EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

MEMORANDUM

TO: Joni Bosh, Northwest Energy Coalition

FROM: Jaimini Parekh and Amanda Goodin

DATE: December 6, 2021

RE: Legal interpretation of CETA's requirement to consider the social cost of greenhouse gas emissions

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This memorandum contains our legal analysis of the mandate in the Clean Energy Transformation Act ("CETA") that utilities consider the social cost of greenhouse gas emissions as a cost adder in planning documents and resource decisions. RCW 19.280.030(3). This memorandum also analyzes PacifiCorp's request that the UTC waive this requirement for purposes of its calculation of the incremental cost of compliance with CETA's clean energy standards, RCW 19.405.060(3).[1] For the reasons below, the UTC lacks authority to waive this requirement because it is mandatory under CETA's plain language and purpose, and waiver would be contrary to the public interest. WAC 480-07-110(1). Accordingly, the UTC must deny PacifiCorp's request for a waiver.

Analysis

I. CETA requires utilities to include the social cost of greenhouse gas emissions in CEIPs and in the incremental cost of compliance.

A. CETA requires utilities to incorporate the social cost of greenhouse gas emissions in CEIPs

CETA requires all electric utilities to incorporate the social cost of greenhouse gas emissions as a cost adder in their planning documents and resource decisions. The full statutory text makes clear that all resource plans, including clean energy implementation plans ("CEIPs"), must include the social cost of greenhouse gas emissions:

> An electric utility shall consider the social cost of greenhouse gas emissions, as determined by the commission for investor-owned utilities pursuant to RCW 80.28.405 and the department for consumer-owned utilities, when developing integrated resource plans and clean energy action

[1] *See* Petition for Exemption from WAC rule 480-100-605 which requires that the "alternative lowest cost and reasonably available portfolio" include the social cost of greenhouse gases "in the resource acquisition decision," on behalf of PacifiCorp d/b/a Pacific Power & Light Company, dated November 1, 2021 in Docket UE-210829 (hereinafter "Petition").

plans. An electric utility must incorporate the social cost of greenhouse gas emissions as a cost adder when:

(i) Evaluating and selecting conservation policies, programs, and targets;
(ii) Developing integrated resource plans and clean energy action plans; and
(iii) Evaluating and selecting intermediate term and long-term resource options.

RCW 19.280.030(3)(a).

The statute explicitly requires use of the social cost of greenhouse gas emissions for the types of actions and analyses that must be included in CEIPs.[2] Specifically, under subsections (i) and (iii), utilities must include the social cost of greenhouse gas emissions whenever they are selecting or evaluating mid- or long-term resource options or conservation targets. RCW 19.280.030(3)(a)(i), (iii). CEIPs are required to include these analyses. RCW 19.405.060(1) (CEIPs must "propose[] specific targets for energy efficiency, demand response, and renewable energy," and must include the "specific actions" that utilities will take to comply with CETA's clean energy standards). While CETA does not explicitly include CEIPs in the list of planning documents that must incorporate the social cost of greenhouse gas emissions, RCW 19.280.030(3)(a)(ii), that does not change the requirement that the decisions and analyses in CEIPs include the social cost of greenhouse gas emissions, RCW 19.280.030(3)(a)(i), (iii). Accordingly, CETA requires that utilities add the social cost of carbon into their analysis in the CEIP.

Other sections of CETA likewise confirm that utilities must include the social cost of carbon when preparing CEIPs. CETA mandates that CEIPs be "consistent with" a utility's integrated resource plan. RCW 19.405.060(1)(b)(iii). Utilities must incorporate the social cost of greenhouse gas emissions into their integrated resource plans. RCW 19.280.030(3)(a)(ii). If a utility failed to consider the social cost of greenhouse gas emissions in its CEIPs, those plans would become materially inconsistent with the analyses in the utility's integrated resource plan. While the consistency requirement does still leave room for utilities to incorporate updated information in their planning decisions, it does not allow utilities to discard central components of their resource evaluation methodology, such as the requirement to incorporate the social cost of greenhouse gas emissions as a cost adder.

B. CETA specifically requires utilities to include the social cost of carbon in their evaluation of the incremental cost of compliance with CETA's clean energy standards

CETA's plain language, structure, and purpose require utilities to include the social cost of greenhouse gas emissions in their calculation of the incremental cost of compliance with the clean energy standards. For the reasons below, the social cost of greenhouse gas emissions must be included in both the actions the utility plans to take to comply with CETA (the "CETA portfolio") and the baseline established by the "alternative lowest reasonable cost portfolio." [3]

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[2] *See Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002) (where the language of a statute is plain on its face, courts must give effect to that plain meaning).

[3] "Plain meaning 'is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Lake v. Woodcreek Homeowners Ass'n,* 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *State v. Engel,* 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)).

CETA's core mandate directs utilities to transition to one hundred percent clean energy. This transformation of the state's electricity supply proceeds in several phases. Ultimately, by 2045, utilities must use clean energy (renewable resources and/or non-emitting generation) to "supply one hundred percent of all sales of electricity" to Washington customers. RCW 19.405.050(1). As an interim step, by 2030, utilities must ensure that clean energy supplies at least eighty percent of their sales of electricity to Washington customers. RCW 19.405.040(1). This interim 2030 standard allows utilities more flexibility than the ultimate 2045 standard by allowing utilities to rely on "alternative compliance options" for no more than twenty percent of their load that might still be supplied by fossil fuels. RCW 19.405.040(1)(b).

CETA requires that utilities evaluate the incremental cost of complying with these clean energy standards. RCW 19.405.060(3)(a). CETA directs the UTC to establish rules guiding utilities' calculation of the incremental cost of compliance, by comparing the cost of compliance with CETA's clean energy standards to the cost of "an alternative lowest reasonable cost portfolio." RCW 19.405.060(5).

The incremental cost of compliance is used to cap the utilities' financial obligation to comply with CETA's clean energy standards. This cost cap affects a utility's evaluation and selection of resources because when the cost cap is triggered, utilities may choose lower-cost but higher-emitting resources even if those choices delay a utility's compliance with CETA's clean energy standards. *See* RCW 19.405.060(3)(a). Accordingly, calculating the incremental cost of compliance is a necessary component of "evaluating and selecting intermediate term and long-term resource options," and CETA requires utilities to include the social cost of greenhouse gases in this calculation. RCW 19.405.060(1)(b)(iii).

CETA's structure and purpose also compel utilities to include the social cost of greenhouse gas emissions in both its CETA portfolio and the alternative lowest reasonable cost portfolio, to accurately calculate the incremental cost of compliance. In determining the incremental cost of compliance, CETA requires that utilities narrowly consider only costs "directly attributable to actions necessary to comply with the requirements of RCW 19.405.040 and 19.405.050." RCW 19.405.060(3)(a). Similarly, the statute specifies that the incremental cost of compliance is the "average incremental cost of *meeting the standards . . . under subsection (1)."* RCW 19.405.060(3)(a) (emphasis added). This language makes clear that only actions that are solely necessary to comply with the 2030 and 2045 clean energy standards can be included in the incremental cost calculation.

Costs stemming from the use of the social cost of greenhouse gas emissions, however, are not "directly attributable" to actions necessary to meet the clean energy standards. RCW 19.405.060(3)(a). Instead, a separate section of CETA imposes this obligation on virtually all planning and resource decisions. RCW 19.280.030(3)(a).[4] Incorporating the social cost of greenhouse gas emissions is an underlying requirement that must be included in the "alternative lowest reasonable cost portfolio," RCW 19.405.060(5), because a portfolio would not be "reasonable" if it failed to comply with the mandatory requirement to incorporate the social cost of greenhouse gas emissions.

[4] Short term resource decisions, such as spot market purchases, are not included in this requirement and are not at issue in PacifiCorp's waiver request.

This interpretation is consistent with CETA's core purpose: to rapidly transform Washington's energy supply to 100% clean energy. *See* RCW 19.405.010.[5] Requiring utilities to incorporate the social cost of greenhouse gas emissions into planning and resource acquisition decisions will generally have the effect of making clean resources more cost-competitive with dirty fossil fuel resources, because incorporating the true social cost of fossil fuels substantially increases their cost. In turn, this will accelerate the transition to clean energy because it will drive utilities to select clean resources when their true social cost is lower than the cost of fossil fuels. CETA included this requirement to level the playing field between clean resources and fossil fuels, by accounting for substantial costs that would otherwise be externalized and excluded from a utility's resource decisions.

CETA's clean energy standards go further than simply leveling the playing field: they mandate that utilities transition to 100% clean energy. Utilities may only delay this necessary transition where the *incremental* costs of complying with these specific standards exceed a cost cap. These *incremental* costs cannot include actions the utility would take regardless of the clean energy standards. Because utilities are independently required to select cost-effective resources – and incorporate the social cost of greenhouse gas emissions into that decision – the costs of acquiring clean energy resources cannot be included in the calculation of *incremental* cost if those resources are lowest cost once the social cost of greenhouse gas emissions is included.

Requiring utilities to include the social cost of greenhouse gas emissions in the alternative lowest reasonable cost portfolio is consistent with the legislature's plain intent.[6] The legislature did not include any and all clean energy costs in the incremental cost of compliance. If the legislature intended such a result, it would have said so. Instead, the legislature narrowly defined the incremental cost of compliance to include only *additional costs* incurred by a utility that are necessary to comply with CETA's clean energy standards. RCW 19.405.060(3)(a). Utilities may not exclude the social cost of greenhouse gas emissions from the lowest reasonable cost portfolio because doing so impermissibly expands the legislature's narrow definition of incremental cost.

If instead utilities were allowed to claim as incremental all costs of acquiring clean resources – even where those resources are independently cost-effective and so would be chosen regardless of the need to meet the clean energy standards – it is likely that these inflated incremental costs would trigger CETA's cost cap more frequently. Indeed, PacifiCorp's waiver petition illustrates this risk: the petition acknowledges that the effect of omitting the social cost of greenhouse gas emissions from the alternative lowest reasonable cost portfolio is to include 2.12 million dollars per year in energy efficiency resources as an incremental cost of compliance with CETA's clean energy standards, despite the fact that those energy efficiency resources would be cost-effective and so independently required in an alternative lowest reasonable cost portfolio that includes the social cost of greenhouse gas emissions. *See* Petition at ¶ 12.

[5] "If the statute at issue, or a related statute, incorporates a relevant statement of purpose, our reading of the statute should be consistent with that purpose." *Matter of Adoption of T.A.W.*, 186 Wn.2d 828, 840, 383 P.3d 492 (2016).

[6] In interpreting a statute, the Court's "fundamental purpose is to ascertain and carry out the intent of the legislature." *Quinault Indian Nation v. Imperium Terminal Servs., LLC*, 187 Wn.2d 460, 468, 387 P.3d 670 (2017).

In short, omitting the social cost of greenhouse gas emissions from the alternative lowest reasonable cost portfolio has the effect of artificially inflating the incremental cost of compliance by including actions that are not directly attributable to CETA's clean energy standards. Artificially inflating the incremental cost of compliance could allow utilities to substantially delay their compliance with CETA's clean energy standards, despite CETA's clear purpose to require a rapid transformation of Washington's energy supply to 100% clean. *See* RCW 19.405.010. The UTC cannot adopt an interpretation of CETA that so plainly undermines the statute's core purpose.[7]

II. The UTC lacks authority to waive the regulatory requirement that utilities include the social cost of greenhouse gas emissions in the incremental cost of compliance.

The UTC has issued regulations governing how utilities must calculate the incremental cost of compliance, as CETA requires. *See* WAC 480-100-660; WAC 480-100-605. These regulations require utilities to compare the cost of a portfolio that complies with CETA to the cost of an alternative portfolio to calculate the incremental cost of compliance.

Specifically, the "Alternative lowest reasonable cost and reasonably available portfolio" ("Alternative Portfolio") is defined as:

> the portfolio of investments the utility would have made and the expenses the utility would have incurred *if not for the requirement to comply* with RCW 19.405.040 and 19.405.050. The alternative lowest reasonable cost and reasonably available portfolio must include the social cost of greenhouse gases in the resource acquisition decision in accordance with RCW 19.280.030(3)(a).

WAC 480-100-605 (emphasis added).

PacifiCorp is asking the UTC to waive the requirement that it include the social cost of greenhouse gas emissions in the Alternative Portfolio. PacifiCorp argues that CETA does not require considering the social cost of carbon when determining the Alternative Portfolio, and accordingly, the Commission has the discretion to waive this requirement.

As explained above, however, CETA does require utilities to consider the social cost of greenhouse gas emissions in the incremental cost of compliance, by including it in both the Alternative Portfolio and the CETA Portfolio. Because the Commission does not have authority to waive any regulatory requirements if doing so would be contrary to the statute, the UTC must deny PacifiCorp's request. WAC 480-07-110(1) (providing that the Commission can only modify or exempt regulatory

[7] "Statutes should be interpreted to further, not frustrate, their intended purpose." *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007) (internal quotations and citation omitted). *See also Quinault Indian Nation v. Imperium Terminal Servs., LLC*, 187 Wn.2d 460, 468, 387 P.3d 670 (2017) ("[W]hen passing laws that protect Washington's environmental interests, the legislature intended those laws to be broadly construed to achieve the statute's goals.").

requirements if "the exemption or modification is consistent with the public interest, the purposes underlying regulation, and applicable statutes[.]").[8]

In short, the UTC's definition of the Alternative Portfolio directly tracks the statutory mandate, which limits the incremental cost of compliance to only those actions "directly attributable to actions necessary" to comply with CETA's clean energy standards. RCW 19.405.060(3)(a). For this reason, every investment in clean energy *cannot* be lumped into the incremental cost of compliance. Financially prudent investments in renewable energy generation that a utility undertakes because they are cost effective considering the harms to the public from global climate change *are not* included in the incremental cost of compliance. These type of renewable energy investments are not "necessary to comply" with RCW 19.405.040(1) and 19.405.050(1), because utilities should be undertaking them in the ordinary course of business. These are exactly the type of investments that utilities should describe in their Alternative Portfolio.

In its waiver application, PacifiCorp argues including the social cost of carbon in its Alternative Portfolio would lead to absurd results because it did not include the social cost of carbon in its CETA Portfolio. PacifiCorp states that they only used the medium cost of gas and load, not the social cost of greenhouse gas emissions, when calculating the CETA Portfolio. Petition at ¶¶ 6-7. But as explained above, CETA requires utilities to consider the social cost of greenhouse gases when evaluating both the Alternative Portfolio *and* the CETA Portfolio, and the Commission may not waive this statutory requirement. WAC 480-07-110(1).[9]

PacifiCorp argues that they may fail to include the social cost of greenhouse gas emissions in the CETA portfolio in their integrated resource plan, despite the fact that CETA explicitly requires utilities to include it. *See* RCW 19.280.030(3)(a). Specifically, PacifiCorp reasons that because they included the social cost of greenhouse gas emissions in all of the portfolios that they did not select, they may omit it from the one that they actually plan to implement. Petition at ¶ 6 & n.1. This interpretation finds no support in the statutory text, which broadly requires the use of the social cost of greenhouse gas emissions in "integrated resource plans." *See* RCW 19.280.030(3)(a)(ii). Nor can it be reconciled with the requirement that utilities use the social cost of greenhouse gas emissions in resource decisions, RCW 19.280.030(3)(a)(iii), since the CETA portfolio is the one that will guide the utility's decisions going forward. PacifiCorp claims that "no state it serves" requires inclusion of the social cost of greenhouse gas emissions in its preferred portfolio, but Washington law does include this requirement in CETA.

In short, PacifiCorp cannot justify its failure to include the social cost of greenhouse gas emissions in the alternative portfolio by pointing to its failure to comply with the statute's requirement to consider the social cost of greenhouse gas emissions in its preferred portfolio or its CETA portfolio.

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[8] *See also Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002) ("Administrative rules or regulations cannot amend or change legislative enactments.") (internal quotations and citation omitted).

[9] UTC regulations also require that a utility's CETA-compliant portfolio consider "cost of risks associated with environmental effects, including emissions of carbon dioxide." WAC 480-100-605. *See also* WAC 480-100-660 (in determining the incremental cost of compliance, a utility must compare the "lowest reasonable cost" portfolio with the Alternative Portfolio). PacifiCorp has not requested exemption from this regulatory requirement.

Instead, PacifiCorp must incorporate the social cost of greenhouse gas emissions in each of these analyses.

III. Waiver would be contrary to the public interest.

Even if the statute did not mandate that utilities include the social cost of greenhouse gas emissions in the incremental cost of compliance (which it does), the Commission would still be compelled to deny PacifiCorp's request because it is contrary to the public interest and would undermine the core purpose of CETA. *See* WAC 480-07-110(1) (the UTC may only grant an exemption from rules if consistent with the public interest). Exempting PacifiCorp from considering the social cost of greenhouse gases would directly undermine the purpose of CETA, because it would prevent PacifiCorp from internalizing into its resource planning the cost of human health and the environment harms caused by the utility's reliance on fossil fuels.

PacifiCorp claims that waiving the requirement to consider the social cost of carbon when calculating the incremental cost of compliance would benefit the public interest, but this argument runs counter to the purpose of CETA. By enacting CETA, the legislature sought to empower utilities "through regulatory tools and incentives, to achieve the goals" of the statute, including a rapid transition to 100% clean energy. RCW 19.405.010(5). Through CETA, the legislature sought to change the financial incentives that drive utility ratemaking and decision-making regarding investments in energy generation. In particular, the legislature sought to require electrical and gas companies to use the social cost of carbon for planning, evaluating, and acquiring all resources. *See* Senate Bill Report E2SSB 5116, Apr. 11, 2019, at page 1, bullet point no. 6. By including this requirement, the legislature sought to disincentivize reliance on energy resources that emit large quantities of greenhouse gases, by internalizing the cost of public health and environmental harms into the utilities' cost calculus.

Waiving the requirement to consider the social cost of carbon when determining the incremental cost of compliance is contrary to the public interest because it would directly undermine one of the central purposes of CETA—to reduce the public harms caused by unmitigated climate catastrophe. In enacting CETA, the legislature recognized "that the public interest includes … reduction of burdens to vulnerable populations and highly impacted communities; long-term and short-term public health, economic, and environmental benefits and the reduction of costs and risks[.]" RCW 19.405.010(6). Integrating the social cost of carbon into utility resource planning advances this public interest purpose by forcing utilities to include the cost of serious public health and environment harms caused by fossil fuel use in their cost comparison between resources. In enacting CETA, the legislature recognized that "[a]bsent significant and swift reductions in greenhouse gas emissions, climate change poses immediate significant threats to our economy, health, safety, and national security." Accordingly, the legislature sought to internalize the social cost of climate change into utility decision making, by requiring utilities to consider this cost when "[e]valuating and selecting intermediate term and long-term resource options." RCW 19.280.030(3)(a).

The legislature has articulated that the public interest includes a rapid transition to clean energy, away from the recognized harms caused by fossil fuels. The UTC may not undermine this public interest by granting PacifiCorp's request for a waiver.

Conclusion

In conclusion, the UTC must deny PacifiCorp's Petition for a Waiver because the Commission does not have authority to waive the regulatory requirements of WAC 480-100-605 and 480-100-660, which require utilities to include the social cost of carbon in its calculations of the incremental cost of compliance. Waiving these regulatory requirements would conflict with the letter and spirit of CETA—a law that requires utilities to internalize the health and environmental harms of their actions by considering the social costs associated with greenhouse gas emissions from their activities.