE
<p>Burden to prove compliance with Emissions Performance Standard</p>	<p>Puget Sound Energy</p>	<p>PSE recommends that the following language be deleted from proposed WAC 480-100-405(1)</p> <p style="text-align: center;">Electrical companies bear the burden to prove compliance with the greenhouse gases emissions performance standard under the requirements of WAC 480-100-405 or as part of a general rate case. For electrical companies that fail to carry their burden of proof, the Commission may disallow recovery of some or all costs in rates, impose penalties, or take such other action as is consistent with law.</p> <p>PSE contends that requiring electrical companies to bear the burden of proving compliance with the greenhouse gases emissions performance standard is contrary to RCW 80.80. According to PSE, RCW 80.80 “places the burden for determining compliance or noncompliance with the EPS on the Washington State Department of Ecology (“Ecology”) and the Commission.”</p>	<p><i>Leave the referenced language at WAC 480-100-405 as is.</i></p> <p>Being clear in the proposed rule that the burden to prove compliance with the EPS rests with the utility is reasonable for a number of reasons:</p> <ul style="list-style-type: none"> <li>• The statute makes specific reference to Commission review in the context of general rate cases, proceedings in which PSE concedes it bears the burden of proof. It is also reasonable to clarify the utility’s burden as the moving party in any special single issue proceeding to determine compliance.</li> <li>• Compliance with the law is a characteristic of prudent utility management. PSE concedes it bears the burden to prove its resource choices are prudent.</li> <li>• Utilities - not the Department of Ecology nor the Commission - will possess the information necessary to prove compliance with the EPS (much of which may well be qualified for confidential treatment).</li> </ul>

ISSUE	INTERESTED PERSON	COMMENTS	STAFF RESPONSE
Definition of “new ownership interest.”	Puget Sound Energy	<p>PSE recommends the proposed definition of this term at WAC 480-100-405(2)(e) be modified to read:</p> <p style="padding-left: 40px;">"New ownership interest" means the acquisition by an electric utility of more than 50 percent of the assets, or more than 50 percent of the equity interests in the owner of the assets, of a baseload power plant or a cogeneration facility or the electrical generation portion of a cogeneration facility. In no event shall any direct or indirect change in ownership of an electric utility constitute a new ownership interest.</p> <p>According to PSE, the word "ownership" as used in the term "new ownership interest" means that the provisions of RCW 80.80 apply to changes in a controlling interest of a generation asset, rather than a minority interest. PSE contends that the 5 percent ownership threshold included in the rule adopted by Department of Ecology and proposed in the Commission’s rule will “create a substantial administrative burden on all parties and does not reflect the intent of RCW 80.80.”</p>	<p><i>Leave the proposed definition as is with the addition of “A direct or indirect change in ownership of an electric utility does not constitute a new ownership interest in baseload electric generation.”</i></p> <p>The statute provides no specific definition of ownership interest. Nonetheless, PSE’s proposal seems at odds with the express terms of the statute. If the intent was to limit the scope to controlling interests, the statute could have just said “new ownership.” PSE’s proposal to limit the scope of the term cannot be squared with the statute. On the other hand, leaving the term “ownership interest” undefined leaves the door open for arguments that any change in interest, no matter how small, triggers the statutory requirements. We share PSE’s concern that this could lead to administrative burden. Contrary to PSE’s assertion, setting a threshold actually furthers administrative efficiency and is more consistent with the term used in the statute than is PSE’s proposal.</p> <p>The purpose of the statute is to regulate utility actions, not utility ownership. Consequently, we think the final sentence in PSE’s proposal is a reasonable and constructive clarification.</p>

