December 6, 2021

Amanda Maxwell
Executive Director and Secretary
Washington Utilities & Transportation Commission

Glenn Blackmon
Manager, Energy Policy Office
Department of Commerce

Re: Docket No. UE-210183 – Relating to Electricity Markets and Compliance with the Clean Energy Transformation Act - Comments of Joint Utilities

Dear Ms. Maxwell and Mr. Blackmon,

The Washington Utilities and Transportation Commission and the Washington Department of Commerce (Joint Agencies) issued a Notice of Opportunity to File Written Comments (Notice) in Docket UE-210183 on November 10, 2021, requesting comments by December 6, 2021. Avista, PacifiCorp, Puget Sound Energy, and Public Generating Pool (Joint Utilities) appreciate the opportunity to comment on this matter.

GENERAL COMMENTS

The Joint Utilities generally agree with the draft rules' objective to prohibit double counting of nonpower attributes associated with RECs used for alternative compliance, and the scenarios under which double counting may occur. However, the Joint Utilities do not support the overarching compliance approach taken in the current draft rules. The draft rules impose limitations on suppliers selling unbundled and bundled RECs that become retained RECs to Washington utilities, which will create practical and legal problems. The current rules likely run afoul of the dormant commerce clause. In addition, the rules as drafted will significantly hamper the ability of utilities to source unbundled RECs for alternative compliance and to economically optimize generation across a large geographic footprint by significantly limiting the pool of available resources. Resource diversification is increasingly necessary to the reliable operation of the electric system as we work to decarbonize the system. Finally, the draft rules require registration and tracking of that is beyond the capabilities of the existing Western Renewable Generation Information System (WREGIS) and would necessitate the establishment of a significant and costly additional registration system that is entirely avoidable by utilizing other, more reasonable, compliance approaches.

The Joint Agencies should revise the draft rules to eliminate the Washington State registration requirement and instead set forth straightforward requirements that apply to Washington utilities – rather than out-of-state generators. The recommended revisions will achieve the same end result, but in a much more straightforward manner using existing systems and methods.

The Joint Utilities support section -YYY, dealing with storage accounting, as drafted. This section recognizes that the Clean Energy Transformation Act's (CETA) basic compliance obligation deals solely with total renewable or non-emitting generation, and retail electric load, both of which are measured in MWhs. No section of the law indicates that any losses, including storage losses, should be considered as a part of a compliance obligation, unless the resource is on the customer side of the meter.

Finally, the Joint Utilities suggest that the Joint Agencies strike language in section -XXX(1) indicating that the requirements of this section are "the minimum requirements necessary to demonstrate that no double counting has occurred. The Commission may require the utility to produce other evidence or take specific actions as it determines necessary to ensure that there is no double counting of nonpower attributes." This language significantly undercuts the certainty provided by rules and creates a risk that a utility could follow the rules perfectly, but still be considered to have engaged in double counting. If so, CETA compliance might be threatened, and utilities could face financial penalties without any notice that the penalized conduct was actually prohibited.

In addition to the responses below, the Joint Utilities have included as Attachment A to these comments a redlined version of the proposed draft rules. The intention of the redlines is to improve upon the proposed rules in preventing double counting of RECs used for CETA compliance and to require compliance based on the actions taken by the utility using the RECs for compliance. The concerns relating to the double counting of environmental attributes of RECs should be addressed in the contract between the utility and seller of the RECs rather than in the business practices of the seller.

RESPONSE TO QUESTIONS

1. **Requirements for obtaining unbundled RECs:** The draft rule would require that utilities obtain unbundled RECs only from renewable generating facilities that comply with certain business practices in all transactions, regardless of whether the transaction involves a Washington utility.

    a. Is it feasible to require renewable generation facilities to register and certify with the state of Washington that all of their transactions comply with the draft rules' business practices?

    Response: No, it is not. The unbundled REC market is highly liquid and involves hundreds, if not thousands, of REC-producing renewable generating facilities across the Western Interconnection.

    First, there are likely serious legal issues with requiring out-of-state facilities to comply with certain business practices in all transactions, including transactions with no nexus to Washington. Generally, states may regulate the out-of-state conduct of utilities with regard to utility procurement. This includes limiting the types of resources and suppliers that utilities can contract for, including in some cases requirements that

suppliers register with the state.[1] These requirements are constitutional because they restrict the activities of the regulated utility and only impose incidental burdens on out-of-state sellers.[2]

In contrast, requiring out-of-state facilities to comply with a Washington regulation in all their transactions would almost certainly constitute an impermissible extraterritorial effect on wholly out-of-state commerce, which would violate the dormant commerce clause.[3] The practical effect of the rule is to regulate the wholly out-of-state conduct of all entities that do business with Washington utilities, because it conditions an entity's ability to do business with Washington utilities on compliance with the state's regulation in all transactions. This is precisely the kind of risk that the Supreme Court warned against in *Heely v. Beer Institute*, where it found that the "Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[4]

In addition to the potential legal problems with this requirement, the practical difficulties and potential market implications associated with requiring renewable generating facilities to register and adhere to specific Washington business practices should prompt reconsideration of the draft rules. Artificially limiting the pool of suppliers that utilities may transact with and potentially erecting new barriers to the acquisition of unbundled RECs, renewable energy and nonemitting resources may lead to increases in compliance costs, and ultimately higher costs to customers.

b. Should the Joint Agencies consider alternatives to requiring that renewable generation facilities adhere to specific business practices in order to prevent double counting?

Response: Yes. The Joint Agencies should not proceed with a requirement that renewable generation facilities adhere to specific business practices, especially for all transactions. The Joint Utilities suggest that the Joint Agencies consider adopting rules that avoid potential legal problems by requiring specific contract provisions that protect against double-counting instead of trying to regulate out-of-state suppliers or generators. These rules should recognize the contractual information that is available in REC transactions and that it is not possible for utilities to verify that counterparties are meeting specific business practices for all of their REC transactions. However, it is possible for utilities to secure specific requirements through contractual agreements,

[1] *See*, e.g. ORS 469A.027.
[2] A straightforward registration or certification requirement that does not impose any restrictions on out-of-state conduct is constitutional because the associated burden on interstate commerce is de minimis or nonexistent. *See Ferndale Lab'ys, Inc. v. Cavendish*, 79 F.3d 488, 494 (6th Cir. 1996).
[3] *See, e.g. Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 376 (6th Cir. 2013) (Washington might be "forcing states to comply with its legislation in order to conduct business within its state, which creates an impermissible extraterritorial effect").
[4] 491 U.S. 324, 336 (1989), *citing Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982).

preventing double-counting. See the Joint Utilities response to 1.d below for further explanation.

c. Should the Joint Agencies consider an alternative in which the business practices identified in subsection (2)(a) through (c) are required only for transactions that result in the transfer of an unbundled REC to a Washington utility?

Response: The Joint Agencies should consider alternative rules in subsection (2) that would apply only to transactions that result in the transfer of unbundled REC to a Washington utility, but not through requirements placed on business practices. Instead requirements for attestations in contracts should be utilized to ensure no double-counting. The requirements in subsection (2) need to be modified to accommodate this approach, and because subsection (2) deals with requirements for unbundled RECs used for alternative compliance, sections applicable to other types of transactions may not be applicable. The Joint Utilities suggested redlines to subsection (2) are provided in Attachment A and described as follows:

- Subsection (2)(a) addresses how a facility can make bundled sales, which are not at issue in this rule. This section has been modified in the attached redlines to cover only the sale of the underlying energy associated with the unbundled REC.
- Subsection (2)(b) requires that electricity associated with an unbundled REC be sold unspecified and without any representation of the fuel source. As drafted, this section would require a seller to associate a specific MWh of electricity with a specific unbundled REC, which cannot currently be done because of the assignment of monthly vintages to RECs.
- Subsection (2)(c) imposes limits on how electricity associated with an unbundled REC can be used in a capped jurisdiction, such as California. This subsection faces the same problems as subsection (2)(b), namely, how to identify which MWh should be associated with a specific REC.

d. Is a transaction-based approach feasible? If feasible, is it necessary to ensure no double counting of non-energy attributes?

Response: Yes. REC transactions (purchases and sales) are memorialized with either a contract or a transaction confirm that is part of a larger Master Agreement or a contract between the counterparties. Included in that confirm or contract would be language that would specify which environmental attributes would be included with the purchase of the REC and whether an attestation that the energy associated with the production of that REC was not used in any other jurisdiction to comply with GHG or renewable regulations or programs. In this manner, the seller is attesting to the validity of the REC as not having been associated with a "resource specific" energy sale, including specified sales to California.

If a transaction-based approach is used as recommended, the Joint Agencies could audit the transaction confirms or contracts as necessary for any unbundled RECs purchased that were used for alternative compliance.

Lastly, it is important to note that WREGIS simply certifies that one REC is created from one MWh of renewable energy. WREGIS is not a platform that can track what happened with the underlying electricity of an unbundled REC. However, WREGIS is the first step to ensuring there is no double-counting of environmental attributes. Because of the combination of WREGIS and parties complying with the contract provisions of the sales agreements, there is no need to track the underlying electricity.

*e. **Would a transaction-based approach be more or less effective and enforceable than the draft rules in preventing double counting?***

Response: A transaction-based approach would be more effective and enforceable because it places the onus on the utility using an unbundled REC for alternative compliance to ensure that the contract language of any contract to procure unbundled RECs prevents double counting of environmental attributes.

2. Business practices for transactions involving electricity delivered or claimed under greenhouse gas cap programs:

*a. **Sec. -XXX(2)(c) applies to transactions involving GHG cap programs outside Washington. Is it reasonable to distinguish between GHG cap programs outside Washington and Washington's own GHG cap program, the Climate Commitment Act (CCA)? Is it relevant in making this decision that the electricity and the unbundled REC are used in the same jurisdiction?***

Response: As noted above, the Joint Utilities have agreed to accept the basic concept that non-power attributes are double-counted when a REC is used for CETA while the underlying energy is sold on a specified basis to a different jurisdiction. The acceptance of this concept is, in part, rooted in immediately available and practical ways to prevent such double-counting from occurring. Currently, specified transactions are largely limited to sales to California which limits the scope and impact of these rules. However, as discussed in a number of forums, including the Washington Markets Work Group, there are practical and potentially unintended consequences associated with the strict application of this concept if and/or when more states adopt similar policies.

For the practical reason that CETA and the CCA are intended to work together, while the rules for implementation and compliance requirements for Washington's GHG program are still under development, and the costly unintended consequences and infeasibilities that are likely to arise if utilities are not able to use the same non-emitting MWh for both CETA and the CCA, it is critical to distinguish between GHG cap programs outside of Washington and Washington's own GHG cap program. This is

consistent with the treatment of RECs in California, where the California Public Utilities Commission concluded that RECs could be used for RPS compliance as well as be counted as non-emitting under the California cap-and-trade program.

However, the Joint Utilities do have concerns that distinguishing between the GHG cap programs in California and Washington will create issues if and when Washington considers linking to California's GHG cap program. Treating resources within California differently from resources within Washington may create additional unintended consequences in terms of the dormant commerce clause and utilities' ability to transact. As noted above, the Joint Utilities believe that this issue will likely need to be revisited in the future as CETA and CCA programs mature.

It is also important to note that the Joint Utilities found this section of the draft rules confusing and had difficulty interpreting the intention as written. The attached redlines propose significantly simplified language for this section.

b. Sec. -XXX(2)(c) uses the term "GHG cap program," and the workshop discussion focused primarily on California's cap and trade program. How should the term "GHG cap program" be defined? Should the rule identify specific programs? If so, please provide an alternative term and definition.

Response: For the purposes of this rulemaking, it may be useful to describe relevant programs as "GHG cap programs that do not require retirement of RECs from renewable resources as a means of demonstrating that the resource has no emissions." This would sufficiently capture California and other jurisdictions that implement similar programs in the future where the use of a REC for CETA compliance could result in double counting.

3. **Identification of RECs associated with specified source electricity sales:** ***Sec. -XXX(2)(a) requires the inclusion of RECs in sales of specified source electricity and requires that the RECs be from the same generating facility and have the same month/year vintage. Is this matching of RECs with electricity reasonable or is a more precise matching of RECs with electricity necessary and feasible for compliance?***

Response: The matching of RECs with electricity on a monthly basis is technically feasible[5] as RECs are tracked within WREGIS with vintages by month and year, but it may not be advisable for the reason given in the Joint Utilities' responses to question one. Anything more granular is not possible at this time.

4. Double counting safeguards for retained RECs: The statutory prohibition on double counting applies to unbundled RECs retired for alternative compliance obligations. The draft rules on "use" allow retained RECs to be used in addition to electricity from

[5] Bonneville Power Administration has indicated that RECs associated with power sold from the federal system will be allocated on an annual basis.

renewable generation resources for primary compliance. Should the business practices preventing double counting be applied to retained RECs? If so, does draft section -ZZZ do this effectively?

Response: It is not clear that there is any need for draft section -ZZZ, because there is no risk of double counting of retained RECs. Because utilities must initially own both the REC and the associated electricity for a REC to become a "retained REC," it would be possible to draft rules that simply prohibit the utility from making any representation about the nonpower attributes associated with unspecified sales in those sales. However, such a rule should not attempt to regulate the representations that the purchaser might make, as neither the Joint Agencies nor the Joint Utilities can control the conduct of those purchasers.

Further, as written, draft section -ZZZ has similar problems as those identified for section -XXX in response to question 1.a above. Namely, draft section -ZZZ appears to regulate all transactions made by an out-of-state entity, including those that occur wholly out of state. This likely violates the dormant commerce clause. Additionally, it creates potentially dire consequences for Washington utilities' ability to procure least-cost nonemitting resources from a diverse geographic footprint.

Finally, the Joint Utilities note that the statutory prohibition on double counting extends solely to unbundled RECs used for alternative compliance. While it may be a good policy choice to extend double counting provisions to retained RECs, there is no legal requirement for the Joint Agencies to do so.

CONCLUSION

The Joint Utilities appreciate the opportunity to provide comments in response to the Commission's Notice.

Sincerely,

/s/ Shawn Bonfield

Shawn Bonfield
Sr. Manager of Regulatory Policy & Strategy
Avista

/s/ Jon Piliaris

Jon Piliaris
Director, Regulatory Affairs
Puget Sound Energy

/s/ Shelly McCoy

Shelly McCoy
Director, Regulation
PacifiCorp

/s/ Therese Hampton

Therese Hampton
Executive Director
Public Generating Pool