February 9, 2022

VIA ELECTRONIC FILING

Amanda Maxwell
Executive Director and Secretary
Washington Utilities & Transportation Commission
621 Woodland Square Loop SE
Lacey, WA 98503

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

Dear Ms. Maxwell:

On January 19, 2022, the Washington Utilities and Transportation Commission (Commission) issued a Notice of Opportunity to File Written Comments on Draft Rules (Notice) that would implement certain sections of the Clean Energy Transformation Act (CETA). The Commission requested comment on its Notice by February 9, 2022. Avista, PacifiCorp, and Puget Sound Energy (Joint Utilities) appreciate the opportunity to comment.

The Joint Utilities are generally supportive of many of the high-level concepts contained in both the "use" and storage/double counting draft rule sets. Consistent with RCW 19.405.040(1), the "use" rules correctly interpret CETA's core compliance obligation in a manner that allows a utility to comply over the course of a multiyear compliance period. The storage draft rules recognize that the eligibility of renewable or nonemitting electricity for CETA compliance is not affected by the use of storage resources. Finally, the double counting draft rules are a significant improvement over prior drafts, as they now require utilities, not the unregulated renewable energy credit ("REC") seller or generating facility, to take action to show compliance.

Although these concepts are fundamentally sound, the draft rules, particularly those draft rules on the topic of "use," require considerable work before they can become final. The general comments section below provides discussion of the Joint Utilities' detailed concerns in the following areas:

1) The draft rules issued by the Commission differ substantially from the draft rules issued by the Department of Commerce (Commerce), particularly in the area of compliance with the CETA clean energy standards (i.e., "use"). There is no stated policy rationale or explanation for these differences.

2) The Commission's draft rules have structural issues that mix planning, acquisition, and compliance obligations that are not based in any part of

CETA. CETA assesses compliance on a retrospective basis, based on what a utility delivered to its customers, and its generation over the course of a multi-year compliance period. Although it is important for utilities to plan to comply with CETA in its Integrated Resource Plan (IRP), such planning should not be considered a basis for compliance determination.

3) The Commission's draft rules include requirements for post-2045 compliance that are beyond its statutory authority.

4) The reporting requirements, especially those in draft WAC 480-100-650(6), are extensive and will result in tremendous volumes of data that will be difficult or impossible to reconcile for the intended purpose. These reporting rules will put an undue burden on both utilities and the Commission for the collection, dissemination, and analysis required by the draft rules. Moreover, the commercial nature of this data will require much of the data be designated confidential, which hinders the transparency elements in CETA.

Attached as Attachment A to this letter are redline suggestions to the "use" draft rules for consideration by the Commission. Attached as Attachment B to this letter are redline suggestions to the energy storage and double counting draft rules for consideration by the Commission. Due to the number and gravity of the concerns with the current draft rules, the Joint Utilities strongly encourage the Commission to reissue draft rules on these topics for further review and comment by parties before taking further steps toward issuing final rules.

GENERAL COMMENTS

A. Second Draft Rules on "Use" in RCW 19.405.040(1) and RCW 19.405.050(1)

1. Substantial Differences Between Commerce and Commission Draft Rules

In previous comments, the Joint Utilities recommended that the Commission realign this rulemaking process with Commerce.[1] Alignment is necessary because the core CETA compliance requirements, including resolution of the "use" issue, are identical in statute for investor-owned and consumer-owned utilities.[2] There remain significant differences between the second draft rules proposed by the Commission and the second draft rules proposed by Commerce. Importantly, the second draft rules proposed by Commerce use RECs to demonstrate compliance as required by CETA.[3] In contrast, the second draft rules issued by the Commission use RECs and electricity for

[1] UE 210183 Joint Utility Comments, November 12, 2021. *See, e.g.* RCW 19.405.040(1) (applying to "electric utilities").

[2] *Id.*

[3] RCW 19.405.040(1)(c) requires verification of "electricity from renewable resources used to meet the standard" of CETA by retirement of renewable energy credits, as tracked and retired in the tracking system selected by Commerce. RCW 19.405.040(1)(f) requires verification of "[n]onemitting electric generation used to meet the

the compliance approach, notwithstanding the clear direction provided by CETA. In addition, the Commission's proposed second draft rules add complexity through an acquisition element, the concept of retained nonpower attributes ("retained NPAs"), and extensive reporting requirements. Neither Commerce nor the Commission provide any justification for dissimilar rules to implement the same statutory language. As pointed out in previous comments,[4] the differences in these two sets of draft rules, if adopted without further reconsideration or reconciliation, will likely create unintended market consequences, competitive advantages, and inequitable costs of compliance for utility customers. In particular, customers of the investor-owned utilities could end up burdened by higher costs than those of the consumer-owned utilities. The redline draft rules proposed by the Joint Utilities in Attachment A to these comments provide suggestions for more closely aligning the two agencies' draft rules.

2. Use of Retained NPAs for Primary Compliance

Although the terminology in the Commission's second draft "use" rules has shifted from retained REC to retained NPA, the fundamental concept—utilities may use a retained NPA for primary compliance, even if the associated electricity is sold in an unspecified wholesale transaction—has not changed. Although the Joint Utilities support this approach and recommend it as consistent with CETA's multiyear compliance period provisions, the Joint Utilities note that the second draft rules proposed by Commerce do not use the same approach for the same issue. The redlined draft rules proposed by the Joint Utilities in Attachment A to these comments maintain the use of the retained NPA concept in WAC 480-100-650(1) and (2). However, the Joint Utilities suggest revisions to WAC 480-100-650(3) because the analogous language in the second draft rules proposed by Commerce is straightforward and consistent with the overall approach used by the Commission. Accordingly, the Joint Utilities recommend adopting language to WAC 480-100-650(3) that is more similar to the second draft rule language proposed by Commerce.

It is unclear from the second draft rules proposed by the Commission whether the Commission will require some sort of methodology to account for retained NPAs. As noted in the comments of the Joint Utilities submitted on November 12, 2021, each of the Joint Utilities makes system sales, in which they make unspecified sales from a general pool of resources, with no unit or generation type attribution possible.[5] It will not be possible to say with certainty that a REC, for example, from PacifiCorp's TB Flats wind facility is a retained NPA because PacifiCorp has no way to determine that the specific megawatt-hour from the TB Flats wind project was sold as unspecified power during the applicable hour. These complications will require further dialogue on how to identify and account for retained NPAs. For example, the Commission and the utilities could develop an accounting method wherein a certain number of RECs and non-power attributes are deemed retained NPAs based on the quantity of unspecified wholesale sales a utility has made in a given time period, such as a month or a year.

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standard" by documentation that the utility owns the nonpower attributes of the electricity generated by the nonemitting electric generation resource.

[4] Joint Utility Comments, Docket UE-210183 (Nov. 12, 2021).

[5] *Id*. at 6.

3. The Draft "Use" Rules Mix Planning, Acquisition and Compliance Requirements, which is Confusing and Not Supported by Law

The limits on when and how utilities may plan to use retained NPAs in draft WAC 480-100-650(1)(a) and WAC 480-100-650(2)(a) apply to the IRP requirement. Consequently, these limits belong in WAC 480-100-620, which pertains to the content of IRPs. Further, the Joint Utilities find the planning requirement section of the second draft rules proposed by Commerce to be clearer and would suggest that the Commission adopt similar language in its rules. The redlined draft language proposed by the Joint Utilities in Attachment A to these comments provide a suggestion for adopting language similar to the Commerce draft rule language in WAC 480-100-620(11).

In addition to the need to move planning requirements to the IRP rules, the Joint Utilities view the current versions of draft WAC 480-100-650(1)(b) and WAC 480-100-550(2)(b) as neither justifiable nor necessary. As the Joint Utilities pointed out in an earlier set of comments, CETA compliance is assessed on a retrospective basis.[6] No part of CETA indicates that a utility's use of compliance instruments can be conditioned on engaging in a particular decision-making method that varies from the actual compliance requirements. In fact, CETA specifically requires that utilities use electricity "in an amount equal to… [their] retail electric loads over each multiyear compliance period."[7] The second draft rule proposed by the Commission limits utilities' ability to comply "over each multiyear compliance period," because utilities are deprived of the compliance value of retained NPAs if they do not meet these arbitrary acquisition requirements. Adopted final rules cannot eliminate a statutorily guaranteed compliance pathway. Therefore, the Commission should eliminate these acquisition requirements.

Moreover, the acquisition requirements in draft WAC 480-100-650(1)(b) and WAC 480-100-550(2)(b) are generally based on a utility's need as identified in its IRP. The rules related to planning are sufficient for determining a utility's need, and the acquisition requirements in draft WAC 480-100-650(1)(b) and WAC 480-100-550(2)(b) provide no additional value to the resource acquisition planning process. Further, even if these requirements were required by CETA, the current drafting is unclear and arbitrary. For example, how should a utility run its resource acquisition process if it is not allowed to plan to rely on retained NPAs? Over what time period is a utility not allowed to rely on retained NPAs—hourly, daily, annually, or something else? How would a utility demonstrate that it did not rely on use of retained NPAs when making long-term resource and contract acquisitions? What is the legal justification or rationale for restricting resource selections with a contract term or useful life of greater than two years?

The Joint Utilities note that the second draft rules proposed by Commerce do not include the same acquisition requirements. This is one area in particular where the substantive differences in the agency rules could lead to unintended, but significant, differences in the CETA compliance

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[6] Joint Utility Comments of November 3, 2021, at 3; *see also id*. at 4 n.5 (emphasizing that "[a] s CETA compliance is assessed on a retrospective basis, a prospective planning requirement as an element of compliance would fall outside the plain text and intent of the law.")

[7] RCW 19.405.040(1)(a).

requirements between utilities. The best course of action would be to adopt the Commerce approach, and eliminate the acquisition requirements as shown in Attachment A.

4. The Rules Should Reflect the Language Used in RCW 19.405.050(1)

Draft WAC 480-100-650(2) states that a utility "must demonstrate that it is supplying all of its retail electric service obligations with renewable and nonemitting resources" starting in 2045. This is a different phrase than is used in RCW 19.405.050(1), which states that "nonemitting electric generation and electricity from renewable resources [must] supply one hundred percent of all sales of electricity to Washington retail electric customers" starting in 2045. There is no justification to vary the rules' language from the words used in the statute, especially when that statutory obligation contains no ambiguity that requires interpretation. Attachment A suggests changes consistent with this position.

5. The Reporting Requirements Request Substantial Information that May Not Exist or Would Not be Useful for the Stated Purpose

The quantity of data requested in the second draft rules proposed by the Commission is substantial, would be burdensome to compile, and likely overwhelming to receive and review. The Joint Utilities believe that the Commission and stakeholders must undertake further discussion on the intent of the information requested and data necessary to fulfill the objectives of CETA compliance. In fact, the draft rules seem to acknowledge that this information is not strictly necessary from a compliance perspective, because the information requested is for informational purposes only. In addition to general concerns about volume, value, and necessity, the Joint Utilities have practical concerns about the availability of the requested data. Hourly data for some of the elements in the draft second rules proposed by the Commission simply cannot be provided at this time. First, none of the Joint Utilities have total Washington retail sales available on an hourly basis. None of the Joint Utilities has Advanced Metering Infrastructure (AMI) installed for 100% of their retail customer load. Rather than provide a carveout in the rules that allows for utilities to provide monthly retail sales in such a scenario, utilities should solely be required to provide total retail sales on a monthly basis until such time that a utility has such hourly data available. Furthermore, if the intent behind the reporting requirements is to compare the various data elements to inform generation, purchases and sales as compared to retail electric load, all data should be reported on the same timescale for comparative purposes. The Joint Utility redlines propose a uniform timescale for reporting based on data availability. Otherwise, a party reviewing the data would be comparing monthly data in some cases with hourly data in others, which cannot provide greater granularity or value than comparing monthly data to other monthly data.

Second, specific data elements in the second draft rules related to energy imbalance markets require information that will take considerable effort to reconcile and report on an hourly basis. Additionally, this data will be complicated or impossible to understand or use in a way that is meaningful for CETA compliance. For example, current Energy Imbalance Market (EIM) data is available from the California System Operator in five-minute increments. This five-minute data is not easily converted to hourly level data. Utilities can aggregate imbalance participation on an hourly basis, but this would not provide a meaningful picture of how electricity was used, which

electricity was used off-system, which electricity was used by the utility to serve its own customers, and for a multi-state utility, which electricity was used to serve only Washington customers. For these reasons, the Joint Utilities recommend removing references to imbalance market data sources in the rules. The redlines provided in Attachment A provide alternative reporting requirements that are less onerous, simpler to provide, and offer meaningful insight to CETA compliance elements.

Third, the contract documentation requested would be voluminous and inherently confidential. As such, the Joint Utilities question the value of providing such data on an annual basis. Rather, the Joint Utilities propose that any necessary contract documentation should be maintained by the utility and provided to the Commission upon request. In particular, providing documentation for each sale, purchase, and exchange agreement for which the source of the electricity was unspecified or each agreement for bundled electricity sales from renewable or nonemitting generation is simply not practical on an annual basis. Finally, providing any data provided to the Northwest Power Pool's resource adequacy program is not relevant to a utility's compliance with CETA. If the Commission has a desire for this data, the Joint Utilities suggest discussing the need, relevancy, and how it may be provided.

Data systems will need to be created to track and compile the information related to the reporting section of these rules. The Joint Utility redlines propose that reporting begin with the 2024 annual clean energy progress report. This will allow utilities approximately six months after the rules are finalized in June 2022 to set up reporting templates and processes in order to begin compiling the required information for 2023.

6. The Rules Should be Rooted in the Eighty Percent Requirement of RCW 19.405.040(1)

Draft WAC 480-100-650(2) incorporates the 2045 standard into the "use" rules. It is neither necessary nor desirable to include rules for a compliance obligation that is over two decades in the future. No doubt much will change long before 2045 when it comes to utilities' environmental compliance, including acquisition of renewable and nonemitting resources. As such, debating the language for complying with the 2045 standard so late in the "use" rulemaking process is not a valuable use of time. For this reason, the Joint Utilities first would ask the Commission to remove subsection (2) at this time in order to focus on the 2030 standard and remainder of the rules in question. If the Commission deems inclusion of the 2045 standard in the "use" rules as necessary at this time, then the Joint Utilities would offer the following comments.

Much of the detail and proposed rule is unnecessary, and the subsection can be significantly simplified. Simply stating the following would be sufficient for the Joint Utilities' understanding of the intent of this added section, "Beginning in 2045, a utility must demonstrate that it is supplying all of its retail electric service load with renewable and nonemitting resources. A utility must also demonstrate that it has secured transmission rights or assets to provide feasible transmission for renewable or nonemitting resources to serve its retail electric service load." Of note is removal of the reference to "retail electric service obligations" because this term is undefined in law and its meaning is unclear, particularly when CETA refers to a defined term—

retail electric load[8]—in determining compliance with CETA. See previous discussion in these comments on the importance of remaining consistent with RCW 19.405.050(1).

7. The Rules Should be Consistent with the Primary and Alternative Compliance Requirements of RCW 19.405.040

Draft WAC 480-100-650(1) states that a utility must serve "a minimum of 80 percent of its retail electric load obligation, *or other minimum percentage established* by the Commission," with renewable or nonemitting electricity. However, RCW 19.405.040(1)(b) does not provide the Commission authority to set any percentage aside from eighty percent for primary compliance. That statute states that "through December 31, 2044, an electric utility *may satisfy up to twenty percent of its compliance obligation*" with alternative compliance options. If the Commission sets a "minimum percentage" other than eighty percent, it would implicitly be *reducing* the percentage that can be satisfied with an alternative compliance option. This would contravene the statute and should be eliminated from the draft rules.

B. Second Draft Rules to Address the Prohibition on Double Counting

The second draft rules proposed by the Commission and Commerce regarding double counting appropriately require jurisdictional utilities to show compliance, and not parties over whom the agencies' jurisdiction is limited or nonexistent; however, some additional clarity is necessary.

The revisions to draft WAC 194-40-XXX/480-100-XXX resolve the majority of the Joint Utilities' primary concerns with prior draft rules on this topic. Subsection (3) obligates *the utility* to provide proof of compliance with the double counting rules, which is consistent with CETA's statutory intent and avoids the constitutional concerns created by regulating out-of-state entities' business practices. The Joint Utilities support these changes to this subsection.

However, the Joint Utilities continue to assert that setting only "minimum" requirements for double counting is problematic. As noted in the comments of the Joint Utilities on December 6, 2021, the following language in section -XXX(1) should be deleted:

> This section sets only the minimum requirements necessary to demonstrate that no double counting has occurred. The [Commission]/[Auditor] 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 undercuts the certainty provided by rules and creates a risk that a utility could follow the final, approved rules perfectly but still be considered to have engaged in double counting. If

[8] CETA generally defines the term "retail electric load," with certain exceptions such as loads served by voluntary renewable energy tariffs or certain qualifying facilities, "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).

so, CETA compliance might be threatened, and utilities could face financial penalties without any notice that the penalized conduct was actually prohibited. The Joint Utilities recognize that energy markets will evolve, and new mechanisms will be developed that are germane to this area. The ambiguity and compliance uncertainty created by this section, however, poses significant financial risk for utilities, and, in turn, for their customers because the value of unbundled REC purchases could be undermined. Therefore, the Joint Utilities encourage the Commission to set clear, enforceable, and determinate standards for double counting so utilities can make decisions without incurring significant regulatory and financial risk.

Additionally, the Joint Utilities note a concern for consideration regarding proposed subsection (4), related to using unbundled RECs for alternative compliance where the RECs were created by renewable electricity marketed by the Bonneville Power Administration ("BPA") and first directly sold into a state with a greenhouse gas (GHG) program. This language is unnecessary and may disallow the use of unbundled RECs, even when no double counting has occurred. The protection against double-counting of attributes of electricity associated with unbundled RECs is contained in 2(b), and is adequate protection for this very narrow example, as well. Generally, electricity may be sold into a state with a GHG program but not claimed as renewable or non-emitting in that state. Subsection (2) (b) correctly prohibits the use of attributes based on when they are claimed, not where electricity sales are made. There may be some instances where renewable electricity marketed by the BPA is sold directly into Oregon, however, a utility in Oregon may not need the renewable electricity for compliance with a GHG program because it is not subject to Oregon's program.[9] Those utilities should be able to sell the excess renewable electricity and/or REC back to a Washington utility who then should be able to use the REC for alternative compliance. This concern could be resolved by striking subsection (4) from the draft rule language.

C. The Storage Provisions of the Second Draft Rules Proposed by the Commission are Consistent with CETA

The Joint Utilities support draft WAC 194-40-YYY/480-100-YYY. This draft rule recognizes that temporarily storing electricity does not affect, in any way, a utility's CETA compliance obligation, except when the storage device is behind the meter. This section recognizes that CETA solely addresses (i) total renewable or non-emitting generation and (ii) retail electric load, both of which are measured in megawatt hours. 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.

[9] Only PacifiCorp and Portland General Electric are subject to by House Bill 2021, Oregon's 2021 law that requires both utilities to eliminate emissions associated with electricity sold to Oregonians by 2040.

RESPONSES TO SPECIFIC QUESTIONS

1. Draft WAC 480-100-650(2). The first sentence states that 100 percent of the electricity needed to supply retail electric service obligations must be generated by renewable and nonemitting resources. The second sentence explicitly establishes a requirement to secure transmission service rights for the electricity generated by the renewable and nonemitting resources. Is it sufficient for the first sentence to include an implicit requirement for feasible transmission service or is the second sentence also necessary to clearly state the requirement?

The Joint Utilities do not oppose a requirement to show adequate transmission service rights for electricity generated by renewable and nonemitting resources used to meet the 2045 standard. Generally speaking, no regulated utility would procure a resource without having sufficient transmission service to move that generation to load. Accordingly, the Joint Utilities would not oppose any requirement to demonstrate sufficient transmission service rights for CETA compliance, but such a demonstration would not be necessary.

2. Draft WAC 480-100-650(1)(b). The prohibition on the reliance on retained nonpower attributes when making decisions on long-term acquisitions is applied to contracts longer than two years, as utility contracts of two years or less are generally used for hedging a utility's resource portfolio. Is this the correct contract length or should the cutoff be longer or shorter, and why?

As noted in the comments above, reference to reliance on retained NPAs when making resource acquisitions is inconsistent with the statute and should be removed in its entirety. As such, reference to contract length is unnecessary.

3. Are the demonstrations required in WAC 480-100-XXX(3) reasonable and sufficient to prevent double counting considering the Commission's ongoing authority to prevent double counting?

Yes, subject to the clarifications discussed above and suggested in Attachment B.

4. Are the requirements under WAC 480-100-ZZZ sufficient, clear, and understandable?

Generally speaking, yes. However, WAC 480-100-ZZZ(1)(a) does not appear germane to when a retained NPA can be used for primary compliance because the subsection addresses when the NPA is transferred with the underlying electricity. The Joint Utilities provide some suggestions in the redlines in Attachment B to clarify the requirements under this subsection. The Joint Utilities also suggest removing a reporting requirement that is duplicative of suggestions in the Joint Utility redlines in Attachment A, an approach that keeps all reporting requirements in the same section.

CONCLUSION

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

Sincerely,

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