

**Comments of the Renewable Northwest Project
on CTED's Proposed Rules (CR 102)
for the Energy Independence Act**

Submitted by:
Ann English Gravatt
Policy Director
November 16, 2007

The Renewable Northwest Project (RNP) submits these comments in response to the Notice of Proposed Rulemaking by the Department of Community, Trade and Economic Development (CTED) concerning the Proposed Rules to implement the Energy Independence Act, RCW 19.285 et. seq. filed with the Office of the Code Reviser on October 3, 2007.

Introduction

RNP appreciates the time dedicated to this rulemaking process by CTED Staff and the other stakeholders. The Proposed Rules provide a path for compliance with Initiative 937 that will result in more clean energy development in Washington.

RNP has previously submitted extensive written comments in this rulemaking process (March 22, May 29 and August 15, 2007), as well as participated in each of the workshops and recent public hearings.¹ We have limited our comments here to the remaining issues we believe must be addressed by CTED before finalizing the rules by the end of the year.

Stakeholders continue to make a great deal of comparison between the Proposed Rules issued by the Washington Utilities and Transportation Commission (WUTC) and the rules currently under consideration in CTED's proceeding. Some of the consumer owned utilities would appear to prefer Commission jurisdiction, having asserted a preference for the WUTC rules. RNP has already offered an analysis of the differences in statutory jurisdiction of the two state agencies (*See* RNP August 15 comments pages 1-2). In short, stakeholders' arguments about CTED's authority simply read out of the law the requirement that CTED adopt timeline, process and documentation rules "to ensure proper implementation of the law." RCW 19.285.080 (2).

But, we also note the very different process of ensuring compliance with the law that exists for the investor owned utilities and for the publics. Whereas the WUTC has ongoing jurisdiction over compliance and enforcement for the investor-owned utilities, the process for public utilities is very different—CTED must adopt rules, the Auditor must audit for compliance and the Attorney General will enforce compliance. Further, the WUTC has extensive regulations and guidelines pertaining to public participation, entitling public interest organizations the opportunity to petition the Commission as well

¹ For convenience, RNP is attaching to these comments a copy of its August comments, which are already part of the administrative record of this rulemaking proceeding pursuant to RCW 34.05.370(2)(c).

as intervene as legal parties in Commission proceedings. The Auditor currently has no such formal public participation process. Given that very different statutory structure, detailed process, timeline and documentation rules, clearly setting forth the requirements for utilities, are in the best interests of all parties.

We offer the following comments on the Proposed Rules.

WAC 194-37-110 Renewable Energy Reporting

RNP supports the proposed rules in this section related to reporting on renewable resource compliance. RNP earlier filed a legal analysis of the statutory requirements of utility compliance (*See* RNP August 15 comments at 10 to 14). In sum, RNP asserted that the plain meaning of the words to “use” or “acquire” eligible renewable resources and/or RECs by January 1 can not be modified by rule. The Act clearly requires utilities to use eligible renewable resources or acquire renewable energy credits by January 1 of the compliance year. RNP appreciates that CTED’s Proposed Rules WAC 194-37-110(1) correctly support this construction of the Act.

This interpretation does not, as suggested by some, turn an annual target into a single days’ requirement. Instead, the January 1 date is the trigger for measuring compliance of:

- (1) the resources lined up to be available to the utility during the target year or,
- (2) resources that will be available to the utility in the subsequent year, so long as the utility has acquired the RECs associated with that resource (i.e. “subsequent” year RECs); and,
- (3) resources that were available to the utility in the prior year, when the utility has acquire the associated RECs (i.e. “prior” year RECs).

RNP has also asserted that while the utilities are required to be in compliance by January 1, it is possible that an eligible renewable resource or REC upon which the utility relied to demonstrate compliance could fail to perform during some unexpected event (e.g., underperformance of a generating resource). WAC 190-37-110(2) is intended to address this situation. This section, however, has created some confusion and we believe the Proposed Rules need to be clarified.

WAC 190-37-110 (2)(a)(i) requires a utility, beginning in June 2014, to report on the actual megawatt hours acquired or RECs produced for each target year. Some utilities in the WUTC process have relied on this provision to assert that CTED has provided an additional year to be in compliance (in comparison to the WUTC’s requirement to act by January 1). During the September workshop, CTED Staff made clear that this provision dealt with reporting on actual performance of the resources relied upon, not extending the date by which a utility must be in compliance. As we stated in our August comments (*See* RNP August 15 comments at pages 12-13), this subsection of the rules relates to reporting requirements for utilities that “meets the renewable energy requirements” in the Act. In short, on its face, the rule applies to utilities that have

already satisfied the “by January 1” requirement and are now reporting on actual performance. Nevertheless, because some stakeholders continue to press the argument, however unsupported, that this subsection trumps the clear statutory requirements and trumps the language contained in WAC 190-37-110(1), we offer clarifying language:

(2) Renewable energy target reporting.

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

(i) Demonstration that it acquired:

(A) Megawatt-hours of eligible renewable resources by ~~December 31~~ January 1 of the target year and that those megawatt-hours were actually generated by December 31 of the target year;

(B) RECs produced during the target year, the year prior or the year subsequent to the target year; or

(C) Any combination of (a)(i)(A) and (B) of this subsection, in amounts sufficient to meet the percent of load target for the calendar year two years prior. * * *

WAC 194-37-130 Documentation of incremental hydropower.

We continue to disagree with the rules related to documentation of incremental hydropower. The Proposed Rule on incremental hydropower does not yet follow the requirements or intent in the Act. The Proposed Rule would permit a qualifying utility to sell the rights to its owned incremental hydropower to another utility for the purchasing utility to use in satisfying the requirements 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. In other words, the Act did not by its own terms or by its structure or intent create a “tradable” market in incremental hydropower.

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.² 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

² While we disagree, in part, with CTED’s rules related to incremental hydropower, they rightly do not extend to permitting reliance on incremental hydro upgrades at federal facilities or at facilities owned by non-qualifying Washington utilities. The statutory definition of eligible renewable resource clearly restricts incremental electricity to “projects owned by a qualifying utility.” Therefore, in spite of the argument by some stakeholders who assert CTED should permit incremental hydropower upgrades at federal facilities and at facilities owned by non-qualifying Washington utilities to count towards the renewable energy targets, CTED has no authority to adopt such a rule, which would clearly exceed the bounds of the law. RCW 34.05.570(2)(c).

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 provide that only a qualifying utility that owns a hydro facility may count the incremental power for its own renewable standard.

WAC 194-37-160 Documentation of financial cost cap – current information and timeline.

This section addresses the documentation necessary for calculation of the incremental cost, if any, of the eligible renewable compared to the substitute resource. This section has undergone several changes throughout the rulemaking. Utilities were interested in being able to recalculate the incremental costs in years after the renewable resource is acquired. RNP had expressed concern about rules permitting discretionary recalculation, fearing that the recalculation would only occur in years in which the renewable would appear more expensive (e.g., gas prices drop significantly). CTED Staff settled on permitting a recalculation of the incremental costs but requiring it to occur in every year in which the utility relied on the cost cap to meet the renewable standard.

At the September workshop, further concern was expressed about these rules. As a result, the final Proposed Rules offer a utility a choice – an annual update methodology, consistent with the previous drafts, and a permanent one-time methodology. We support this final change to these rules because it is clear that a utility must choose one method to calculate the incremental costs in perpetuity. There is no longer the possibility that a utility will recalculate only at its discretion.

WAC 194-37-190 Documentation of financial path – Substitute resource and resource equivalence.

RNP provided extensive comments in August (See RNP August 15 comments at pages 5-9) on the rules requiring documentation of the substitute resource for the cost cap analysis and appreciate the changes that have been made to the provisions. The Proposed Rules now clearly require the substitute resource to be “reasonably available”, not qualify as an eligible renewable, and be of the same “contract length” or “facility life” as the relevant eligible renewable. RCW 19.285.050 (1)(b).

We continue to have concerns, however, with part of subsection (a) and subsection (d). Given the late date of the proceeding and restrictions on making substantive changes to the rules which would leave insufficient time for final rules to be issued before the end of the year, we ask that these sections be deleted.

Subsection (d) specifically addresses utilities with a surplus of resources and allows them to rely on “that excess resource or a forecast of projected market prices as the substitute resource * * *”.

First, a rule is not necessary for this situation because the Act itself provides for the circumstance when a utility has sufficient power to serve its load but must also be in compliance with the Act. Utilities not needing power can instead purchase RECs to meet the standard. All of the costs associated with such purchases are accepted as incremental costs that apply toward the cost cap. WAC 194-37-200. Some utilities have repeatedly stated that they don’t believe they can acquire a long term contract for RECs. RNP believes that there are many parties who would enter a long term contract for RECs (green power marketers, renewable energy developers, other utilities). This speculative concern is not based on a robust analysis of what the market would offer and there has been nothing offered in this rulemaking process to support such assertion. We believe a utility must issue a Request For Proposals for RECs to know what sort of contracts are available.

Some Washington utilities are rightly assessing how they will meet I-937 as part of their IRP process. As a result, RNP Staff has already witnessed how the Substitute Resource rules may be interpreted. It appears that some utilities may be interpreting the ability to rely on forward price curves, as permitted by (a) and (d) (read together) without recognizing the other statutory requirements, specifically equivalence in contract length. RNP recognizes that that the rules are clear that the provisions of (b) must also be satisfied. But because utilities, up to now, seem to be overlooking this requirement, we remain concerned.

Forward price curves are estimates of prices for power transacted at some future date—they do not represent the cost of a ten or fifteen year “strip purchase.” Such long term purchase would be negotiated between parties, partly based on the forward price curve estimate, but also taking into account market volatility and uncertainty in the interim. A long dated strip purchase would likely entail a substantial risk premium taking into account, among other things, uncertainty in carbon risk. Because of this confusion in interpretation, we reiterate that the best resolution is to delete this section, given the ability of a utility, instead, to rely on a REC purchase to comply with the law.

RNP believes the final sentence of (a) presents the same challenge as (d). It reads: "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." This section may leave the impression that a utility can rely on a forward price curve or other speculative estimates of future prices that either may not be comparable or don’t take into account the risk premium associated with long term forward purchases of power. This reference in subsection (a) should also therefore be deleted. If not, the word “strip” should be inserted to remove any doubt that the use of projected market prices must also satisfy the statutory requirement that the substitute resource be for the same “facility life”. RCW 19.285.050(1)(b).

Conclusion

Thank you for the opportunity to provide these final comments on CTED's Proposed Rules implementing Initiative 937. We look forward to continuing to work with the agency and Washington utilities to achieve the goals of the statute.