

MEMORANDUM

TO: Joni Bosh, NWECA and Kelly Hall, Climate Solutions

FROM: Amanda Goodin

DATE: November 12, 2021

RE: Legal Interpretation of the Clean Energy Transformation Act

This memorandum contains our legal analysis of the core mandate of the Clean Energy Transformation Act (“CETA”): that utilities use clean energy to supply their Washington retail electric customers. RCW 19.405.040(1); RCW 19.405.050(1). This memorandum also analyzes the Washington Utilities and Transportation Commission’s (“UTC”) proposed draft rule defining this core obligation.¹ For the reasons below, the UTC’s interpretation conflicts with CETA, and the UTC lacks authority to adopt the draft rule as proposed.²

Washington’s Clean Energy Transformation Act is sweeping and transformative. The legislature explicitly intended to require a transformation of Washington’s energy supply. RCW 19.405.010(1). *See also* RCW 19.405.010(2) (“It is the policy of the state to . . . transition the state’s electricity supply to one hundred percent carbon-neutral by 2030, and one hundred percent carbon-free by 2045.”). CETA requires all sales of electricity to be first greenhouse gas neutral and later greenhouse gas free. RCW 19.405.040; RCW 19.405.050. To implement this transformation, CETA requires utilities to use electricity from renewable resources or non-emitting generation to supply Washington customers. RCW 19.405.040; RCW 19.405.050. At every turn, CETA’s plain language underscores its requirement that utilities transition rapidly to a portfolio of one hundred percent clean resources.

¹ *See* Notice of Opportunity to File Written Comments and Draft Rules on “Use” dated October 12, 2021 in Docket UE-210183.

² This memorandum addresses the UTC’s draft proposed rule in Docket UE-210183, which conflicts with CETA for many of the same reasons as the legal interpretation advanced in the letter dated July 31, 2020 from the Public Generating Pool, Puget Sound Energy, Pacific Power, and Avista, and accompanying legal memorandum. Accordingly, some of the analysis in this memorandum overlaps with the analysis in the Earthjustice memorandum addressed to Wendy Gerlitz, dated August 10, 2020.

The UTC's proposed draft rule interprets the requirement that utilities "use" clean energy in a way that conflicts with the plain language and stated purpose of CETA. The UTC's definition of "use" in proposed WAC 480-100-650 does not in fact require utilities to use clean energy to serve Washington retail electric customers, as CETA requires. RCW 19.405.040(1); RCW 19.405.050(1). The UTC's interpretation is also inconsistent with the mandate that utilities' sales of electricity be first greenhouse gas neutral and later greenhouse gas free, as well as the legislature's stated policy of transitioning Washington's energy supply to be one hundred percent clean. See RCW 19.405.010; RCW 19.405.040; RCW 19.405.050.

The UTC's proposed interpretation of CETA would eviscerate CETA's core requirements. Specifically, the UTC's proposed rule would allow utilities to rely on fossil fuel generation for any or all of the electricity they sell to Washingtonians, so long as they retain sufficient renewable energy credits ("RECs") and comply with a vague and unenforceable procurement requirement. Under this reading, CETA's one hundred percent clean energy mandate requires no transformation of Washington's energy supply, it only requires utilities to hold title or contract for resources that may never serve Washington.

Under the UTC's untenable interpretation, CETA's one hundred percent clean energy mandate allows utilities to continue to rely on fossil fuels indefinitely. This interpretation cannot be squared with the plain text of the statute or the stated intent of the legislature to transition to one hundred percent clean energy. The Commission lacks authority to adopt the proposed draft rule in UE-210183 because it conflicts with the statute.³

Part One of this memorandum discusses CETA's requirements and explains why the plain language of CETA requires utilities to use clean electricity to supply their Washington customers. Part Two of this memorandum explains why the UTC's definition of use in proposed WAC 480-100-650 conflicts with CETA and exceeds the UTC's authority.

I. CETA REQUIRES UTILITIES TO SUPPLY WASHINGTON CUSTOMERS WITH CLEAN ELECTRICITY

CETA requires utilities to use clean electricity to supply their Washington customers. The plain language of the mandates in RCW 19.405.040(1) and RCW 19.405.050(1) and the legislature's stated purpose and intent compel this interpretation, as do other provisions of the statute that govern penalties and planning. Similarly, related provisions of the Energy Independence Act demonstrate that CETA's plain language means what it says: utilities must actually use clean electricity to serve Washington customers.

³ "A rule that conflicts with a statute is beyond an agency's authority." *Devine v. Dep't of Licensing*, 126 Wn. App. 941, 956, 110 P.3d 237 (2005).

A. The plain language of CETA's 2030 and 2045 mandates require clean electricity

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 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 their "sales of electricity" to Washington customers are greenhouse-gas neutral. 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 up to twenty percent of their load. RCW 19.405.040(1)(b).

Both the 2045 and 2030 standards also specify, in identical language, that a utility must "demonstrate its compliance with this standard *using* a combination of nonemitting electric generation and *electricity from renewable resources.*" RCW 19.405.050(1) (emphasis added); RCW 19.405.040(1)(a) (emphasis added). In other words, utilities comply with both standards by "using" clean electricity.⁴ This identical "use" language in the 2030 and 2045 standards presumptively has the same meaning.⁵

Both the 2030 and 2045 standards mean what they say: utilities must use electricity from clean sources to supply their customers. Significantly, CETA directs this "use" requirement to "*electricity from renewable resources.*" RCW 19.405.050(1); RCW 19.405.040(1)(a) (emphasis added). A requirement that utilities "use renewable resources" might create some ambiguity—but the requirement that they use "*electricity from renewable resources*" does not.⁶

While "use" is not defined in CETA, its common definition leaves little room for doubt.⁷ Merriam-Webster's online dictionary defines "use" as "to put into action or service," or "to

⁴ "Nonemitting electric generation" is defined as "*electricity from*" a nonemitting resource. RCW 19.405.020(28). Accordingly, CETA requires utilities to use clean *electricity* to meet the 2030 and 2045 standards, regardless of whether it comes from a renewable resource or from nonemitting electric generation.

⁵ "When the same words are used in different parts of the same statute, it is presumed that the Legislature intended that the words have the same meaning." *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 313, 884 P.2d 920 (1994) (quoting *State v. Hutsell*, 120 Wn.2d 913, 920, 845 P.2d 1325 (1993)).

⁶ 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).

⁷ "When a statutory term is undefined, we typically apply the term's plain and ordinary meaning unless a contrary legislative intent is indicated." *State v. Veliz*, 176 Wn.2d 849, 854, 298 P.3d 75 (2013) (quoting *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011) (internal alterations omitted)).

expend or consume by putting to use.”⁸ Utilities “use” electricity by supplying it to their customers. Selling electricity, or any other commodity, does not fit within this commonly understood definition of use. One does not explain they have sold their car by saying that they “used” it.

Terms common to the electric power market similarly support interpreting CETA in accordance with the common meaning of “use.” When a utility “procures” a resource, they acquire ownership of it. Under the UTC’s interpretation of CETA, utilities need only procure renewable resources (or procure their output by contract) and retain the associated RECs to meet the clean energy mandates. Had the legislature intended to require only initial ownership of renewable resources, they could have used any number of terms, including a procurement requirement, to convey this more limited obligation. They did not. Instead, the legislature required utilities to use “*electricity from renewable resources.*” RCW 19.405.050(1); RCW 19.405.040(1)(a). Utilities may “use” clean electricity regardless of whether they own the underlying resource – purchased electricity satisfies CETA’s requirements, so long as it is clean. Conversely, if a utility owns a renewable resource but does not use the *electricity* from that resource, it does not satisfy CETA’s requirements.

The legislature’s stated purpose and intent in CETA also compel the conclusion that utilities must use clean electricity to supply their Washington customers.⁹ The legislature envisioned that Washington would “transform[] its energy supply” and “transition the state’s electricity supply” to one hundred percent clean. RCW 19.405.010(1)-(2); *see also* RCW 19.405.050(1) (“It is the policy of the state that nonemitting electric generation and electricity from renewable resources supply one hundred percent of all sales of electricity to Washington retail electric customers by January 1, 2045.”).

This language directed to the state’s energy supply underscores that the legislature intended to require change in the generating resources that actually supply Washington with electricity. Requiring electricity from renewable resources to supply Washington customers is consistent with this explicit goal. In contrast, under the UTC’s interpretation, nothing would prevent a utility from relying on fossil fuel-fired power generation to supply some or all of their customers’ electricity, so long as they retain a sufficient quantity of RECs from resources that

⁸ When a term has a well-accepted, ordinary meaning, a general purpose dictionary may be consulted to establish the term’s definition. *HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009); *City of Spokane ex rel. Wastewater Mgmt. Dep’t v. Dep’t of Revenue*, 145 Wn.2d 445, 454, 38 P.3d 1010 (2002).

⁹ 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). “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).

may never serve Washington. This is entirely inconsistent with the legislature's stated intent to transform Washington's energy supply to one hundred percent clean.

B. CETA's penalty and planning provisions also require actual use of clean electricity

The Commission must interpret CETA's "use" requirement in the context of the entire statute.¹⁰ The penalty and planning provisions in CETA make clear that CETA's clean electricity mandates require utilities to use clean electricity to supply their Washington customers.

CETA provides penalties for a utility that "fails to meet" the 2030 clean energy standards. RCW 19.405.090(1)(a). These penalties apply "for each megawatt-hour of electric generation used to meet load that is not electricity from a renewable resource or nonemitting generation." *Id.* This language could not be plainer. If a utility uses electricity that is not clean to "meet load," then they must pay a penalty for each hour of fossil fuel fired generation, weighted by the type of fossil resource that led to the violation. *Id.* The only reasonable interpretation of this language is that supplying Washington customers with electricity from fossil resources constitutes a failure to meet the 2030 clean energy standard.

CETA explicitly defines alternative compliance options as satisfying the 2030 standard for up to 20% of a utility's compliance obligation, RCW 19.405.040(1)(b), so utilities may rely on fossil resources for up to 20% of their load without incurring a penalty for "fail[ing] to meet" that standard, RCW 19.405.090(1)(a). But beyond this flexibility that the statute explicitly affords, CETA must be read to penalize utilities "for each megawatt-hour of electric generation used to meet load that is not electricity from a renewable resource or nonemitting generation." RCW 19.405.090(1)(a). If failing to supply customers with clean electricity is not penalized for the 80% of a utility's load that cannot be met with alternative compliance options, then the statute's explicit penalty provision has no application. Such an interpretation is untenable.

CETA's planning provisions likewise support reading the clean energy "use" requirement to mean what it says. The legislature anticipated the need for "upgrades to electricity transmission and distribution infrastructure" to meet the Act's clean energy mandates, and noted that it takes significant advance planning in order to "deliver electricity generation sites to retail electric load." RCW 19.405.150. If utilities need not use electricity from

¹⁰ "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)).

renewable resources to supply their retail electric customers, then there would be little need for the advance transmission and distribution planning process the legislature required.¹¹

C. The Energy Independence Act

CETA is not the first clean energy legislation passed in Washington. The Energy Independence Act (“EIA”), passed by voters in 2006, is a closely related statute, albeit one that relies on different regulatory tools, and its provisions inform the interpretation of CETA.¹²

Unlike CETA, the EIA does not require utilities to supply their customers with clean electricity. The EIA includes a renewable portfolio standard, which requires utilities to meet targets, established as a percentage of their annual load, with either clean energy or RECs. Specifically, the EIA directs utilities to “use eligible renewable resources or acquire equivalent renewable energy credits” to meet its standards. RCW 19.285.040(2)(a). Because utilities can comply with renewable energy credits alone, the renewable portfolio standard under the EIA does not require that electricity from renewable resources actually serve a utility’s customers.

In contrast, the core mandate of CETA is that all “sales of electricity” be greenhouse gas neutral and (later) greenhouse gas free. RCW 19.405.040(1); RCW 19.405.050(1). Utilities must demonstrate compliance “using a combination of nonemitting electric generation and *electricity from renewable resources*.” RCW 19.405.040(1)(a) (emphasis added). These requirements that utilities “us[e] . . . electricity from renewable resources” and that “sales of electricity” be greenhouse gas free have no analog in the EIA.

This difference in language between these two closely related statutes must be read to create different requirements. In CETA, the legislature did not repeat the explicit language in the EIA that allows renewable resources and RECs to be used interchangeably for compliance. RCW 19.285.040(2)(a). Nor does CETA repeat the less specific language in the EIA, that utilities may “use eligible renewable resources” to show compliance. *Id.* CETA’s requirements are more precise and more demanding: utilities must use “*electricity from renewable resources*” to comply. RCW 19.405.040(1)(a) (emphasis added). CETA, unlike the EIA, demands clean electricity for compliance, not just acquisition of clean resources or RECs.

These differences between CETA and the EIA are unsurprising. Renewable portfolio standards are first-generation regulatory tools that have been used to encourage initial investment in renewable resources. Washington was far from the first state to adopt such a standard, and Washington’s renewable portfolio standard has been in place since the EIA was

¹¹ See *In re Estate of Mower*, 193 Wn. App. 706, 720, 374 P.3d 180 (2016) (courts are required to “avoid interpretations of a statute that would render superfluous a provision of the statute”).

¹² See *Wash. Pub. Ports Ass’n v. Dep’t of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003) (Courts must consider “not only the ordinary meaning of the words, but the underlying legislative purposes and closely related statutes to determine the proper meaning of the statute.”).

adopted in 2006. At this early stage, the voters sought to encourage any investment in renewable resources.

Nearly fifteen years later, the cost of renewable resources has fallen dramatically and our awareness of the urgency and severity of the climate crisis has deepened. Responding to these changed circumstances and the urgent need for action, the legislature chose a one hundred percent clean energy standard to transform Washington's electricity supply. This different regulatory tool comes with different, and more stringent, requirements.

In short, CETA's more demanding statutory language goes beyond the requirements of the EIA, and requires utilities to actually supply their customers with clean electricity.

II. THE UTC'S PROPOSED RULE CONFLICTS WITH THE STATUTE AND EXCEEDS THE UTC'S AUTHORITY

CETA's plain language and stated legislative purpose permit only one interpretation: utilities must use electricity from renewable resources and non-emitting generation to supply Washington retail electric customers. The UTC acknowledged this requirement in its preliminary interpretation of CETA, which concluded that CETA does in fact require utilities to use clean electricity to satisfy the clean energy standards.¹³ In contrast, the UTC's new, contrary interpretation in proposed WAC 480-100-650 conflicts with the statute, and the proposed rule exceeds the UTC's authority.¹⁴

In proposed WAC 480-100-650, the UTC separates the mandate that utilities "use" clean energy into two requirements. First, the proposed rule specifies that a utility demonstrates "use" of electricity if it has "acquired" clean resources "to meet its retail electric load" (hereinafter the "procurement requirement"). Proposed WAC 480-100-650(1)(a).

Second, a utility must also demonstrate "use" via compliance reports (hereinafter the "compliance requirement"). Proposed WAC 480-100-650(1)(b). These compliance reports generally require a utility to show, "[f]or all resources used for compliance . . . , a demonstration of the acquisition of the electricity through ownership, control, or contracted agreement" Proposed WAC 480-100-650(2)(d). However, the compliance requirements separately note that "retiring retained RECs is a form of using electricity" for purposes of the required compliance reports. Proposed WAC 480-100-650(2)(e).

¹³ See Notice of Opportunity to File Written Comments dated June 12, 2020 in Docket UE-191023.

¹⁴ "A rule that conflicts with a statute is beyond an agency's authority." *Devine v. Dep't of Licensing*, 126 Wn. App. 941, 956, 110 P.3d 237 (2005).

Neither the procurement requirement nor the compliance requirement, alone or together, can substitute for the statutory requirement that utilities actually use clean energy to serve their Washington customers. RCW 19.405.040(1); RCW 19.405.050(1).

A. The Procurement Requirement Cannot Substitute for Use of Electricity

1. *Acquire does not mean use*

The procurement requirement in Proposed WAC 480-100-650(1)(a) does not constitute “use” of electricity within the plain meaning of CETA. As discussed above, *supra* Section I.A, CETA requires utilities to use “*electricity from*” renewable resources. This plain language requires more than simply “acquiring” the resource.

Other terms, such as “procurement” and “acquisition,” specifically refer to a utility’s acquisition of resources. Indeed, in CETA the legislature used both of these terms in other sections of the statute to refer to a utility’s ownership or control of a resource. *E.g.*, RCW 19.405.050(2); RCW 19.405.080(3)(e); *see also* RCW 19.405.020(7)(b)(i). These different terms should be presumed to have different meanings, particularly when used in the same statute.¹⁵ If the legislature intended to require utilities to acquire or procure clean resources, they would have said so. Instead, they required utilities to *use the electricity* from clean resources.

The structure and language of the 2045 standard underscores the fact utilities must do more than acquire clean resources to “use” clean electricity. Specifically, in the 2045 standard, the statute first provides that clean energy must supply 100% of all sales of electricity by 2045, and utilities must demonstrate compliance by “using electricity” from clean sources. RCW 19.405.050(1). The statute then provides that utilities must incorporate the 100% clean requirement “into all relevant planning and resource acquisition practices, including . . . acquisition of . . . electric generating facilities.” RCW 19.405.050(2). If the requirement to use electricity in subsection (1) is simply an acquisition requirement, portions of subsection (2) become redundant: it would direct utilities to incorporate an acquisition requirement into their resource acquisition practices and acquisition of electric generating facilities. The UTC may not interpret CETA in a way that renders statutory language redundant or superfluous, yet Proposed WAC 480-100-650(1)(a) does just that.¹⁶

While the 2030 standard does not contain the same language on acquisition practices and resource acquisition, the “use” requirement appears, in identical language, in both the 2030 standard and the 2045 standard. *Compare* RCW 19.405.040(1) *with* RCW 19.405.050(1) (an

¹⁵ *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (“When the Legislature uses different words within the same statute, we recognize that a different meaning is intended.”).

¹⁶ Statutes must be interpreted “so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. Larson*, 184 Wn.2d 843, 850, 365 P.3d 740 (2015) (internal citation omitted).

“electric utility must demonstrate its compliance with this standard *using* a combination of nonemitting electric generation and *electricity from renewable resources*”) (emphasis added). There is no reason to interpret this identical language differently in the 2030 and 2045 standards.¹⁷ Both standards require utilities to use clean electricity, not simply to acquire clean resources.

2. *The UTC’s interpretation creates a conflict with the statutory penalties*

The penalty provisions of CETA cannot be reconciled with the UTC’s proposed interpretation of “use” that converts the clean energy standards to acquisition requirements.

As discussed above, *supra* Section I.B, CETA penalizes utilities if they use fossil resources to meet load. Under the UTC’s interpretation of CETA’s “use” requirement, however, utilities would be compelled to pay a penalty for conduct that falls squarely within what the proposed draft rule allows. Namely, under the UTC’s proposed rule, the 2030 clean energy mandate allows utilities to use electricity from fossil fuels to supply their customers for any or all of their load, so long as the utility has acquired clean resources and retained the RECs. But under the penalty provisions, if such fossil fuel generation is used to “meet load” — as it would be, if it supplies their customers — then it would incur a penalty payment. RCW 19.405.090(1).

The UTC’s interpretation of CETA must reconcile the use requirement in the clean energy standards with the penalty provisions that enforce it.¹⁸ The only way to do this is to interpret the clean energy standards to require utilities to use the electricity from clean sources to supply their customers. Under the UTC’s interpretation of “use,” however, the same conduct — supplying customers with fossil fuel generated electricity — would be permissible under the 2030 standards while also being financially penalized as a failure to meet the 2030

¹⁷ “When the same words are used in different parts of the same statute, it is presumed that the Legislature intended that the words have the same meaning.” *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 313, 884 P.2d 920 (1994) (quoting *State v. Hutsell*, 120 Wn.2d 913, 920, 845 P.2d 1325 (1993)).

¹⁸ “The ‘goal is to avoid interpreting statutes to create conflicts between different provisions so that we achieve a harmonious statutory scheme.’” *Am. Legion Post #149 v. Washington State Dep’t of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008) (quoting *Echo Bay Cmty. Ass’n v. Dep’t of Nat. Res.*, 139 Wn. App. 321, 327, 160 P.3d 1083 (2007), *review denied*, 163 Wn.2d 1016, 180 P.3d 1290 (2008)).

standards.¹⁹ The UTC lacks authority to adopt its proposed rule because it creates a conflict between statutory provisions.²⁰

3. *The UTC lacks authority to convert CETA's clean energy standards into a renewable portfolio standard*

The UTC's proposed procurement requirement functionally converts CETA's 2030 and 2045 clean energy mandates to renewable portfolio standards. The legislature, however, selected a different regulatory mechanism in CETA, and the UTC lacks authority to rewrite that choice. While the UTC may have intended for the proposed draft rule to impose a more granular procurement obligation, the rule as written imposes only an annual procurement requirement, and in any event even a more granular procurement requirement would still conflict with CETA unless it required actual use of clean electricity.

The UTC's proposed rule requires a utility to acquire clean resources to "meet its retail electric load." Proposed WAC 480-100-650(1)(a). "Retail electric load," in turn, is defined as the "amount of megawatt-hours of electricity delivered in a given calendar year by an electric utility to its Washington retail electric customers." RCW 19.405.020(36); Proposed WAC 480-100-605. While CETA's text does define this term and incorporates it as an element of a utility's compliance with the 2030 standards, RCW 19.405.020(36); RCW 19.405.040(1)(a)(ii), the UTC's rule goes beyond what the statute permits by removing the requirement that utilities use clean electricity to supply their Washington customers. Because retail electric load is simply an annual volume of electricity, a utility may satisfy the UTC's proposed procurement requirement by acquiring generating resources regardless of whether those resources could produce electricity during the time of year and day that Washington customers need it. By its terms, the UTC's proposed rule allows compliance with up to 100% retained RECs and imposes no obligation on utilities to use electricity to actually meet the shape of their customers' load. Accordingly, it functions as a renewable portfolio standard (albeit one that only authorizes retained RECs). As discussed above, CETA relies on a different regulatory tool than the renewable portfolio standard created by the EIA. Reducing CETA to a renewable portfolio standard impermissibly erases the substantial differences in these two statutory schemes.²¹

Indeed, since utilities are generally obligated to meet CETA's requirements at the lowest reasonable cost, *see* RCW 19.405.040(6)(i); RCW 19.405.050(3)(a), if acquiring resources solely for

¹⁹ Courts "must interpret statutes to avoid absurd results." *Cent. Puget Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC*, 191 Wn.2d 223, 242, 422 P.3d 891 (2018).

²⁰ Agencies "cannot implement a rule that conflicts with a clear statutory provision." *Alpine Lakes Prot. Soc. v. Wash. State Dep't of Ecology*, 135 Wn. App. 376, 394, 144 P.3d 385 (2006), as amended (Feb. 27, 2007).

²¹ *See 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).

the purpose of retaining RECs and pairing those retained RECs with fossil fuel resources were the least expensive compliance strategy, utilities could be obligated to do so under the UTC's proposed rule even if the electricity from those resources plainly is not needed to meet the shape of a utility's Washington load. Reading CETA to require utilities to continue to rely on fossil fuel resources indefinitely flies in the face of the legislature's stated intent to require the "transformation" of Washington's energy supply to be "one hundred percent carbon free." RCW 19.405.010(1)-(2).

Specifically, CETA's 2030 standard requires utilities to use clean electricity "in an amount equal to" their "retail electric load" over a four-year compliance period. RCW 19.405.040(1)(a)(ii). *See also* RCW 19.405.020(36) (defining retail electric load). However, this section of the statute, like the sentences that precede it, still requires utilities to "use electricity from renewable resources and nonemitting electric generation." RCW 19.405.040(1)(a)(ii).

The statutory requirement that utilities use clean electricity and the flexibility provided by the annual calculation of retail electric load are easily reconciled. CETA's 2030 standard does include significant flexibility for utilities by creating a four-year compliance period, and allowing utilities to use clean electricity "in an amount equal to" their retail electric load over that four-year period. The 2030 standard also explicitly provides alternative compliance options for up to 20% of a utility's compliance obligation. RCW 19.405.040(1)(b). Taken together, these provisions allow a utility to comply with the 2030 standard despite fluctuations in the total percentage of a utility's load that it meets with clean electricity within a four-year period. Because many of the state's utilities are heavily dependent on hydropower, which fluctuates seasonally and annually, this four-year compliance period gives effect to the legislature's stated intent to account for the variability of hydropower. *See* RCW 19.405.010(7).

In short, under CETA's four-year compliance periods, utilities may only count clean electricity that they actually use to supply their customers toward their CETA obligations, but they may be able to accommodate fluctuations in the total percentage of their load that they meet with clean energy within a compliance period. In contrast, the UTC's proposed rule stretches far beyond the statute by removing entirely the requirement that utilities actually use clean electricity to serve Washington customers.

While CETA's 2030 standard provides utilities with some flexibility, the 2045 standard is far more straightforward: "all sales of electricity to Washington electric customers" must be supplied solely by clean resources. RCW 19.405.050(1). The UTC's proposed rule stretches the flexibility in the 2030 standard beyond what the statute permits, as discussed above. But the UTC's rule applies to the 2045 standard as well, which finds even less support in the statutory text. Nothing in the 2045 standard allows annual averaging or flexible compliance options. The statute simply requires that Washington customers be supplied with 100% clean electricity. The UTC's rule does not.

Acquiring a one hundred percent clean portfolio is undeniably more challenging than simply acquiring renewable resources without regard to whether they produce electricity when it is needed. But that is the challenge the legislature required utilities to meet over the course of the next several decades. With aggressive investments in conservation and efficiency, demand side management, storage, and different renewable resources spread out geographically that peak at different times, Washington’s utilities can meet this challenge – especially with the decades of lead time the statute affords.

The UTC’s proposed draft rule, in contrast, incentivizes (or even requires) utilities to purchase whatever renewable resources are cheapest, regardless of whether the energy they produce will meet their customers’ demand. Even if the UTC modified its proposed draft rule to require utilities to procure clean resources that could meet their customers’ demand in real time, such a rule would still fall far short of what CETA requires. Under any interpretation that converts CETA’s use requirement to a mere procurement requirement, so long as a utility holds title or contracts for renewable resources, they could retain the RECs, sell the energy, and continue to meet all of their customers’ demand with fossil fuels. This is not what the legislature intended in requiring the “transformation” of Washington’s energy supply to be “one hundred percent carbon free.” RCW 19.405.010(1)-(2).

CETA requires utilities to invest intelligently in renewable and non-emitting resources that meet (or change) the shape of their customers’ demand, and to actually use those resources to supply their customers with electricity. CETA also allows utilities to continue to participate in markets to purchase and sell electricity, so long as the electricity they purchase to supply Washington is clean. CETA’s one hundred percent clean standards pose a challenge – one that the legislature explicitly envisioned would “spur transformational change in the utility industry.” RCW 19.405.010(5). The UTC must give effect to the legislature’s intent by adopting rules that advance Washington toward an optimal clean energy system, one that uses a broad portfolio of clean energy resources to meet customer load.²² Neither the plain text of CETA nor the legislature’s stated intent permit the UTC to adopt the definition of “use” in the proposed draft rule. Proposed WAC 480-100-650(1).

4. *The UTC’s procurement requirement is unenforceable*

Finally, the UTC’s procurement requirement in Proposed WAC 480-100-650(1)(a) is unenforceable. Nothing in the rule specifies how the utilities must demonstrate that they have met this procurement obligation, nor how the UTC or third parties would enforce violations. While the statute includes explicit enforcement provisions, those are directed at a utility’s use of

²² “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 Seros., 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.”).

electricity to serve customers. RCW 19.405.090. Nothing in these penalty provisions allows the UTC or third parties to challenge or penalize a utility's decision to acquire a generating resource. The legislature's careful attention to enforcement and penalties for violations of the 2030 and 2045 standards demonstrates that they did not intend these standards to be reduced to an unenforceable procurement standard.

The UTC's questions in its Notice of Opportunity to Comment suggest that the procurement requirement could require utilities to acquire a mix of resources that "are well-suited to directly meet projected retail electric load." To the extent the UTC believes Proposed WAC 480-100-650(1)(a) imposes any obligation on utilities to acquire resources that *could* allow them to use clean electricity to meet the shape of their customers' load, this obligation does not appear in the proposed rule text. And because the statute does not contain any provisions or structure to enforce a procurement requirement, any such obligation would be entirely unenforceable even if the rule text were modified to explicitly include this obligation.

More importantly, even if the UTC could somehow craft and enforce a requirement that utilities acquire a portfolio of clean resources that they could *theoretically* use to serve their Washington customers, such a requirement would still fall short of the statute if it did not require utilities to *actually* use clean electricity to serve Washington customers. The UTC cannot justify an interpretation of CETA's one hundred percent clean energy requirements that would allow utilities to rely on fossil fuels indefinitely, because it is impossible to reconcile with CETA's plain language and stated purpose of transitioning Washington to a one hundred percent clean energy supply.²³

B. The Compliance Requirement Cannot Substitute for Use of Electricity

The compliance requirement in the UTC's proposed rule also conflicts with the statutory requirement that utilities use clean electricity to meet the 2030 and 2045 standards.

The proposed rule provides that "retiring retained RECs is a form of using electricity" for purposes of the required compliance demonstration. Proposed WAC 480-100-650(2)(e); Proposed WAC 480-100-650(1)(b); *see also* Proposed WAC 480-100-605 (defining "retained RECs"). The UTC's proposed rule plainly allows utilities to rely on electricity that they have *not* used to serve their Washington retail electric customers to comply with CETA's 2030 and 2045 standards. For all of the reasons enumerated above, this directly conflicts with CETA's plain language, purpose, and structure.

²³ "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).

Additionally, CETA's text and structure specifying when RECs may be used for compliance with the 2030 standards prevent the UTC from allowing retained RECs to be used to demonstrate compliance.

CETA's text makes clear that RECs are not electricity. Instead, RECs are defined as a "tradeable certificate of proof" that includes the "non-power attributes associated with that one megawatt-hour of electricity." RCW 19.405.020(31). CETA's plain language requires the *electricity* that serves Washingtonians to be clean. By definition, RECs cannot meet that requirement because RECs are *non-power* attributes and CETA requires use of electricity, which is power.²⁴

Indeed, the statutory definition of a REC highlights the absurdity of the UTC's definition of retained REC on its face. The proposed rule declares that "retiring retained RECs is a form of using electricity." Proposed WAC 480-100-650(2)(e). Because RECs are non-power attributes – in other words, *not* electricity – the UTC's proposed rule announces that retiring non-power attributes that are not electricity is a form of using electricity. In addition to squarely conflicting with the statutory text, this definition is impermissibly absurd and arbitrary.²⁵

CETA's structure, including its treatment of unbundled RECs, likewise lends no support to the UTC's proposed interpretation. Unbundled RECs are defined in CETA as RECs that are "sold, delivered, or purchased separately from electricity." RCW 19.405.020(38). CETA specifies that unbundled RECs may be used as alternative compliance options, which are limited to 20% of a utility's compliance obligation under CETA's 2030 standard and are not allowed in any amount under CETA's 2045 standard. RCW 19.405.040(1)(b); RCW 19.405.050(1).

The UTC's proposed rule creates a new category of REC, defining "retained RECs" as RECs that are "owned or controlled by a utility where the associated electricity is sold in a wholesale sale as unspecified electricity." Proposed WAC 480-100-605. Fundamentally, however, both a retained REC and an unbundled REC have been separated from their associated electricity, and neither can meet a utility's statutory obligation to use *electricity* from clean resources.

This is true irrespective of any differences between retained RECs and unbundled RECs. Even if CETA does not compel the UTC to include "retained" RECs in the definition of

²⁴ *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (courts must "assume the legislature meant exactly what it said and apply the statute as written") (internal citations and quotations omitted).

²⁵ "An agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances." *Puget Sound Harvesters Ass'n v. Wash. State Dep't of Fish & Wildlife*, 157 Wn. App. 935, 945, 239 P.3d 1140 (2010).

“unbundled” RECs because a retained REC has not been “sold,” that still does not allow utilities to rely on retained RECs to meet standards that demand the use of clean *electricity*. Defining “retained RECs” separately from “unbundled RECs” does not allow the UTC to authorize uses of retained RECs that violate the statute.

Instead, the fact that the legislature explicitly addressed the use of RECs and limited their use to the 20% alternative compliance options allowed in the 2030 standard cuts against any interpretation that significantly expands their use. The legislature already addressed when and how RECs may substitute for clean electricity, and the UTC’s proposed rule impermissibly converts the legislature’s chosen 20% alternative compliance framework into a 100% alternative compliance framework. The legislature already created enumerated exceptions to CETA’s requirement that utilities rely on clean electricity through an explicit alternative compliance framework, and the UTC lacks authority to broaden this framework in a way that undercuts the statute’s primary goal: to rapidly and completely decarbonize Washington’s electricity supply.²⁶

* * *

In sum, CETA’s plain language and stated legislative purpose require utilities to use electricity from clean resources to supply their Washington customers to meet the 2030 and 2045 clean energy standards. The UTC’s proposed rule, in contrast, allows utilities to use electricity from fossil fuels to supply their Washington customers indefinitely. The UTC’s proposed rule conflicts with CETA and exceeds the UTC’s authority.

²⁶ See *Ctr. for Biological Diversity v. Dep’t of Fish & Wildlife*, 14 Wn. App. 2d 945, 967, 474 P.3d 1107 (“Rules that are not consistent with or are broader than the statutes they implement are invalid.”); *Ellensburg Cement Prod., Inc. v. Kittitas Cty.*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014) (“Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius*—specific inclusions exclude implication.”) (internal quotations and citation omitted).