

**COMMENTS OF THE RENEWABLE NORTHWEST PROJECT
ON THE
CTED JULY 17 ENERGY INDEPENDENCE ACT DRAFT RULES**

Submitted by:
Ann English Gravatt, Policy Director
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Renewable Northwest Project (“RNP”) submits these comments in response to the Department of Community, Trade and Economic Development (“CTED”) Staff July 17 draft rules (“Draft Rules”) issued to implement the provisions of the Energy Independence Act (“Act”), codified at RCW 19.285. These comments are limited to the rules relating to the renewable standard. We continue to appreciate the work by CTED Staff and the other participating stakeholders in this proceeding.

I. OVERVIEW

In prior comments filed in this proceeding, some parties have urged CTED to significantly edit its proposed rules on the basis that the rules go beyond “only process, timelines, and documentation” rules as required in RCW 19.285.080(2). CTED is directed in the law to adopt rules “concerning only process, timelines, and documentation to *ensure proper implementation of this chapter.*” RCW 19.285.080(2). While the first phrase is an important limitation, CTED can not ignore the remainder of the statutory directive. In adopting these rules, CTED is well within its rulemaking authority granted by the legislation.

As RNP has stated repeatedly, the intent of the law is to achieve more MWs of new renewable resources and more cost-effective energy efficiency for Washington customers. Although CTED’s authority is more limited than the WUTC’s, CTED is not working in a vacuum. CTED’s rulemaking scope is process, timelines and documentation rules, but in order to adopt a process rule, CTED must take a position on the objective of the process; to adopt a timeline rule, CTED must take a position on when something needs to be done by; and to adopt documentation rules, CTED must take a position on the types of documents the auditor and the public will need to see. To ensure proper implementation of the law, CTED must take a position on what proper implementation of the law is.

RNP recognizes that the Act uses different wording, in part, in reference to the WUTC rulemaking. However, RNP emphasizes that both agencies are unequivocally directed to follow the guiding principle of ensuring proper implementation of the law when adopting rules. The distinction between the two provisions should not be read to mean that CTED is restricted from taking a position on how best to ensure proper implementation of the law. Instead, CTED is restricted from adopting rules related to qualifying utilities, over which CTED otherwise has no jurisdiction, that go beyond “process, timelines and documentation to ensure the proper implementation” of the law (as opposed to the WUTC, which has primary jurisdiction over the investor-owned utilities.).

A specific example of what this means is that CTED is well within the scope of its authority to adopt rules specifying that the utilities might document compliance with the renewable target “by January 1” of the target year because in so doing CTED has read the Act to require compliance by January 1 and therefore is adopting timeline, process and documentation rules to ensure that utilities comply with that deadline (or more broadly stated, to ensure proper implementation of the law).

On the other hand, it also means that CTED cannot give utilities more rights than they would enjoy under the law. This is one of the critical distinctions with WUTC’s authority. WUTC could, for example, adopt a rule declaring there was only one method it would accept in determining “annual retail revenue requirement”; CTED would not have authority to prescribe only one method. However, as discussed below, this prohibition on CTED mandating only one method where the language of the statute would permit other routes does not mean that CTED can give the utility unfettered discretion to choose any option. Instead, in instances where CTED wishes to provide additional flexibility (and where the law would otherwise permit it), CTED should provide appropriate limitations on that flexibility that require process, timelines or documentation that tie back to the letter and intent of the law. Returning to the annual retail revenue requirement example, that means CTED could say that there is more than one way to come up with that number, but no matter what way the utility chooses to come up with that number it must still demonstrate that that number is what the utility uses on an annual basis to collect retail revenue. Thus, CTED has given the utility discretion but has also ensured that in exercising that discretion the utility stays within the bounds of statutory requirements.

Finally, it is not a sufficient response to limit CTED’s rulemaking to state that it is the auditor, not CTED that will determine compliance. It is CTED, not the auditor, that must adopt rules and the auditor must audit for compliance with the Act and with the rules adopted by CTED. RCW 19.285.060(7).

We offer the following comments on the Draft Rules with the above principles in mind.

II. COMMENTS ON DRAFT RULES RELATING TO RENEWABLE ENERGY

- A. **WAC 194-37-030(2)**
Definitions – “Annual Revenue Requirement”
WAC 194-37-130(2)
Financial Documentation of Annual Revenue Requirement

RNP Proposed Rule Language:

WAC 194-37-030(2)

“Annual revenue requirement” means that portion of a utility’s annual budget approved by its governing body for the current target year that is intended to be recovered through retail electricity sales in the State of Washington in that year, or that portion of the utility’s revenue that the utility expects to recover through retail electricity sales in the State of Washington in that year that is determined pursuant to the process by which the

utility establishes such number, as otherwise documented by the utility pursuant to WAC 194-37-130.

WAC 194-37-130(2)

A utility that ~~elects to~~ uses a different basis for the determination of its annual revenue requirement for purposes of calculating what it expects to recover through retail electricity sales in the State of Washington in that year, may use that number in the calculation of the cost cap and must also provide documentation to support this alternative approach.

Concerns: As currently drafted, the definition of “Annual Retail Revenue Requirement” and the documentation of the same provide a utility the discretion to adopt a calculation of annual revenue requirement solely for purposes of this Act without any connection to what the utility uses for retail revenue purposes. These provisions therefore set up a documentation requirement that does not ensure proper implementation of the statute.

The phrase “annual retail revenue requirement” is used in I-937 as the basis for assessing whether the no-load growth or cost cap alternative compliance mechanisms are applicable to the utility. In each instance in which “revenue requirement” appears in I-937, it is qualified by the two words “annual” and “retail”. Accordingly, the Draft Rules must require documentation of the qualifying utilities’ revenue requirement calculated annually *as used to collect retail revenues*, not just as calculated for purposes of I-937 compliance. A utility may use a different method than a budget approved by its governing body to determine annual retail revenue requirement and such alternate method is not prohibited by the Act. But whatever method (budget or otherwise) the qualifying utility uses for purposes of the cost cap calculation, it should be also required to demonstrate that that revenue requirement is in fact the normal method relied on by the utility for purposes of collecting *retail* revenue. Such a clarification ensures consistency with the statute and prevents utility gaming.

**B. WAC 194-37-030(12)
Definitions –“Eligible renewable resource”**

RNP Proposed Rule Language:

An eligible renewable resource within the Pacific Northwest may receive integration, shaping, storage or other services from sources outside the Pacific Northwest and remain eligible to count towards a utility’s renewable resource target.

Concerns: The Draft Rules include a new paragraph (C) in the definition of “eligible renewable resource”. RNP understands this paragraph is intended to capture a clarifying proposal submitted by Powerex in its May 29, 2007 written comments. During the July 11, 2007 CTED workshop on renewable issues (“July Workshop”), no party objected to CTED Staff’s proposal to include Powerex’s clarifying language. Powerex has proposed that CTED add to its rules language similar to that in proposed WUTC rule 480-109-020(3) which makes it clear that that a renewable resource *located within the Pacific Northwest* could receive integration, shaping,

storage or other services from outside the Pacific Northwest and remain an eligible renewable resource. In adding this concept to the draft rules, CTED Staff left out the requirement that the eligible renewable resource must be within the Pacific Northwest when receiving these services in order to remain eligible. As specified in the statute, renewable resources outside the Pacific Northwest must be delivered into Washington state on a “real-time basis without shaping, storage, or integration services” to remain eligible. *See* 19.285.030(10)(a)(ii). The Draft Rules must be modified to reflect the statutory requirements consistent with the Powerex proposal.

C. **WAC 194-37-030**
Definition – “WREGIS”

Proposed Rule Language

“WREGIS” means the Western Renewable Energy Generation Information System. WREGIS is an independent, renewable energy database for the region covered by the Western Interconnection. WREGIS creates renewable energy certificates, WREGIS certificates, for verifiable renewable generation from units that register in the database. The department selected WREGIS as the provider of a tracking system to issue verified RECs.

Concerns: The Draft Rules strike the final sentence in the WREGIS definition in which CTED states that it had “selected WREGIS as the provider of a tracking system to issue verified RECs.” RCW 19.285.030(17) requires CTED to select a REC tracking system to verify the REC. In proposed WAC 194-37-030(23), the definition of “renewable energy credit” (or “REC”) states that the “certificate is verified by Western Renewable Energy Generation Information System.” The fact that the proposed definition requires RECs to be verified *by WREGIS* means that CTED has selected WREGIS as the entity to verify and track RECs, and therefore, the strikeout in the “WREGIS” definition merely removes a perceived redundancy. However, RNP believes that explicitly stating CTED’s selection of WREGIS would clarify any question resulting from the strike-out.

Restoration of the struck language is especially important if CTED’s proposed deletion of the explicit statement on the selection of WREGIS is intended to signify that CTED has not selected WREGIS. CTED has an unequivocal obligation under the law to select a REC-tracking system. RCW 19.285.030(17). This rulemaking is the proper place to make such election. Moreover, for the reasons provided in our March 22, 2007, comments, WREGIS is the best available option for REC tracking and verification in WECC. It is now operational, transparent and verifiable.

At the July Workshop, some utilities raised the concern that they wished to claim ownership of the REC without using the WREGIS system. REC is a defined term in the Act requiring verification by a tracking agency selected by CTED. If the utility wishes to claim ownership of a REC in order to demonstrate compliance with the annual targets, the REC must meet this criteria. The change may have been intended to capture the request by some utilities at the July Workshop that CTED remain open to selecting an alternative tracking system in the future. Consideration of any replacement tracking system should take place in an open, public

forum so that stakeholders have the option of participating and providing comment on any replacement. CTED has the authority to revise the rules in the future if necessary. RCW 19.285.080(4). Accordingly, CTED should select WREGIS now in the rules and rely on its ongoing rulemaking authority to address concerns regarding changing the tracking system in the future.

D. WAC 194-37-030(24)

Definition - “Substitute resource”;

WAC 194-37-170

Documentation of Financial Path – Substitute Resource and Resource Equivalence

RNP Proposed Rule Language

WAC 194-37-030

“Substitute resource” means reasonably available electricity or generating facilities of the same contract length or facility life as the eligible renewable resource the utility invested in to comply with chapter 19.285 RCW requirements that otherwise would have been used to serve a utility’s retail load in the absence of chapter 19.285 RCW requirements to serve that retail load with eligible renewable resources.

WAC 194-37-170

- (1) In support of its annual filings to the department under RCW 19.285.070, utilities must document the type, availability and cost of the reasonably available substitute resource used to calculate the incremental cost of an eligible renewable resource.
 - A. In documenting the incremental cost under RCW 19.285.050 (1) (b), a utility is encouraged to identify substitute resources using its integrated resource planning process, if one is available. If a utility elects to choose a substitute resource from a ~~document~~ other different source than its published integrated resource plan, it must document the basis for this decision. Documentation of the cost of a substitute resource may include, but is not limited to, formal offers for the sale of electricity, or published cost projections from reputable third-party sources.
 - B. In its selection of a substitute resource, the utility must provide documentation demonstrating that the substitute resource satisfies the requirements set forth in RCW 19.285.050. The requirements include:
 1. Utilities shall document equivalence between the eligible renewable resource and the alternative substitute resource by demonstrating the equivalence in the amount of energy produced by each resource;
 2. Utilities shall document equivalence between the eligible renewable resource and the alternative substitute resource by demonstrating the same ~~and the~~ contract length or facility life of each resource.
 3. Utilities shall document that the substitute resource is reasonably available within the relevant market.

4. Utilities shall document that the substitute resource does not qualify as an eligible renewable resource.
 5. Utilities will endeavor to demonstrate the equivalence between the service characteristics and risk profiles of each resource.
- C. Only supply-side substitute resources shall be used by utilities in the calculation of the incremental cost of eligible renewable resources. ~~If a utility has surplus generation as a result of the requirements in RCW 19.285.040 (2), it may use its surplus resources as the substitute resource. Supply-side substitute resources may include facilities that are sold as a result of the requirement to acquire eligible renewable resources.~~
- D. When the renewable requirements under RCW 19.285.040 (2) result in a utility having resources in excess of its load, the utility may use that excess resource as the substitute resource if the substitute resource requirements of WAC 190-37-170(1)(B) are otherwise satisfied. ~~and that utility intends to comply with the requirements of RCW 19.285.050, +~~ The utility will document the resale revenues, net of transaction costs, received through the sale of excess resources or the purchase price for the sale of the excess facility sold as a result of the requirement to acquire eligible renewable resources. If the utility uses something other than the documented resale revenues in the determination of the levelized delivered cost of the substitute resource it must provide documentation to support this alternative approach that demonstrates that it represents market cost.
- E. When the renewable requirements under RCW 19.285.040 (2) result in a ~~A~~ utility otherwise entitled under its BPA power sales contract to have the BPA meet its net power requirements for the expected life of an eligible renewable resource foregoing and foregoes part of its BPA entitlement ~~in order to meet the requirements of RCW 19.285.040 (2),~~ the utility may use the cost of the foregone power purchases from BPA, plus any billing credit obtained for reducing its purchases from BPA as the basis for the cost of the substitute if the substitute resource requirements of WAC 190-37-170(1)(B) are otherwise satisfied ~~resource in RCW 19.285.050.~~

Concerns: The CTED proposed definition of “substitute resource” omits several key components required by the Act in order for a resource to be used in the cost-cap calculation, provided in RCW 19.285.050. The cost cap provides an alternative compliance mechanism wherein the utility need not comply fully with the annual target that would otherwise apply to the utility during the target year where the utility “invested four percent of its total annual retail revenue requirement on the incremental costs of eligible renewable resources, the cost of renewable energy credits, or a combination of both”.

Much of the discussion at the July Workshop on the cost cap provision presupposed a scenario where the utility was long or foregoing cheaper power in order to buy renewable energy to comply with the requirements of the Act. As an initial matter, RNP reiterates that the statute already provides a mechanism for utilities to comply with the annual targets, without foregoing other alternatives or being unable to use the utility’s own resources. That mechanism is the

purchase of unbundled RECs. If the utility does not need additional power to serve load, it can simply purchase RECs to satisfy its annual renewable targets.

Critical to proper implementation of the cost cap provision is a legally permissible interpretation of what types of resources (and associated costs) can be used in the comparison of the incremental costs of eligible renewable resources to “reasonably available substitute resources”. RCW 19.285.050(1)(b). The Draft Rules provide some general guidelines on determining the substitute resource and then, also include three specific resources that the Draft Rules would permit to be used as “substitute resources.” RNP proposes clarifying changes to the general guidelines and more substantive proposals to address its concerns regarding the “special” substitute resource cases included in the Draft Rule.

1. Each Substitute Resource Must Meet All of the Requirements in RCW 19.285.050

The Draft Rules provide in the definitions that the “substitute resource” is the “electricity or generating facilities that otherwise would have been used to serve a utility’s retail load” in the absence of I-937 requirements. This proposed definition leaves out details on the critical elements specific in the Act for identifying the “substitute resource”. The Act specifically requires that the substitute resource must (1) be “reasonably available”; (2) not qualify as an eligible renewable resource; and (3) be the “same contract length” or the “same *** facility life” as the eligible renewable resource to which the substitute resource is being compared. RCW 19.285.050(1)(b).

In addition, WAC 190-37-170 requires documentation on equivalence (in amount and contract length or facility life) and “availability” but does not require detailed documentation demonstrating that the substitute resource (1) was “reasonably available” and (2) does not qualify as an eligible renewable resource. Because the draft definition and documentation rule does not capture all of the statutory requirements, RNP proposes clarifying rule language that makes it explicit that the statutory requirements must be satisfied, and associated supporting documentation provided, in all cases.

2. The Draft Rules Fail to Give Meaning to “Reasonably Available.”

The cost cap provisions require that the utility use a substitute resource that is “reasonably available” when calculating the incremental cost of eligible renewable resources. The Draft Rules do not provide a definition of “reasonably available” and at the July Workshop, stakeholders generally believed that no definition was necessary. With respect to a reasonably available substitute resource, the utility will just “know it when it sees it”. RNP submits that this approach fails to ensure proper implementation of the statute because CTED has not adopted a rule to ensure we arrive at documentation of a legally acceptable “reasonably available substitute resource”.

“Reasonably available” plainly means a viable market or ownership opportunity for the utility to serve its load where the fuel is available, the generating facility is available and transmission to utility load is available. In other words, rather than serving load with the eligible

renewable resource, the utility could actually serve its load with this other resource during the target year. Allowing the utility to rely on a purely hypothetical substitute resource could lead to a situation where in the target year in which the utility wants to use the cost cap, it says, for example, seven years ago, we would have chosen to build a coal plant instead of the resource decision we made this year and that coal plant is the substitute resource we will compare the costs of the eligible renewable resource. This concern is particularly important because CTED Draft Rules require the utility to update the cost information used each year the cost cap is relied upon.

3. The Draft Rules on Specific Substitute Resources Are Overbroad.

RNP is concerned that the specific substitute resource situations in subsections (C), (D), and (E) appear to prejudge that those specific resources will always meet the statutory requirements that must be satisfied before a resource can be used as the substitute resource in the cost cap calculation. It is not possible at this time to definitively state that a specific “excess resource”, for example, will meet the equivalency requirements (*e.g.* same amount and same contract length or facility life) required in RCW 19.285.050. Accordingly, RNP is proposing changes to these subsections to make clear that, although they deal with specific resource situations, all of the requirements for identifying a “substitute resource” must still be satisfied.

In addition to these changes, RNP proposes changes to subsections (C) and (D) because they appear to serve overlapping purposes. After the first sentence of subsection (C), the remainder of the subsection deals with the circumstance where compliance with the renewable target results in the utility having “surplus generation”.

Subsection (D) deals with a utility having “resources in excess of its load”¹ as a result of compliance with the renewable target. There is no need for separate provisions for these two circumstances because whether compliance with the Act results in “surplus generation” or “resources in excess of load”, the utility must still satisfy all three statutory conditions in order to be able to use the resource as the substitute resource. (*i.e.* the resource must be “reasonably available”, non-eligible renewable and the same amount, contract length or facility life as the eligible renewable resource). RNP has also proposed changes to deal with whether cost is determined by sale of excess output or sale of the facility itself in subsection (D) that we strike from subsection (C).

Once the equivalency requirements are met, then the determination of levelized cost should be based on the actual or market resale revenues associated with that resource (or output) as proposed in the Draft Rules. These costs are the best indicator of the cost at which that resource would be reasonably available to utilities. As currently drafted, subsection (D) first states that the utility can use the sales price of surplus generation but then permits the utility to document some other basis for cost. RNP has two concerns with how the rule is drafted in this regard.

¹ As part of the “reasonably available” requirement, the utility should also have to document that the surplus generation they wish to use in the cost cap calculation is not committed under long-term contract but would in fact be available to the utility to serve load.

First, by permitting the utility to use any other cost, without restriction, CTED has impermissibly expanded the scope of the “levelized delivered cost” of the “reasonably available substitute resource” beyond what is intended in the Act. Once an owned (or contracted for) resource previously used to serve load becomes surplus, *i.e.* no longer necessary to serve load as a result of the requirements of the Act, the utility can achieve revenue from sales for the surplus power. So, the cost to the utility to use that resource to serve load, instead of selling it on the market, is the embedded cost of the resource and the lost revenues.

Second, RNP reiterates the concern expressed in its May 29 comments about the potential for gaming by utilities under this provision. Nothing in CTED’s proposed language would prevent two utilities intentionally making contracts among themselves at below market prices for the purpose of inflating incremental costs. Aside from a special deal to frustrate the purposes of the Act, it cannot be reasonably argued that that resource would be available in the market at that cost.

For these reasons, we believe that the surplus resources must either: (1) be sold at market or; (2) be based on a market price used in connection with assessing the foregone revenues associated with using surplus resources as the substitute resource. If the resource is sold below market, then a substitute price should be used as cost because the utility would be unable to demonstrate that that price actually represented the foregone revenues (*i.e.* costs) to it of using that resource as the substitute resource. Finally, a substitute market sales price should be used if the utility does not make a sale (*i.e.* if it backs down excess generation).

Draft Rule provision (E) allows utilities to use BPA power sales contracts as a substitute resource to the extent the utility may have a reduced allocation of such power as a result of purchases pursuant to the Energy Independence Act. We note that BPA’s current proposal for allocating its resources specifically excludes reductions in allocation due to renewable resource acquisitions,² possibly obviating the need for this section altogether. Further, similar to section (C) and (D), the rule does not limit the use of the BPA preference power rate to circumstances that satisfy the statutory requirements. Subsection (E) does not explicitly require that the BPA contract have the “same contract length or facility life” and equivalent amount as the eligible renewable resource but rather seems only to require that the utility have a right to BPA power for the life of the eligible renewable resource.

In addition, elsewhere in the draft rules [WAC 194-37-090(1)(C)(i)], CTED staff permits the utility to count portions of BPA preference power towards their renewable energy targets, whereas here, this same power is permitted to be used as the substitute resource. The cost cap provision requires the substitute resource to be one that “do[es] not qualify as [an] eligible renewable resource[]”. The BPA power cannot be both an eligible renewable resource for purposes of meeting the annual target and a non-eligible renewable resource for purposes of alternative compliance in the draft rules

² See specifically slide 8 of “Regional Dialogue High Water Mark Determination for Tiered-Rate Methodology,” BPA, August 8, 2007 (http://www.bpa.gov/power/PL/RegionalDialogue/2007-08-08_BPA_high_water_mark_determination.pdf)

E. WAC 194-37-090
Renewable Resource Energy Reporting

Proposed Rule Language

(1) Universal Renewable Energy Reporting Requirements. Each utility report shall include the following information:

C. The names of the eligible renewable resource facilities that the utility owns or with which the utility has a contract and a list of the amount and vintage of renewable energy credits owned or acquired by the utility, dated no later than January 1 of the target year, and the estimated annual quantity of eligible renewable resources or RECs that the utility will acquire through these resources or contracts to meet its annual targets.

i. A utility may count any purchases of eligible renewable electricity, for which BPA ~~has not separately sold~~ has or will retire the affiliated RECs on behalf of the utility, or RECs from the BPA generated by eligible renewable resources to meet all or any portion of its annual eligible renewable resource targets. To document the annual amount of power supplied by BPA from eligible renewable resources, the utility may rely on BPA's determination of the portion of its power supply provided by eligible renewable resources during a calendar year for which BPA ~~has not separately sold~~ has or will retire the associated RECs on behalf of the utility.

(2) Renewable Energy Target Reporting

A. A utility that meets the renewable energy requirements in RCW 19.285.040 (2) must include the following in its June 1 report of each year beginning in 2014.

- i. ~~Demonstration that it acquired sufficient~~ the eligible renewable resources used or renewable energy credits acquired by December 31 January 1 of the target year upon which the utility relied to demonstrate compliance with annual targets in prior years were actually acquired, produced and/or generated. The utility may acquire renewable energy credits or use additional generation from eligible renewable resources in the compliance year and/or acquire renewable energy credits in the subsequent year to make up for any performance deficiency but not for failures to comply. and RECs up through the prior year to meet the percent of load target for the calendar year two years prior. This demonstration may be a finding of compliance from its auditor.
- ii. Documentation of the amount of megawatt-hours purchased or generated, the amount of WREGIS-certified RECs purchased and the names of the respective

eligible renewable facilities that produced the associated power, specified by the year it was generated.

Concerns: RNP generally supports CTED’s proposed rules related to reporting on renewable resource compliance. RNP believes that CTED has, with a few important exceptions noted below, crafted rules for compliance that, if followed, should lead to proper implementation as audited by the auditor and enforced by the attorney general. However, based on comments at the July Workshop, RNP understands that there is still confusion about the requirement to provide documentation of acquisitions of RECs and use of eligible renewable resources to meet the annual targets **by** January 1 of the target year. RNP submits that there is only one permissible, legal reading of the renewable energy standard in I-937—utilities must establish their compliance with the annual targets by January 1 of the target year. Indeed, CTED is obligated to draft rules that advance the legislative purpose of the Act according to the plain meaning of the words of the Act.³

1. The “Plain Meaning” of the Act Requires Compliance “by January 1, 2012”

In interpreting the words of a statute, courts look to the plain and obvious meaning of the words in the statute.⁴ Looking carefully to the words in the statute, the statute requires that the utility must **“use”** eligible renewable resources or **“acquire”** renewable energy credits (“RECs”) to meet the target **“by”** January 1, 2012 (and by January 1 of subsequent years). RCW 19.285.040(2)(a)(i). Thus, the utility is required to do something (“use” or “acquire”) **BY** January 1, 2012.

CTED’s proposed rules require the utility to provide documentation of compliance “no later than January 1” of the target year in WAC 194-37-090. RNP proposes a change to the draft language however because it only captures one of the two possible methods of compliance—it refers only to eligible renewable resources owned or under contract by January 1. The utility could also use RECs or a combination of the two to satisfy the target and therefore proposes some additional language.

2. The Law Does Not Permit Compliance without Penalties Beyond January 1

RNP is concerned that the clear statutory requirement, properly stated in WAC 194-37-090(1)(C) is inadvertently undermined by inexact drafting in the latter part of the rule dealing with “Renewable Energy Target Reporting”. The Draft Rule provides:

³ See *Edelman v. State Ex Rel. P.D.C.*, 152 Wn.2d 584, 591, 99 P.3d 286 (2004) (stating that agencies may not promulgate rules that amend or change legislative enactments); see also *Dep’t of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973) (stating that rules of statutory construction apply to initiatives as well as to legislative enactments).

⁴ See *Young v. Estate of Snell*, 134 Wn.2d 267, 279, 948 P2d 1291 (1997); *State ex rel. Royal v. Board of Yakima County Comm’rs*. 123 Wn23 451,451, 869 P2d 56 (1994) (meaning of a statute must be derived from the wording of the statute itself where the statutory language is plain and unambiguous).

(2)(A) *A utility that meets the renewable energy requirements in RCW 19.285.040 (2)* must include the following in its June 1 report of each year beginning in 2014.

- i. Demonstration that it acquired sufficient eligible renewable resources by December 31 of the target year and RECs up through the prior year to meet the percent of load target for the calendar year two years prior. This demonstration may be a finding of compliance from its auditor. (Emphasis added).

The italicized language presupposes that the utility had met the statutory requirement, which includes compliance by January 1 of the target year. However, the subsection (i) requires documentation of the utility's continuing effort to acquire eligible renewable resources through the target year and RECs through to the end of the year after the target year. The rule goes on to state that that demonstration "may be a finding of compliance from its auditor." RNP is unclear what this language is intended to mean. If it means that the utility must still comply with the January 1 deadline and, in addition, later must demonstrate that its expected generation and acquired RECs turned out to actually occur as expected, that is consistent with the law. If it means that in meeting that requirement, the utility can simply file a report from the auditor that has already found that the expected generation and RECs performed according to plan, that is also consistent with the law. Because CTED has expressly recognized the January 1 requirement in Subsection (1)(C) of the proposed rule, this is the most logically consistent reading of the rule.⁵

Because of potential ambiguity, RNP believes that CTED should add some clarifying language to ensure that the rule is not improperly interpreted in isolation to mean that the utility has an additional two years after the January 1, 2012, deadline, to meet the target. Such a reading would be inconsistent with the law because it would not require the 3% target to be met until almost two full years after January 1, 2012.

While the utilities are required to be in compliance by January 1 of the compliance year or pay penalties, it is possible that an eligible renewable resource or renewable energy credit upon which the utility relied to demonstrate compliance could fail to perform due to some unexpected event during the compliance year⁶ (such as underperformance of a generating resource). Absent remedial action, such underperformance would cause the utility to fail in actual fact to produce the renewable energy or ensure that the REC was produced that was used to satisfy the annual target for that compliance year.

⁵ It is also an interpretation of the plain meaning of the words of the Act that gives meaning to all parts of the Act and advances the intent of the statute. *See Jordan v. O'Brien*, 79 Wn.2d 406, 410, 486 P.2d 290 (1971) ("Statutes should be construed so as to give effect to every word.") *Clark v. Payne*, 61 Wn. App. 189, 193, 810 P.2d 931 (1991). *See Morgan v. Johnson*, 137 Wn2d 884, 891-92, 976 P.2d 619 (1999) (in considering a statute, a court must "assume that the legislature means exactly what it says"). RNP has provided a detailed legal analysis of the compliance provisions of I-937, which is available at www.wutc.wa.gov.

⁶ A subsequent year REC used to comply with the statute would, most likely, fail, if at all during the year after the compliance year.

RNP believes that Section 2 of WAC 190-37-090 may be intended to address this underperformance situation in that it assumes compliance with the “by January 1” requirement and is dealing with later year reports. However, we propose changes to the rules to give the utility the opportunity to use more eligible renewable resource generation during the compliance year or purchase more renewable energy credits during the compliance year or subsequent year to make up for any underperformance.⁷ The utility would report on, and the auditor would audit and measure, the remaining underperformance shortfall not remedied by the utility during the review of the annual report after the end of the subsequent compliance year (e.g., in June 2014 for 2012 target year). The auditor would then calculate a penalty for any underperformance shortfall not remedied by the utility. This proposal gives meaning to the statutory requirement to comply at the start of the compliance year while also ensuring actual production of the energy or REC and also gives meaning to being able to rely on subsequent year RECs. Using this approach, the CTED rules concerning process, timelines and documentation would insure proper implementation of the law.

3. The Statute Does Not Provide a “Grace Period” before Penalties Can Be Imposed for Failure to Comply

At the July Workshop, some utilities raised the concern that they would not know their load for the most recent prior year in order calculate and meet their target. CTED Staff seemed to concede that some “grace period” after January 1, of the target year may be appropriate before it would be appropriate to assess penalties for non-compliance. As a practical matter, concerns regarding uncertain load or overcompliance are misplaced as discussed below. Moreover, these arguments do not support an interpretation of the statute contrary to its plain meaning and intent. The Act itself does not provide any grace period; accordingly, CTED cannot adopt rules permitting such a grace period and the utilities should not expect that no penalties will be assessed for “compliance” purchases made after January 1 of the target year.

Utilities are in the business of meeting their loads, and are capable of accurately predicting within a very small degree of error what 3%, 9% and 15% of their loads will be by the relevant target dates. Further, the Act allows a utility to calculate its load based on the “average of the utility’s load for the previous two years.” RCW 19.285.040(2)(c). The ability to average 24 months of generation – two years of seasonal variability – facilitates the utility’s ability to accurately predict the generation needed to meet the target.

To support our position, Ken Dragoon, RNP’s Research Director, prepared a paper for the WUTC rulemaking process, analyzing this argument with examples of the de minimis margin of error in predicting load and utilities’ ability to manage that uncertainty under the proposed rules. This paper is attached as RNP Compliance Examples. Because the target is based on two years’ worth of load data, as the utility approaches the target for compliance, the amount of unknown load becomes a smaller and smaller portion of the total of known, available data. The

⁷ If the reason for underperformance satisfied the definition of a “force majeure”, the utility would obviously not be required to make up the underperformance. However, such force majeure would be reported in the subsequent annual report and reviewed the Auditor.

proposed rules provide ample flexibility (including reliance on RECs over a range of years) to manage the de minimis amount of uncertainty approaching the compliance deadline – far in excess of the flexibilities utilities have to manage their responsibilities to meet their full retail loads.

Utility representatives contend that the fear of uncertain loads may lead a utility to “over-comply” with a given standard in order to avoid a penalty. As the examples show, this fear is unfounded because the amount of uncertainty is very small, and the proposed compliance mechanism allows considerable flexibility to move RECs among compliance years—analogous to how very large storage reservoirs on hydro systems allow utilities to move energy from one year to the next. For the most part, shortfalls in one year can be made up from RECs acquired for the next compliance year, and conversely, surplus RECs can usually be used for the next compliance year. The proposed rules also allow such shortfalls or surpluses to be traded in REC markets. There is virtually no circumstance under the proposed rules that would force a utility to plan above any reasonable target forecast in order to comply with the law.

Finally, the utility who found itself in an “over compliance” situation could sell excess RECs into the market, thereby increasing the liquidity of REC markets which would redound to the benefit of customers through offsetting revenue and increased liquidity. Alternatively, the utility could simply retain the excess generation or designate the RECs for a future year compliance. In any event, if CTED believes this compliance is a legitimate concern, the Act permits CTED to consider providing incentives for utilities to exceed the standard, another way of looking at “over compliance”. RCW 19.285.060(4).

4. Other Proposed Changes

In addition to the issues regarding the timeline for compliance discussed above, RNP proposes that the following issues be clarified in the Draft Rules:

- In WAC 194-37-090(1)(C)(i), CTED has proposed adding language regarding BPA RECs. The Act unequivocally prohibits eligible renewable resource power to count towards compliance with the renewable targets “where the associated renewable energy credits are owned by a separate entity.” RCW 19.285.040(2)(f)(i). Nevertheless, during the July Workshop, several utilities expressed concern that they do not expect BPA to actually transfer title to RECs to the purchasers of BPA power but those utilities did not believe that their lack of the RECs should prevent them from counting this power towards compliance with their targets.

RNP appreciates that the CTED Draft Rules are intended to address this specific situation; however, RNP’s conversations with BPA staff indicate a difference in opinion from those expressed by utility representatives regarding ownership of RECs from BPA contracted renewable resources. This apparent disparity in viewpoints regarding ownership rights is exactly the problem addressed by the Act’s requirements for verification of RECs. A utility may only count eligible renewable resources towards its renewable target, and no other entity can own the associated REC. It is not sufficient for BPA not to have sold the REC to someone else; BPA is itself a “separate entity” apart from the qualifying utility. The requirement could be met if BPA retired the REC

through WREGIS on behalf of the qualifying utility. In other words, through WREGIS only one REC can be created for each MWh and if that unique REC was retired, no other entity would own it and while the qualifying utility itself would never own it, it could lawfully comply because no other entity is owning the REC upon retirement either.

As noted above, BPA's treatment of RECs and eligible renewable resources is still very much in flux. The Draft Rule presupposes certain treatment of RECs and business practices by BPA, which may or may not actually be how BPA treats renewable power in the future. Furthermore, it is unclear at what point a REC might be considered "unsold". If a utility counts generation from BPA facilities for compliance that BPA subsequently sells, both BPA and the utility are potentially at risk of double counting the generation. Again, this is the precise circumstance the Act sought to avoid by requiring verification of RECs. Accordingly, as an alternative to the proposed changes to the rule, RNP would suggest deleting language specifically dealing with BPA power at this time.

- Finally, during the July Workshop, parties discussed whether the CTED rules should include process and timeline rules associated with the Auditor's audit for compliance with the renewable targets. RNP understands, based on comments made by the auditor at the July Workshop, that the auditor would prefer that timelines for compliance audits not be specified in the rules due to the fact that it already has in place routine audit timetables which vary by utility. RNP does not object to the auditor conducting the audit on the most efficient timetable; however, whenever the audit is undertaken, the auditor should be auditing for compliance with the timetables as set forth in the law and as specified above—*i.e.* compliance **by** January 1 of the target year. Penalties for failure to comply are mandatory. If the utility does not meet the target (or qualify for any alternative compliance mechanism), the utility must pay penalties; there is no discretion granted to CTED or the Auditor in the Act. RCW 19.285.060(1) (“[A] qualifying utility that fails to comply with the *** renewable energy targets *** **shall** pay an administrative penalty to the state of Washington ***.”) (emphasis added). Penalties for non-compliance must be assessed for non-compliance as of January 1 of the target year regardless of when the audit is conducted.

**F. WAC 194-37-100
Documentation of Renewable Energy Targets**

RNP Proposed Rule Language:

(1) ~~Upon request of the auditor, e~~ Each utility provides the auditor access to contracts indicating purchases of RECs or megawatt-hours from eligible renewable resources no less than the annual percentage standard for the reporting year. The megawatt-hours from eligible renewable resources count towards the percentage annual renewable energy target as long as the associated RECs are not owned by a separate entity or have not been used in an optional pricing program.

(4) Each utility that claims a 2.0 multiplier credit for the electricity output from an eligible renewable resource per RCW 19.285.040(2)(b) shall provide documentation that the REC applied in that year that is associated with the distributed generation resource is owned by the utility in that year. ~~If the distributed generation resource produces less than 1 megawatt-hour annually, then possession of a WREGIS-certified REC is unnecessary as long as the utility retains the ownership of the non-power attributes of the resource.~~

Concerns: RNP does not understand CTED’s proposed addition to subsection 1 of this rule to include the requirement that the auditor request contracts to ensure compliance with the renewable targets. The auditor must verify that the underlying contracts for the resources and/or RECs actually exist for the timeframes and amounts claimed by the utility. Given this, there is no reason to require the auditor to ask for this fundamental piece of documentation each time.

Second, in Subsection (4), CTED has proposed rules that exempt distributed generation resources from the requirement to transfer WREGIS-certified RECs to the utility in order for the utility to count that generation as double towards its target. RNP is sympathetic to the rationale for the proposed change⁸—CTED is concerned, as was made plain during the July Workshop, that WREGIS certification would be too costly for these small projects. However, RNP does not believe that CTED can disregard the plain language of the statute in order to resolve this practical problem. RCW 19.285.040(2)(b) unequivocally requires the qualifying utility to own the “renewable energy credits” associated with distributed generation in order to count the output of such resource as double in meeting its energy targets. “Renewable energy credits” is a defined term in the statute and CTED is inappropriately trying to change the meaning of the term here to be something else (*i.e.* environmental attributes).

Nevertheless, the issues related to cost and the size of these projects are legitimate and RNP has followed up with WREGIS and CTED Staff about how they should be addressed. RNP understands that WREGIS has established a process for small projects to be accommodated, making it economic to register with WREGIS. Specifically, WREGIS has established a process for aggregation of small projects by larger entities (*e.g.*, Green Mountain). The aggregator pays the WREGIS fee, approves the REC attestations and agrees to any audits required by WREGIS to verify the generation.

**G. WAC 194-37-110
Documentation of Incremental Hydro.**

RNP Proposed Rule Language:

- (1) Utilities may count toward their annual renewable resource targets incremental power acquired since 1999 through qualified incremental hydropower efficiency improvements at the following facilities.

⁸ In fact, in its March 22, 2007, comments, RNP originally took the position that WREGIS certification and verification was unnecessary for distributed generation. However, upon further review, RNP cannot support this position which is not consistent with the plain meaning of the statute.

- A. Hydropower facilities in the Pacific Northwest that they own ~~or for which they hold contracts for power from utilities~~ where the new generation does not result in new water diversions or impoundments.

Concerns: The Draft Rule on incremental hydropower does not yet follow the requirements or intent in the Act. The structure of several provisions in the Act make clear that the intent of the law was to allow a qualifying utility to use efficiency upgrades in its owned facilities to meet the renewable target but not to be able to sell that incremental hydropower for use by another utility in meeting the target. First, the statutory definition of an eligible renewable resource requires an incremental hydropower facility producing the energy to be owned by the utility claiming a renewable resource itself. Second, incremental hydropower cannot, by definition, create a REC under the Act. *See* RCW 19.285.030(17) (providing that a REC is a “tradable certificate of proof if at least one-megawatt hour of an eligible renewable resource where the generation is not powered by fresh water”). Read together, therefore, there is no eligible renewable resource or REC that can be transferred to another utility and still maintain eligibility to satisfy the renewable energy target. In other words, once the utility that owns the efficiency upgrade transfers the output of the power to another utility, the other utility would own the power, but not the efficiency upgrade, thereby failing to satisfy the definition of “eligible renewable resource”. Likewise, the utility owning the efficiency upgrade will not create any RECs that it can transfer to another utility for that utility to use in meeting its compliance target. The rules should be revised to strike the reference that permits a utility to count towards its annual renewable target incremental hydropower for which it holds a contract.

H. **WAC 194-37-120**
Documentation of Renewable Resource Financial Path for No-Load Growth Utilities

RNP Proposed Rule Language:

A utility that meets the renewable targets identified in RCW 19.285.040 (2) (d) must document all of the following:

- A. That it used a consistent methodology from year to year to weather adjust its retail load;
- B. That its weather-adjusted load for the most recent prior year ~~three years prior to the target year produces a flat or negative trend line, that is either the most recent year or the average of the two recent years~~ is lower than the third prior year;
- C. That it invested at least one-percent of its total annual revenue requirement in each target year on eligible renewable resources, RECs, or a combination of both;
- D. That it executed contracts for power purchases of either eligible renewable resources or eligible WREGIS certificates, and
- E. That it (i) did not, after December 7, 2006, ~~except for continued purchases of requirements power from BPA at its lowest preference power rate,~~ initiate or renew ownership or incremental purchases of electricity from other than renewable resources except on a daily spot market basis, or, (ii) if it did initiate or renew its acquisition of non-renewable resources after December 7, 2006 except on a daily spot

market basis, that it offset those acquisitions by acquiring equivalent WREGIS RECs. The fact that the utility has reached the one percent cost cap does not excuse the requirement to offset as otherwise required in this subsection.

Concerns: RCW 19.285.040(2)(d) provides an alternative compliance mechanism for utilities in a unique circumstance. These include: (1) load has not grown on average over the prior three years (2) the utility was not invested in ownership or purchases of non-renewable generation or power since December 7, 2006 unless it was on the spot market, or offset by an equivalent purchase of RECs; and, (3) the utility invests at least one percent of its total annual retail revenue requirement that year on eligible renewable resources, RECs or both. The draft rule implementing this alternative compliance mechanism is deficient in three respects.

1. No Load Growth Calculation

First, in subpart (B), CTED has tried to give meaning to the first requirement that must be satisfied to be eligible for this alternative compliance mechanism, *i.e.* that the “utility’s weather-adjusted load for the previous three years on average did not increase over that time period.”

During the July Workshop, CTED staff suggested some uncertainty over the meaning of this passage, particularly the specifics of the calculation of the average increase in (weather-adjusted) loads. It is clear that loads may increase or decrease from one year to the next. The amount of the change from one year to the next would be the difference between the later year load from the earlier year load. In a three-year period, there are two such changes that can be calculated. If the difference between the first two years is designated D1, and the last two years D2, and the load for years in incremental order designated L1, L2, L3 then:

$$D1 = L2 - L1$$
$$D2 = L3 - L2$$

Loads increase from one year to the next if D is greater than zero. The average of these changes (increases and decreases) is simply:

$$D_{\text{avg}} = (D1 + D2) / 2$$

Once the average load increase/decrease has been calculated, then in order to determine whether there has been no increase, as required under RCW 19.285.040(2)(d)(i), you simply determine whether D_{avg} is equal to or less than zero. If it is, there has been no increase and the first requirement for alternative compliance is satisfied. Moreover, this interpretation constitutes the simplest interpretation of the average load increase over the three years and gives meaning to the words in the statute. Mathematically, D_{avg} will be less than or equal to zero any time L3 is less than or equal to L1. In other words, if the weather adjusted load in the last of the three years is less than the first year, there was no increase on average over those three years. Some of Staff’s proposed language is workable and consistent with the statute, the remaining clauses should be struck.

2. Remove Carveout for BPA Preference Power Purchases

RNP does not agree with the proposed carveout for purchases after December 7, 2006, for purchases of BPA preference power. The statutory language with regard to purchases is specific: “after December 7, 2006, the utility did not commence or renew ownership or incremental purchases of electricity from resources other than renewable resources other than on a daily spot price basis and the electricity is not offset by equivalent renewable energy credits.” There is no exception for BPA purchases in the statute and therefore, CTED does not have the authority to create such an exception. RNP therefore is proposing to delete this section.

In any event, no offset is necessary if the BPA power is itself from a renewable resource. RCW 19.285.040(2)(d)(ii). In other words, this interpretation does not mean utilities cannot purchase BPA preference power, it simply means that if the utility buys BPA preference power that is not also from a renewable resource, it should offset the non-renewable portions with RECs or other eligible renewable resources to meet the targets set forth in the Act.

3. The Utility Must Fully Satisfy All Three Requirements of the Alternative Compliance Mechanism.

Finally, the three requirements contained in the no-load growth alternative compliance mechanism must all be satisfied in order for the utility to utilize it. That means that the requirement to offset new investments in non-renewable resources is independent of the requirement to reach the 1% cost cap. In other words, the fact that the utility has hit the 1% cost cap does not excuse its separate statutory requirement to offset non-renewable investments. RNP proposes changes to clarify this point.

I. WAC 194-37-140 Documentation of Financial Cost Cap – Current Information

RNP Proposed Rule Language:

No changes to Draft Rule.

Concerns: The “current information” rule requires a utility relying on the cost cap alternative compliance mechanism to document its calculations using “the most current information available to the utility within the prior twelve months”. This draft of the rule is a significant improvement on the prior iteration which had permitted the utility to provide updated information at its discretion, and which, as we previously explained, could lead to gaming. However, we reiterate the same caution we noted at the July Workshop: the requirement to use current information could result in a utility coming in and out of compliance with the requirements of the cost cap rule (*i.e.* as costs move, the increment may go above and below 4%), and therefore, may require the utility to monitor costs so that it did not end up caught short after having done nothing expecting the cost cap to apply when in fact it would not.

J. WAC 194-37-150
Documentation for Financial Path – Levelization of Costs

RNP Proposed Rule Language

- (1) ~~Documentation of Utilities are encouraged, but not obligated, to document~~ the calculation of the levelized annual incremental cost of eligible renewable resources must be provided as follows: using the following methodology:

Step 1: ~~The Utility must c~~Calculate the net present value of the cost of the utility’s eligible renewable resource and substitute resource over an equivalent contract length or facility life.

Step 2: ~~The Utility is encouraged, but not obligated to C~~calculate equal nominal values over the appropriate contract length or facility life that have a net present value equal to those calculated in Step 1, using the same discount rate.

Step 3: ~~The Utility is encouraged, but not obligated to C~~calculate the annual difference between the levelized delivered cost for the eligible renewable resource and the substitute resource to determine the levelized incremental cost of the eligible renewable resource.

~~A. Utilities must document the basis for any change to the levelization methodology used in a prior June 1 report to levelize the costs of an eligible renewable resource and its associated substitute resource.~~

Concerns: In section (1), Step 1 of the rule, CTED Staff has proposed that utilities are “encouraged, but not obligated” to document the calculation of the incremental costs related to the “net present value of the cost of the utility’s eligible renewable resource and substitute resource over an equivalent contract length or facility life”. This step in the process—*i.e.* comparing on equivalent contract length or facility life—is mandatory under the law, not optional. We propose a conforming change.

RNP is also concerned with Section (1)(A), which permits the utility to change its levelization methodology from year to year so long as documentation of the basis for the changes is provided. The proposed rule provides flexibility without any corresponding link to the statutory provision to constrain the utility’s exercise of discretion consistent with the statutory purposes of the Act. For the reasons discussed in our overview, RNP believes that this documentation provision will not ensure proper implementation of the law and should be deleted.

III. CONCLUSION

Thank you for consideration of these comments. We look forward to continuing to work towards the final I-937 rules.