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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 – CR-102 Relating to Electricity Markets and Compliance with the Clean Energy Transformation Act - Comments of Joint Utilities

Dear Ms. Maxwell:

On March 22, 2022 the Washington Utilities and Transportation Commission (Commission) filed a Notice of Proposed Rulemaking (CR-102) with the Office of the Code Reviser at WSR 22-07-100. On March 23, 2022, the 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) including chapter WAC 480-100-600 through -665. The Commission requested comment on its Notice by April 22, 2022. Avista, PacifiCorp, and Puget Sound Energy (Joint Utilities) appreciate the opportunity to comment on this matter.

One of the key issues debated during this phase of CETA rulemaking is the interpretation of the word "use" as applied in RCW 19.405.040(1). Consistent with RCW 19.405.040(1), the "use" rules issued by the Commission on March 23, 2022 interpret CETA's core compliance obligation in a manner that allows a utility to comply over the course of multiyear compliance periods between 2030 and 2045. Another key issue considered during this rulemaking has been how to ensure no double counting of any nonpower attributes of Renewable Energy Credits (RECs) in the use of unbundled RECs per RCW 19.405.040(1)(b)(ii). The Joint Utilities agree that a utility is allowed to comply with its core compliance obligation over the course of multiyear compliance periods between 2030 and 2045 and that the draft rules are sufficient to ensure no double-counting.

Despite this high-level agreement with the two key elements mentioned above, the Joint Utilities remain very concerned that the rules accomplish these objectives in a manner and form that goes far beyond the necessary rule language and that creates complex and administratively burdensome planning, acquisition, contracting and reporting requirements that will likely have multiple negative consequences including:

- Planning and acquisition requirements that will lead to overbuilding of renewable and nonemitting resources leading to significantly higher costs for customers and utilities triggering the incremental cost cap resulting in less progress toward the overarching CETA goals;

- Contracting requirements that could interfere with the utilities' ability to interact in regional markets and result in significantly reduced market participation and/or drive higher prices for premium products to serve Washington customers;

- Extensive reporting requirements that place a burden on utilities and the Commission for the creation of data systems, compilation, and, for the Commission, receipt and review of volumes of data.

Additionally, the draft rules implementing compliance requirements for RCW 19.405.050 go beyond the Commission's statutory authority. The draft rule at WAC 480-100-650(2) uses the undefined term "electric service obligations." The use of this undefined term in the draft rule appears to exceed the plain meaning and intent of CETA.

Additionally, draft language in WAC 480-100-650(1), as proposed, provides the Commission the authority to require utilities to exceed the statutory requirement of 80% renewable and nonemitting generation in 2030, notwithstanding RCW 19.405.040(1)(b)'s unambiguous statement that "[t]hrough December 21, 2044, an electric utility may satisfy up to twenty percent of its compliance obligation… with an alternative compliance option." While RCW 19.405.060(1)(c) allows the Commission to "adjust or expedite timelines" included in utility clean energy implementation plans (CEIPs), this authority does not extend to modifying the statutory 80% standard in RCW 19.405.040 for purposes of the Commission's penalty authority under RCW 19.405.090. In attempting to grant this authority by rule in WAC 480-100-650(1), the Commission is exceeding its statutory authority under CETA and as such, this portion of the draft rules should be removed.

Furthermore, the Commission has issued CR-102 draft rules that vary significantly from the CR-102 draft rules issued by the Department of Commerce (Commerce)[1]; both sets of draft rules are intended to implement precisely the same statutory requirements in CETA. There is no justification from either agency regarding why draft rules to implement the same statutory language should diverge so meaningfully when applied to different utilities. The rule language differences between the two agencies will create competitive advantages for utilities required to comply with the simpler and more straight-forward rules issued by Commerce.

In the first phase of CETA rulemaking for chapter WAC 480-100-600, Puget Sound Energy raised concerns that the collective administrative burden of the rules was too high and would challenge CETA implementation.[2] The draft rules under consideration today layer additional

[1] Department of Commerce, CR-102, March 23, 2022.
[2] UE-190698 and UE 191023: Comments of Puget Sound Energy, September 11, 2020.

administrative burden onto already complex and challenging rules established previously by the Commission. It is worth noting that the Joint Utilities have raised these concerns with the Commission repeatedly throughout the rulemaking process[3] and have provided suggestions and redlines to address these concerns.[4] The Joint Utilities' concerns and redlines to address these concerns have been routinely dismissed throughout the rule development process without satisfactory explanation or justification other than generic disagreement on the part of Commission Staff.[5]

In the current draft rules, the Commission has gone well beyond what is reasonable or necessary to implement CETA. The Markets Work Group, convened pursuant to RCW 19.405.130 to advise on requirements related to market purchases and double counting at issue in this rulemaking, after a contentious process, created a list of 10 important characteristics for the final rules.[6] The draft rules fail to achieve at least four of these important characteristics, namely: 1) create clear and accurate accounting for compliance; 2) minimize administrative burden; 3) support use of the flexibility and efficiency of wholesale electricity markets…; and 4) support cost effective renewable energy development and integration limiting overbuild and curtailment for resources used to comply with the statute.

The following comments provide more discussion regarding the specific concerns of the Joint Utilities on the draft rules issued by the Commission.

GENERAL COMMENTS

A. Draft Rules Updating Planning Rules in Chapter WAC 480-100-600 through -655

1. <u>Planning and acquisition requirements are not necessary and will likely raise costs for utility customers.</u>

The draft rules introduce a new concept of "retained nonpower attribute" (NPA). The fundamental concept, that utilities may use a retained NPA for primary compliance with CETA, even if the associated electricity is sold in an unspecified wholesale transaction, is not described or used in CETA. While this concept, as used in the draft rules during the 2030-2044 timeframe to determine primary compliance, is consistent with the intent and meaning of CETA multiyear compliance period provisions, it is also not necessary for CETA implementation. In fact, Commerce, in crafting rules for the same statutory requirements[7], is able to achieve the same primary compliance without the use of retained NPAs. In particular, as the Joint Utilities have stated in multiple rounds of previous comments, the Joint Utilities are concerned that it will be impossible to determine that any specific REC or MWh is associated with or should be assigned

[3] See UE-210183 Joint Utility Comments, November 12, 2021, UE-210183 Joint Utility Comments, February 9, 2022.
[4] UE-210183, Joint Utility Comments, February 9, 2022, Attachment A and B.
[5] UE-210183, Summary of Comments on 2nd Use and Double Counting and Storage Draft Rules.
[6] Washington Clean Energy Transformation Act Carbon and Markets Issues & Alternatives List, April 7, 2021, page 9.
[7] Department of Commerce, CR-102, March 23, 2022.

as a retained NPA.[8] It will be possible to establish an accounting methodology to "deem" certain RECs or MWhs as retained NPAs, but this will be a purely administrative practice, with no actual relationship to physical power flows.

Beyond challenges with the practical implementation, the use and execution of the retained NPA concept in planning and acquisition standards set forth in the draft rules goes beyond the statutory requirements and adds complexity and complications that will have real implications for compliance costs. Proposed language added to the rules in draft WAC 480-100-620(11), WAC 480-100-650(1)(a) and WAC 480-100-650(1)(b) are neither justifiable nor necessary for CETA compliance. Draft WAC 480-100-650(1)(a) requires utilities to plan for a system in which they cannot use retained NPAs for primary compliance. Draft WAC 480-100-650(1)(b) requires utilities to make acquisition decisions greater than two years in length under the assumption that they will not be able to use retained NPAs for primary compliance. Draft WAC 480-100-650(1)(c), however, allows utilities to use retained NPAs for primary compliance.

This internal inconsistency creates a situation where utilities are planning for and actually making resource acquisition decisions informed by a more constrained system than is actually required for compliance. The likely result of this constrained system is that the analysis used for planning and acquisition decisions will indicate that more renewable resources are needed to reach the 80% primary compliance requirement than what is actually required to comply with the law over the four-year compliance period. This will lead to increased renewable energy acquisition and, because the actual compliance rules do not match the planning and acquisition constraints established by the draft rule, this will likely lead to overbuilding renewables. As a consequence of this overbuilding, when actually operating the system, utilities will likely end up selling higher quantities of excess renewable energy not needed to meet load at reduced prices or curtailing renewable resources with increased regularity. All of these elements raise prices for customers served by the Joint Utilities.

As the Joint Utilities pointed out in an earlier set of comments, CETA compliance is assessed on a retrospective basis.[9] 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."[10] The draft rule proposed by the Commission limits utilities' ability to comply "over each

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[8] See UE-210183 Joint Utility Comments, November 12, 2021, UE-210183 Joint Utility Comments, February 9, 2022. As discussed in these November and February comments, all three Joint Utilities make system sales – meaning that no specific resource can be determined to have supplied a particular MWh in a wholesale sale – it will *never* be possible to say, for example, that a REC generated at a particular wind facility is associated with a MWh sold in a wholesale sale. There are critical reliability benefits to making system sales: resource-specific sales do not deliver buyers a reliable product that can be used for reserves, which would require buyers to carry additional reserves that likely would not be needed.

[9] UE-210183 Joint Utility Comments, 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.")

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

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. The Commission should eliminate these planning and acquisition requirements.

2. <u>Contracting requirements may interfere with utility ability to participate in regional markets.</u>

The Joint Utilities are concerned that contract requirements as written in the draft rule at WAC 480-100-650(6)(b)(i) and WAC 480-100-650(6)(b)(v) are unnecessary for CETA compliance, overly burdensome, and will create consequences that interfere with the utilities' ability to participate in market transactions.

WAC 480-100-650(6)(b)(i) requires utilities to include in reporting filings "*total monthly megawatt-hours of sales, purchases, and exchanges by counter party in which the electricity is sold in a wholesale market without its associated nonpower attributes*". This reporting provision subsequently includes the following language, which appears to require a compliance element associated with contracting:

> *Any contract in which the utility sells electricity in a wholesale market sale without its associated nonpower attributes must include terms stating the seller is not transferring any of the nonpower attributes and the buyer may not represent in any form that the electricity has any nonpower attributes associated with it and that the buyer must include such provision in any sale of the electricity in any subsequent sale it makes.*

The last part of this sentence includes a requirement placed on the seller to require the purchaser of the electricity to take certain actions, including control over the contents of future agreements related to any subsequent sale of that electricity between parties, neither of whom may be Washington utilities subject to CETA. This provision creates logistical problems due to the actual uncertainty of physical power flows in the regional transmission system where utilities almost always sell system power, rather than a specific sale for a designated megawatt-hour. It also creates a wholly unenforceable and impractical requirement because neither the selling utility, nor any agency, will have jurisdiction to monitor the counterparties regarding this provision. The practical effect of this provision may be that non-Washington entities are unwilling to enter into market transactions with Washington utilities that require this special contracting provision. In this event, this could dramatically increase prices for Washington utilities as the supply of willing sellers is reduced, and, in times of high regional demand, even jeopardize reliability by reducing the available market purchases into the state.

WAC 480-100-650 (6) (b) (v) requires that "*Beginning January 1, 2026, all existing or new purchase contracts longer than one month with documentation that none of the electricity delivered is sourced from coal fueled generation.*" This provision goes beyond the statutory language of CETA, which requires that utilities "*must eliminate coal-fired resources from its* *allocation of electricity*"[11] where the allocation of electricity is defined as "**for the purposes of setting electricity rates**, the costs and benefits associated with the resources used to provide electricity to an electric utility's retail electricity consumers that are located in this state."[12] [Emphasis added]

Current regional market systems, including the commonly used WSPP Inc. agreement, do not offer a schedule at present that could be used by Washington utilities to comply with this coal constraint. Complicating the development of such a product is the fact that many entities sell system power that is not tagged or identified to a specific source of generation. It appears likely that the development of such a product specifically for Washington utilities will come at a premium price and ultimately raises prices on market purchases for Washington customers.

Additionally, for multistate utilities operating in states that do not have a similar coal requirement, the provision included in the Commission's draft rule is particularly problematic. For those utilities, the draft rule would likely prevent coal-fired generation from inclusion in any contracts that serve multistate systems of the utility, raising market purchase rates for not only Washington customers, but also customers of other states.

The Commerce draft rules do not contain this contracting requirement. As a result, Washington utilities will have materially different requirements associated with compliance with RCW 19.405.030 depending upon the agency rules they must abide by. This could create market advantages for utilities governed by the Commerce rules, which do not include the more proscriptive contracting restrictions, and disadvantages for utilities that fall under the Commission's jurisdiction.

CETA requirements pertaining to coal are clear in RCW 19.405.030 and agency rules are not needed for implementation. The Joint Utilities remain committed to fulfilling the legislature's intent that coal be removed from the allocation of electricity by the end of 2025. Utilities are already entering into discussions with regional entities to amend market constructs as needed. We ask that the agency not further constrain and complicate compliance with this provision by issuing rule language that diverges from the legislative language and only applies to the investor-owned utilities.

3. Reporting requirements are overly burdensome.

Although some limited improvements were made to the reporting requirements between the draft rules issued in January 2022 and the current CR-102 draft rules, the quantity of data required remains substantial, would be burdensome to compile, and likely will be overwhelming to receive and review for the Commission. The concerns raised in previous Joint Utility comments regarding draft rule reporting requirements remain:

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[11] RCW 19.405.030(1)(a).
[12] RCW 19.405.020(1).

> *"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."*[13]

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 rules proposed by the Commission simply cannot be provided at this time and it is unclear as to what the process is for obtaining an order from the Commission allowing a utility to not provide hourly data for certain elements required. None of the Joint Utilities has Advanced Metering Infrastructure (AMI) installed for 100% of their retail customer load. Consequently, the data requested in WAC 480-100-650(6)(a)(i) total Washington retail sales is not available for any of the Joint Utilities. For WAC 480-100-650(6)(a)(ii) retail sales for voluntary programs, two of the Joint Utilities do not currently have this data available on an hourly basis. Similarly, for WAC 480-100-650(6)(a)(iv) regarding generation from qualifying facilities, utilities will be missing hourly data for some smaller projects up to 2 MW.

Finally, the requirement in WAC 480-100-650(6)(b)(vi) to provide "*any data provided to the Western power pool's resource adequacy program or its successor*" is vague and undefined and, furthermore, is not relevant to a utility's compliance with CETA. As such, this requirement should be removed in its entirety. If the Commission desires this information, there are other ways of obtaining it, such as through the IRP process, rather than including the requirement within these rules.

4. <u>DRAFT WAC 480-100-650(1) exceeds the Commission's statutory authority.</u>

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. While the Joint Utilities agree that RCW 19.405.060 provides the authority for the Commission to approve clean energy implementation plan ("CEIP") *targets* that exceed the minimum 80 percent retail load obligation, that is not the same as actually modifying the *statutory standard* established in RCW 19.405.040(1). This distinction is important because the CETA penalties in RCW 19.405.090 apply only to the standards established under RCW 19.405.040(1) – and *not* targets set by a utility or the Commission in a CEIP. 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. For purposes of applying penalties, the statute therefore does not provide the Commission authority to set any percentage aside from eighty percent for primary compliance. If the Commission sets a "minimum percentage" other than

[13] UE-210183 Joint Utility Comments, February 9, 2022

eighty percent, it would implicitly be *reducing* the percentage that can be satisfied with an alternative compliance option that is provided for under statute. Again, the Commission can set a higher target in a CEIP – but it cannot change the statutory standard for alternative compliance that is associated with RCW 19.405.090's penalty authority.

5. Draft WAC 480-100-650(2) exceeds the Commission's authority under CETA.

Draft WAC 480-100-650(2) states that a utility "*must demonstrate that it is supplying all its retail electric service obligations with renewable and nonemitting resources*" for compliance toward the one hundred percent renewable and nonemitting resource portfolio performance standards and compliance. The term "retail electric service obligations" is not defined in the draft rules, is unclear, and does not appear anywhere in CETA. RCW 19.405.050(1) 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 rule language from the retail sales language used in statute.

Also, as with many other elements in the Commission draft rules, Commerce does not include the same "retail service obligations" requirement in its draft rule. The use of the term by the Commission creates uncertainties and potential challenges in compliance that could significantly raise costs for customers. In contrast, utilities under jurisdiction of the Commerce rules will not face these challenges, which creates competitive disadvantages to those utilities that do.

WAC 480-100-650(2) should be removed from the draft rule. If the Commission determines rules for the post-2045 period are necessary, it should initiate another phase of rulemaking to provide opportunity for discussion and comment.

6. The storage provisions of the draft rules proposed by the Commission are consistent with CETA.

The Joint Utilities support draft WAC 480-100-650(6)(d). 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.

7. Significant differences between Commerce and Commission draft rules create unjustified and unfair application of CETA across utilities.

In previous comments, the Joint Utilities recommended that the Commission realign this rulemaking process with Commerce.[14] 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.[15] Unfortunately, there remain significant differences between the CR-102 draft rules proposed by the Commission and the CR-102 draft rules proposed by Commerce.

Importantly, the draft rules proposed by Commerce use RECs to demonstrate compliance as required by CETA.[16] In contrast, the draft rules issued by the Commission use RECs and electricity for the compliance approach, notwithstanding the clear direction provided by CETA regarding use of RECs for demonstrating compliance. In addition, the Commission's proposed draft rules add complexity through a requirement on utility acquisition processes that do not reflect actual compliance requirements, the concept of retained nonpower attributes ("retained NPAs"), no-coal contracting provisions, and extensive reporting requirements. As previously discussed in these comments, both the acquisition requirement and the no-coal contracting provision could lead to higher compliance costs for utilities under the Commission jurisdiction and increase customer costs associated with CETA compliance for those utilities. Because Commerce does not have a corollary acquisition requirement nor a specific no-coal contracting requirement, compliance costs for utilities governed by the Commerce rules will likely be lower.

Additionally, draft WAC 480-100-650(2) states that a utility "*must demonstrate that it is supplying all its retail electric service obligations with renewable and nonemitting resources*" for compliance toward the one hundred percent renewable and nonemitting resource portfolio performance standards and compliance. As discussed earlier, retail electric service obligations is vague, undefined, and goes beyond the statutory language. The Commerce draft CR-102 contains no such requirement or concept. The differences in the agency rules with regard to the post-2045 requirements will have material, economic consequences for utilities under Commission jurisdiction as we approach that timeframe.

Neither Commerce nor the Commission provide any justification for dissimilar rules to implement the same statutory language. Indeed, the disparate regulatory treatment proposed for the Joint Utilities compared to consumer-owned utilities cannot be justified on either legal or operational grounds. The Joint Utilities, generally, have more fossil fuel generation in their portfolio than the consumer-owned utilities, but the intent and effect of CETA is blind to any distinction between them based on the amount of fossil fuel generation they might have in their portfolios. The fact is that all electric utilities, whether they are one of the Joint Utilities or a consumer-owned utility, serve, or could serve, their retail customers with fossil fuel generation.

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[14] UE 210183 Joint Utility Comments, November 12, 2021. *See, e.g.* RCW 19.405.040(1) (applying to "electric utilities"). UE 210183 Joint Utility Comments, February 9, 2022.
[15] *Id*.
[16] 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 standard" by documentation that the utility owns the nonpower attributes of the electricity generated by the nonemitting electric generation resource.

For example, Clark PUD owns gas-fired generation, the preference customers of the Bonneville Power Administration (BPA) may be supplied with fossil fuel generation when BPA procures energy in the wholesale market, and consumer-owned utilities that manage their own balancing authority, like BPA, purchase fossil fueled generation from the market. There is no logical reason for the Commission and Commerce to impose divergent regulatory requirements on electric utilities.

As pointed out in previous comments,[17] the differences in these two sets of draft rules, if adopted without further reconsideration or reconciliation, will 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.

CONCLUSION

The Joint Utilities respectfully submit that the draft rules issued in the CR-102 by the Commission contain serious issues of concern. The Commission should provide more time for reconsideration and discussion of the concerns raised in these comments. Should the Commission decide to proceed with issuing a final rule, at a minimum, the Joint Utilities recommend that the Commission make the following changes before finalizing the rules:

1) Eliminate subsections WAC 480-100-650(1)(a) and WAC 480-100-650(1)(b).
2) Eliminate or clarify language in WAC 480-100-650(1), described above, that exceeds the Commission's authority under CETA.
3) Eliminate subsection WAC 480-100-650(2).
4) Remove subsection WAC 480-100-650 (6) from this rulemaking phase and reassign to a subsequent phase in order to provide time for additional discussion and consideration.
5) Eliminate subsection WAC 480-100-650 (6)(b)(v).

Taking the actions above will not address all of the concerns with the draft rules raised by the Joint Utilities in these and previous comments; however, it will remove the primary elements that conflict with the draft rules issued by Commerce – creating a more level and consistent compliance approach for all Washington utilities and thus would address the most serious concerns. The Commission simply should not move forward with rules that will create such obvious disadvantages for the utilities under its jurisdiction when the likely consequence is higher costs for customers of those utilities. Nor should the Commission adopt rules that lack legal support, as several sections of these draft rules do.

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

[17] UE-210183 Joint Utility Comments, November 12, 2021.

Sincerely,

/s/Shawn Bonfield

Shawn Bonfield

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Avista Utilities

/s/Shelley McCoy

Shelley McCoy

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/s/Jon Piliaris

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