**BEFORE THE WASHINGTON UTILITIES AND**

**TRANSPORTATION COMMISSION**

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| In the matter of the<br><br>Proceeding to Develop a Policy Statement Addressing Alternatives to Traditional Cost of Service Rate Making. | DOCKET NO. U-210590<br><br>Northwest & Intermountain Power Producers Coalition Phase One Comments |

## I. INTRODUCTION

The Northwest & Intermountain Power Producers Coalition ("NIPPC") provides these comments pursuant to the Washington Utilities and Transportation Commission's ("UTC's" or the "Commission's") April 7, 2022 Notice of Workshop and stated guidance at the workshop, which occurred on April 19, 2022.[1] As noted at the workshop, NIPPC's primary recommendation for this docket is that the Commission address and provide broad policy guidance on the performance incentive set forth in the Clean Energy Transformation Act ("CETA") through which a utility may earn a return on a power purchase agreement ("PPA"). NIPPC respectfully provides these written comments to summarize its oral comments and identify relevant materials not yet in the record.

## II. COMMENTS

The Commission invited stakeholders to address specific questions at the workshop, including:

1. What goals and outcomes should be pursued through regulation in Washington?
2. What are the current regulatory mechanisms, approaches, or processes that are currently influencing

[1] Notice of Workshop at 1-3 (Apr. 7, 2022).

> or incentivizing utility performance? What behaviors or achievements are currently incentivized?[2]

NIPPC organized its oral comments to follow the workshop questions above but believes the need for clarity on CETA's return-on-PPA incentive mechanism may be more clearly understood in a different order. NIPPC has reorganized and bolstered its comments below in the hopes of providing additional clarity.

## A. CETA Blesses the Adoption of a Return-on-PPA Incentive Mechanism

At the workshop, NIPPC noted that, while discussions may focus on the need to implement Senate Bill 5295's mandate for a policy statement on alternatives to cost of service ratemaking,[3] the Commission and stakeholders also need to recognize other legislative guidance. Specifically, Section 1(5) of CETA states that the legislature

> recognize[d] and [found] that the [UTC's] statutory grant of authority for rate making includes consideration and implementation of performance and incentive-based regulation, multiyear rate plans, and other flexible regulatory mechanisms where appropriate to achieve fair, just, reasonable, and sufficient rates and its public interest objectives.[4]

Further, Section 21 of CETA explicitly authorizes the UTC to allow a utility to earn a rate of return on the operating expenses a utility incurs under a PPA.[5] Thus, as the Commission explores performance-based regulation, the Commission needs to

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2 Notice of Workshop at 2-3.
3 2021 Wash. Sess. Laws ch. 188 § 1.
4 2019 Wash. Sess. Laws ch. 288 § 1(5) (codified at RCW 19.405.010(5)).
5 2019 Wash. Sess. Laws ch. 288 § 21 (codified at RCW 80.28.410); *see also* NIPPC Comments at 4-5 (Nov. 29, 2021).

acknowledge and incorporate in any policy statement any existing legislative guidance, like CETA's return-on-PPA incentive mechanism.

For additional reference, NIPPC attaches a legal memorandum it procured on ratemaking in Washington and how CETA's return-on-PPA incentive mechanism compares to traditional regulation.[6] NIPPC also notes that there are real-world examples of a return-on-PPA mechanism,[7] and it is an item of interest before the Montana Public Service Commission.[8]

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[6] Attachment A, NIPPC, Washington Return on Equity Standards Memorandum (Oct. 7, 2021).

[7] Examples of this approach exist in Washington as well as in Arkansas and Michigan. *In re Matter of Puget Sound Energy, For Approval of a Power Purchase Agreement for Acquisition of Coal Transition Power*, Wash. UTC Docket No. UE-121373, Order No. 3 (January 9, 2013) ; Chelan County Public Utility District No. 1, *2017 Annual Report* at 20 (2017) (a summary of the PPA in Chelan PUD's 2017 annual report), available at https://www.chelanpud.org/docs/default-source/default-document-library/financial-report-2017-web.pdf; *In re Matter of Petition of Entergy Arkansas, Inc. for a Declaratory Order regarding a Purchase Power Agreement for a Renewable Resource*, Ark. PSC Docket No. 15-014-U, Order No. 5, (Sept. 24, 2015), available at http://www.apscservices.info/pdf/15/15-014-u_104_1.pdf; *In re Matter of Petition of Entergy Arkansas, Inc. for a Declaratory Order regarding a Purchase Power Agreement for a Renewable Resource*, Ark. PSC Docket No. 17-041-U, Order No. 4 (Jun. 18, 2018), available at http://www.apscservices.info/pdf/17/17-041-U_85_1.pdf; *In re Matter of Application of Consumers Energy Company for approval of its integrated resource plan*, Mich. PSC Case No. U-20165, Order Approving Settlement Agreement (Jun. 7, 2019), available at https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t0000005HSSrAAO.

[8] *In Re Request for Comments Regarding Implementation of HB 597*, Mont. PSC Docket No. 2021.01.007, Notice of Opportunity to Comment at 2 (Oct. 14, 2021).

### B. A Return-on-PPA Incentive Mechanism Could Provide a Solution to the Utility Ownership Bias and Increase the Effectiveness of the UTC's Procurement Rules

NIPPC also addressed at the workshop its view on the underlying problems that the Washington legislature likely sought to address through a return-on-PPA incentive mechanism, which is the utility ownership bias.[9] In brief, current regulation does not reward utilities as much for procuring power from third-parties as it does for building and owning resources itself.

NIPPC understood one utility's comments at the workshop to imply that the UTC's competitive procurement rules resolve this concern.[10] While NIPPC strongly supports the UTC's competitive procurement rules, it is not correct that the rules eliminate the utility ownership bias. In other words, while the rules seek fair treatment, they do not provide equivalent compensation to utility shareholders. Disparate outcomes can lead to utility gaming, where utilities may design competitive procurements to favor utility-owned resources. However, a return-on-PPA incentive mechanism could address the underlying bias and bolster the UTC's competitive procurement rules by disincentivizing gaming activity.

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9 NIPPC briefly addressed this bias in its November 2021 comments in this docket. NIPPC Comments at 5-6. The Regulatory Assistance Project ("RAP") also discusses this bias. *See* RAP, Performance Based Regulation Report at 5 (Mar. 2, 2022).

10 *See generally* WAC 480-107. NIPPC commented extensively on the utility ownership bias in the recent rulemaking. *In re Amending, Adopting, and Repealing WAC 480-107, Relating to Purchases of Electricity*, Docket No. UE-190837, NIPPC Comments at 1-4, Attach. A-D (Mar. 13, 2020) (discussing the utility ownership bias and incorporating NIPPC's comments from the Commission's earlier related rulemaking, specifically Docket No. UE-161024).

### C. Without UTC Guidance, CETA May Not Be Implemented

NIPPC recommends the Commission provide guidance on CETA's return-on-PPA incentive mechanism because NIPPC is concerned that a lack of clarity will hinder any implementation of the statutory text. Puget Sound Energy's ("PSE's") comments at the workshop affirmed this concern. PSE indicated that it is not aware of any utility using the mechanism yet, PSE is not certain what outcome a utility would get if it tried to use the mechanism, and PSE would like to see a "safe" way to implement it, but PSE is concerned by the possibility of an adverse outcome. NIPPC would like to better understand these concerns and hopes this docket can provide an opportunity to engage on these sorts of implementation questions. NIPPC suggests that this docket provide a valuable venue for exploring and potentially settling how to implement the return-on-PPA provision. Stakeholder discussion and preferably some Commission guidance would be better than utilities attempting to implement the provision "cold" (and stakeholders reacting to such attempts) during a competitive procurement.[11]

### D. Implementing Statute is a Core Goal of Any Regulatory Activity

At the workshop, the Commission asked stakeholders to identify regulatory goals, to which NIPPC responded that one goal is promoting a competitive power sector that reduces costs and cost risks for ratepayers. NIPPC views the UTC's very regulatory regime as aiming to enforce competitive pressures upon monopoly utilities to achieve

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[11] However, NIPPC does not want to preclude a utility from seeking recovery of a return on a PPA in a rate case until the conclusion of this investigation, which could be in December 2025 or even later.

better outcomes for ratepayers.[12] Further, promoting competition is, in NIPPC's view, the premise of the legislature's enactment of CETA's return-on-PPA incentive mechanism. Thus, to achieve the legislature's goal, the UTC needs to implement CETA's return-on-PPA provision.

Another way of thinking about this is that one regulatory goal that the UTC needs to consider as this docket proceeds is the implementation of Washington statute. Generally speaking, implementing statute is a core goal of any agency activity, therefore implementing CETA should be part of the stated goals for this docket.

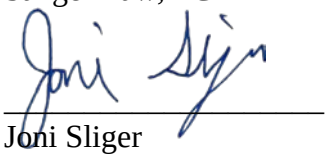
## III. CONCLUSION

For the foregoing reasons, NIPPC respectfully recommends that the Commission address and implement CETA's return-on-PPA incentive mechanism in this docket.

Dated this 27th day of April 2022.

Respectfully submitted,

Sanger Law, PC



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[12] *See generally* History of the Commission, https://www.utc.wa.gov/about-us/about-commission/history-commission.

# Attachment A

# NIPPC, Washington Return on Equity Standards Memorandum

# October 7, 2021

**Northwest & Intermountain Power Producers Coalition**

**MEMORANDUM**

FROM: Irion Sanger
Joni Sliger

RE: Washington Return on Equity Standards

DATE: October 7, 2021

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## I. SUMMARY

This memorandum differentiates: 1) a Washington utility's traditional return on equity authorization (or disallowance) and 2) new statutory language in the Clean Energy Transformation Act ("CETA") authorizing a potential return on certain costs associated with power purchase agreements ("PPAs") that are "major projects" in the utility's Clean Energy Action Plan or that win a utility's request for proposal ("RFP"). This memorandum focuses in particular on treatment of investor-owned electric utilities and does not examine publicly owned electric utilities (e.g., public utility districts).

In summary, while the Washington Utilities and Transportation Commission (the "WUTC") has broad authority to set utility rates, so long as a utility meets specific requirements, it is statutorily and constitutionally entitled to recovery, including a non-zero return on and of utility investments. Generally, utilities are entitled to recover but not earn a return on costs other than capital investments. Recent court cases suggest the WUTC tends to err towards approving recovery more often than not. In contrast to the historic approach, CETA authorizes utilities to seek the WUTC's approval of a return on PPA costs (i.e., a return on costs other than capital investments). CETA does not explicitly require the WUTC to grant any return, either on PPA costs or otherwise. Thus, utilities may seek a return on PPA costs, but they are not legally entitled to even an opportunity to earn a return on PPA costs.

The WUTC has not yet made a final decision on how it will implement CETA's authorization. CETA is drafted to provide the WUTC with discretion whether or not to allow a return on a PPA. One question that has arisen is whether the WUTC should simply treat a CETA return similarly to a utility's ordinary return, particularly in evaluating bids in a resource solicitation (i.e., assume parity between the return on a PPA and the return on a utility-owned resource in the quantitative scoring of such bids). This memorandum concludes a parity approach would overlook the fundamental legal distinctions between a utility's right to a return

on its own investments and CETA's authorization of, but no right to, a return on certain PPA costs. Thus, treating a CETA return similar to an ordinary return, would assume parity exists when in fact it does not.[1]

## II. DISCUSSION

### A. Legal Requirements for WUTC Ratemaking

A primary purpose of government regulation is to protect that government's citizens. Washington State has the sovereign right to regulate private persons for the benefit of the state's citizens, subject to those citizens' constitutional rights, and it has chosen to exercise that right over electric utilities.[2] Washington law obligates electric utilities to provide service that is "safe, adequate and efficient, and in all respects just and reasonable."[3] To enforce the various utility laws, the state legislature has delegated certain powers to the WUTC. Among other tasks, the WUTC must set utility rates so that they are "just, reasonable, and sufficient."[4] In short, Washington law sets a ceiling on the rates a utility may charge, and the WUTC is responsible for ensuring that rates do not exceed this statutory ceiling.[5]

Washington State recognizes another purpose of rate regulation—"assur[ing] that regulated utilities earn enough to remain in business"—as *equally* important to protecting customers from excessive rates.[6] By law, the WUTC must set utility rates so that, in addition to being "just [and] reasonable," they are also "sufficient," which means that the rates "meet the needs of the Company to cover its expenses and attract necessary capital on reasonable terms."[7]

A Washington utility's statutory right to earn a "sufficient" amount in rates reinforces that utility's constitutional rights not to have its private property (including capital investments) put to public use without just compensation.[8] The Supreme Court has held that "[r]ates which

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1 The memo does not address other issues related to CETA's implementation of the return on PPA, including but not limited how the provision can be implemented to reduce utility bias in the resource procurement process.

2 *See People's Org. for Wash. Energy Resources v. WUTC*, 711 P.2d 319, 104 Wn.2d 798, 807 (1985) [hereinafter *POWER*].

3 RCW 80.28.010(2).

4 RCW 80.28.020; *see* RCW 80.01.040(3); RCW 80.28.010(1).

5 *See, e.g., U.S. West Communications, Inc. v. WUTC*, 949 P.2d 1337, 134 Wn.2d 74 (1998) (affirming WUTC decision that, among other things, lowered the telephone utility's rate of return because the WUTC found service was inadequate and unreasonable).

6 *POWER,* 104 Wn.2d at 808 (citing *State ex rel. Puget Sound Power & Light Co. v. Dep't of Pub. Works*, 38 P.2d 350, 179 Wash. 461, 466, (1934)). This 1934 case explained that this dynamic as also necessary to protect ratepayers, albeit future ratepayers.

7 RCW 80.28.020; *WUTC v. Puget Sound Energy*, Dockets UE-190529 and UG-190530 (consolidated), Final Order 08 at P. 71 (July 8, 2020).

8 *See* U.S. Constitution, Amdt. V and XIV; Wash. Constitution, Art. I, Section 16.

are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment."[9] The Washington Supreme Court has expressed its agreement with the U.S. Supreme Court's explanation of these rights:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employes [sic] for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties....[10]

In other words, utilities have constitutional rights that protect them from rates so low as to be confiscatory. The Washington State Constitution provides a state constitutional right that is additional to the federal constitutional right. Further, Washington law provides utilities with statutory rights to sufficient rates that are similarly additional to the utilities' constitutional rights. In summary, Washington utilities have constitutional and statutory rights to rates that allow the utilities to recover certain service-related costs and a return of and on investment costs that is sufficiently high to maintain the utility's financial viability.

Utilities are not entitled to recover all costs, but the prohibitions on cost recovery are specific. First, utilities cannot recover costs unrelated to providing utility service. For example, Washington utilities cannot recover voluntary charitable contributions in rates.[11] Second, a service-related cost is not recoverable if it was not prudently incurred.[12] Third, utilities are not entitled to earn a return on investments that were not "used and useful for service."[13] Note that these requirements essentially parallel the U.S. Supreme Court's description of constitutional rights: 1) the prudent utility is likely one operating "under efficient and economical management"; and 2) a utility's constitutional right to earn a return only on "property which it

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9 *Bluefield Water Works & Imp. Co. v. Public Serv. Comm'n*, 262 U.S. 679, 690, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

10 *POWER,* 104 Wn.2d at 813 (quoting *Bluefield Water Works*, 262 U.S. at 692).

11 *Jewell v. WUTC,* 585 P.2d 1167, 90 Wn.2d 775, 780-781 (1978) (reversing WUTC decision to allow recovery, when costs were for telephone utility's voluntary charitable contributions).

12 *POWER*, 104 Wn.2d at 810.

13 RCW 80.04.250(2).

employes [sic] for the convenience of the public" is met by a return on property that is "used and useful."

Experts often disagree on what the appropriate rate of return is, and typically vary between a couple percentages (e.g., a recommendation for a 10% return on equity vs. an 8% return on equity). However, there is no question that a utility is entitled to earn a non-zero rate of return on investments that are service-related, prudent, and used and useful.

In summary, so long as a utility incurs service-related costs prudently, it is entitled to rates that permit it to recover those costs. Further, if the utility invests in something "used and useful," the utility is entitled to rates that permit it to earn a return on and of its investment (called "rate base").

## B. WUTC Ratemaking Decisions As Applied

Courts can review WUTC decisions, but judges generally defer to the agency's quasi-legislative authority and "are not at liberty to substitute their judgment for that of" the WUTC.[14] Therefore, at least recent court cases generally focus only on whether the WUTC met Washington's procedural requirements for its decision-making process or whether the three standards described above were met (i.e., a cost is service-related, prudently incurred, and, if applicable, was used and useful).[15]

Recent court cases indicate that the WUTC appears to err on the side of ruling in the utility's favor. For instance, around 1978, the WUTC allowed recovery of voluntary charitable contributions; the court reversed because the costs were not service-related.[16] Similarly, the WUTC has allowed recovery of controversial service-related costs, including costs related to an abandoned nuclear power plant and costs related to a potentially unlawful tax.[17]

The WUTC did not allow a return on the abandoned nuclear plant, but the court held that doing so would have violated the used and useful requirement if it had.[18] Notably, a year earlier, a court had reversed the WUTC's decision to allow a return on costs that were not used and

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14 RCW 80.04.170, 80.04.190; *see POWER,* 104 Wn.2d at 812.

15 *See generally* Wash. Admin. Procedure Act, RCW 34.05.001 to 34.05.902.

16 *Jewell,* 90 Wn.2d at 780-781.

17 *POWER,* 104 Wn.2d at 822-823 (affirming WUTC decision to allow recovery of costs related to electric utility's abandoned nuclear power plant), *and Willman v. WUTC*, 93 P.3d 909, 913, 122 Wash.App. 194 (Wash. App. 2004) (affirming WUTC decision to take no action and automatically allow cost recovery where costs regarded Native American tax upon non-Native persons and there was a question as to legal validity of tax).

18 *POWER,* 104 Wn.2d at 822-823.

useful.[19] Also, in 2018, a court reversed another decision for the same mistake, allowing a return on costs that were not used and useful.[20]

The WUTC has sometimes denied recovery, but the circumstances appear to be atypical, such as when a utility actively refuses to provide information, or when the WUTC thinks other states' ratepayers are responsible for the costs (i.e., the costs might be recoverable, but not from Washington ratepayers).[21]

Of recent court cases, only one focused on determining the appropriate rate of return. In that case, a telephone utility filed for a rate increase, but the WUTC instead reduced rates.[22] The WUTC stated somewhat bluntly that the telephone service was both inadequate and overpriced, in part because the utility sold off a lucrative part of its business to an unregulated affiliate for what the WUTC deemed "grossly inadequate" compensation.[23] Also, the WUTC stated it would provide a higher rate of return once service became adequate.[24] The court affirmed the WUTC's decision to set the rate of return at the lowest rate the WUTC found to be reasonable (i.e., 9.367%, a not inconsiderable rate).[25]

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19 *People's Org. for Wash. Energy Resources v. WUTC*, 679 P.2d 922, 101 Wn.2d 425, 426 (1984) [hereinafter *Power I*] (reversing WUTC decision to allow return on costs, where court found recovery violated used and useful statute).

20 *Wash. Attorney General's Office v. WUTC*, 423 P.3d 861, 864 (Wash. App. 2018) (reversing WUTC decision to allow return on costs, where court found recovery violated used and useful statute).

21 *Waste Management of Seattle, Inc. v. WUTC*, 869 P.2d 1034, 123 Wn.2d 621, 624-628 (1994) (reversing WUTC decision to deny recovery of costs, where costs were incurred by company WUTC considered utility affiliate and utility had refused to disclose information, because court found statute obligated WUTC to allow pass-through of specific fees at issue); *PacifiCorp v. WUTC*, 376 P.3d 389, 194 Wash.App. 571 (Wash. App. 2016) (affirming WUTC decision not to change cost allocation methodology regarding costs of out-of-state contracts under the Public Utility Regulatory Policies Act ("PURPA"), effectively denying recovery from Washington ratepayers, where WUTC found costs resulted from different state policies and thus should continue to be allocated to the originating states).

22 *U.S. West Communications, Inc. v. WUTC*, 949 P.2d 1337, 134 Wn.2d 74, 80 (Wash. 1998) (affirming WUTC decision that, among other things, lowered the telephone utility's rate of return because the WUTC found service was inadequate and unreasonable).

23 *U.S. West Communications*, 134 Wn.2d at 80-81, 90.

24 *U.S. West Communications*, 134 Wn.2d at 83.

25 *U.S. West Communications*, 134 Wn.2d at 83. The WUTC set the company's return on equity to 11.3%. *Id.* at 115 n12.

## C. Treatment of PPA Costs under CETA

Traditionally, the WUTC has set rates pursuant to the basic formula R = O + B(r), where "R" stands for the revenue requirement, "O" stands for operating expenses, "B" stands for rate base, and "r" stands for the rate of return the utility can earn on the rate base.[26] In other words, the general formula expects that a utility's total revenue will equal the utility's operating costs plus the costs of the utility's investments multiplied by a rate of return on those investments.

Under the traditional ratemaking approach, utilities could recover costs incurred without any utility investment (such as costs under a PPA), as long as the PPA costs were service-related and prudently incurred.[27] However, a utility would not earn a return on such costs in the ordinary course of events. This is because the utility is not making an investment when it incurs costs under most PPAs. A PPA could be structured differently such that a utility is making an investment as part of the PPA. For example, in *WUTC v. Puget Sound Energy* ("PSE"), the WUTC approved a settlement stipulation that allowed a return on at least some costs under a PPA between PSE and Chelan Public Utility District ("PUD").[28] According to Chelan PUD's 2017 financial report, under the PPA, "PSE is generally responsible to pay 25% of all costs associated with the projects, including capital, operation and maintenance and debt service costs, in addition to charges for capital recovery, debt reduction and various fees."[29] PSE has some responsibility for capital investments under this PPA, thus PSE may be entitled to a return on at least some of PSE's costs under the PPA terms. This example underscores the innovative contracting provisions that could be needed for a utility to justify earning a return on (some) PPA costs under the historic ratemaking approach. It is possible that the WUTC may have itself found other valid justifications, but those possibilities are outside of the scope of this memorandum.

CETA officially authorizes the WUTC to allow utilities to receive a return on costs they incur under PPAs that are "major projects" in the utility's Clean Energy Action Plan or that win a utility's RFP.[30] Section 21 of CETA authorizes a change to how utilities treat "costs incurred in connection with major projects … selected in the electrical company's solicitation of bids," including "all operating and maintenance costs, depreciation, taxes, cost of capital associated with the applicable resource or the execution of a [PPA]."[31] The "cost of capital" includes

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26 *POWER,* 104 Wn.2d at 809-10.

27 There can be often factors at play, such as PacifiCorp's multi-state cost allocation for its PURPA contracts. *See supra* note 20.

28 *WUTC v. PSE*, Docket Nos. UE-170033 and UG-170034 *(consolidated)*, Order No. 08 at i (Dec. 5, 2017); Docket Nos. UE-170033 and UG-170034 *(consolidated)*, Multiparty Settlement Stipulation and Agreement, Exhibit G at 2 (Sept. 15, 2017).

29 Chelan PUD, 2017 Annual Report at 20. Chelan PUD's financial reports are generally available on its website at https://www.chelanpud.org/about-us/our-financials/annual-reports.

30 2019 Wash. Sess. Laws ch. 288 § 21 (codified at RCW 80.28.410).

31 2019 Wash. Sess. Laws ch. 288 § 21.

> For the duration of a [PPA], a rate of return of no less than the authorized cost of debt and no greater than the authorized rate of return of the electrical company, which would be multiplied by the operating expense incurred by the electrical company under the [PPA].[32]

Starting on "the effective date of the [PPA]," utilities may "defer for later consideration by the [WUTC]" the above costs for up to three years.[33] CETA explicitly states that "[c]reation of such a deferral account does not by itself determine the actual costs of the resource or power purchase agreement, whether recovery of any or all of these costs is appropriate, or other issues to be decided by the commission in a general rate case or other proceeding."[34] Thus, CETA authorizes utilities to track the above costs and, at any time within roughly three years, seek WUTC's approval to recover those costs.

Notably, this section of CETA does not explicitly authorize or order WUTC to take any action. Thus, CETA authorizes the WUTC, at its discretion, to consider changing the historic ratemaking treatment of a subset of PPAs such that the utility might recover more than its costs alone. If WUTC decides that a return is justified, then CETA mandates that the return be set within a specific range ("no less than the authorized cost of debt and no greater than the authorized rate of return"). However, CETA does not mandate that any return must be authorized, thus it could be zero. It is possible that WUTC might decide a non-return is only justified when the PPA, taken as whole, was imprudently incurred, such that the utility should not recover any PPA costs.

In summary, a utility is entitled to recover prudently incurred service-related costs and to earn a return on and of prudently incurred investments that are used and useful. CETA authorizes the WUTC to allow a return on PPA costs as though they were utility investments. This grant of authority does not provide the same constitutional or statutory right to a return that applies to actual utility investments. Based on the broad discretion that courts provide the WUTC ratemaking decisions, it is unlikely that any court would find legal error if the WUTC refused to approve a return on an RFP-winning PPA, for example, while a court would almost certainly find legal error if the WUTC denied a return on an RFP-winning utility resource, so long as the utility resource was prudently incurred and used and useful.

The WUTC has not yet made a final decision on how it will implement CETA's authorization. CETA is drafted to provide the WUTC with discretion whether or not to allow a return on a PPA. One question that has arisen is whether the WUTC should simply treat a CETA return similarly to a utility's ordinary return, particularly in evaluating bids in a resource

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32 2019 Wash. Sess. Laws ch. 288 § 21.

33 2019 Wash. Sess. Laws ch. 288 § 21. The time period is somewhat qualified by the unclear statement in the law "However, if during such a period the electrical company files a general rate case or other proceeding for the recovery of such costs, deferral ends on the effective date of the final decision by the commission in such a proceeding." *Id.*

34 2019 Wash. Sess. Laws ch. 288 § 21.

solicitation (i.e., assume parity between the return on a PPA and the return on a utility-owned resource in the quantitative scoring of such bids). This memorandum concludes a parity approach would overlook the fundamental legal distinctions between a utility's right to a return on its own investments and CETA's authorization of, but no right to, a return on certain PPA costs.