

November 16, 2021

Via Electronic Submission

Rachel Assink
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Air Quality Program
P.O. Box 47600
Olympia, WA 98504-7600

Re: Comments of Powerex Corp. on the Proposed Rule Amending the Greenhouse Gas Reporting Rules in WAC 173-441, WSR 21-20-137

Dear Ms. Assink,

On behalf of Powerex Corp., I submit the enclosed comments on the Washington Department of Ecology Air Quality Program's "Reporting Emissions" proposed rule, amending the greenhouse gas reporting rules in WAC 173-441 as a result of the recently-enacted Climate Commitment Act ("CCA").

Powerex would like to thank Ecology for its consideration of these comments and its continued efforts to implement the CCA.

Best regards,

Davis Wright Tremaine LLP



Craig Gannett

Enclosure

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November 16, 2021

Re: Powerex Corp.’s Comments on the Proposed Rule Amending the Greenhouse Gas Reporting Rules in WAC 173-441

Powerex Corp. (“Powerex”) submits the following comments on the Washington Department of Ecology’s (“Ecology”) “Reporting Emissions” proposed rule, amending greenhouse gas (“GHG”) reporting rules in WAC 173-441 as a result of the recently-enacted Climate Commitment Act (“CCA”).

Powerex is a corporation organized under the *Business Corporations Act* of British Columbia, with its principal place of business in Vancouver, British Columbia, Canada. Powerex is the wholly-owned energy marketing subsidiary of the British Columbia Hydro and Power Authority (“BC Hydro”), a provincial Crown Corporation established by the Government of British Columbia.

Pursuant to market-based rate (“MBR”) authority granted by the Federal Energy Regulatory Commission (“FERC”), Powerex sells power in the United States from a portfolio of resources including BC Hydro system capability and various other zero-carbon and renewable power resources acquired from other sellers within the U.S. and Canada. As a supplier of electricity, including from clean and renewable sources, to Washington and throughout the Western Interconnection, Powerex supports rigorous yet workable regulation of GHG emissions from electricity generation.

As an active importer of electricity to California, Powerex has significant experience with the California Air Resource Board’s (“CARB”) cap-and-trade program, which is structured similarly to the CCA’s cap-and-invest program. Powerex’s comments are intended to help Ecology develop effective reporting regulations to meet the objectives of the Washington program. We look forward to working collaboratively with Ecology on this important program for the State of Washington and the Western grid as a whole.

1. Ecology should align the rules with the CCA by requiring electric power entities, not their owners, to report.

In contrast with the provisions of the CCA, most of the obligations under Ecology’s proposed rule appear to apply to owners or operators of electric power entities (“EPEs”), not to the EPEs themselves. Powerex seeks clarity as to whether that was the intended outcome and notes that such an outcome would be problematic for a number of entities, including Powerex. Much of this disconnect between the statute and the proposed regulation appears to stem from retention of pre-CCA wording in the proposed rule.¹ Powerex appreciates Ecology’s efforts in the proposed rule to

¹ The reporting statute amended by the CCA directs Ecology to adopt rules for GHG reporting by electric power entities (“EPEs”), not their owners. Specifically, under RCW 70A.15.2200(5)(a), Ecology “shall adopt rules requiring persons to

adapt the existing GHG reporting rules. However, further changes are needed so that the proposed rule applies to EPEs, not their owners, as directed by the CCA.

A. Ecology should revise the definition of “person” in the proposed rule to align with the CCA.

Under the CCA’s GHG reporting provisions, the term “person” includes “(A) An owner or operator of a facility; (B) a supplier; or (C) an electric power entity.”²

The CCA’s definition of “person” does not include the owner *of an EPE*. By extension, the CCA’s cap and invest program applies to EPEs, not their owners, because a “covered entity” under that program is a “person” (who also meets other criteria).³ Ecology’s proposed regulatory definition of “person” diverges from the CCA:

CCA, RCW 70A.15.2200(5)(h)(iii)	Ecology proposed WAC 173-441-020(1)(m)
the term “person” includes: (A) <i>An owner or operator of</i> a facility; (B) a supplier; or (C) an electric power entity.	“Person” includes <i>the owner or operator of</i> : (i) A facility; (ii) A supplier; or (iii) An electric power entity.

As a result, various requirements of the proposed rule would apply not to EPEs but to their owners—even though the CCA directs Ecology to adopt rules for reporting *by EPEs* as “persons” under the statute.⁴

To align the proposed rule with the CCA, Powerex recommends the following change:

Recommended changes to proposed WAC 173-441-020(1)(m):

(m) “Person” includes: ~~(i) T~~ (i) T the owner or operator of: ~~(i) A~~ (i) A facility; (ii) A supplier; or (iii) An electric power entity.

report emissions” of GHGs. The legislature expanded the definition of “person” to add EPEs (with no mention of their owners or operators). See CCA, Laws of 2021, c. 316 at § 33(5)(h)(iii)(C) (amending RCW 70A.15.2200(5)(h)(iii)). This is a change from the pre-CCA reporting obligations, which applied only to an “owner” or “operator” as defined in, and subject to, mandatory federal GHG reporting rules; or to a “supplier” of certain fossil fuels. See RCW 70A.15.2200(5)(h)(ii) (2020); RCW 70A.15.2200(5)(h)(iii) (2020) (defining “owner” and “operator” by reference to 40 C.F.R. § 98, in language struck by CCA § 33).

² RCW 70A.15.2200(5)(h)(iii).

³ RCW 70A.65.080(1), (2), (3)(a); see also RCW 70A.65.010(55) (incorporating definition of “person” by reference).

⁴ See RCW 70A.15.2200(5)(a), as discussed in the previous section. The owner or operator of an EPE could still have its own reporting requirements if it met the definition of “person” by virtue of its own business activity.

B. Ecology should revise the definition of “reporter” to align with the CCA’s regulatory categories and refer only to entities that actually report.

Revising the definition of “reporter” in the proposed rule to better align with the CCA will avoid uncertainty.

Currently, suppliers and EPEs are “reporters” under the proposed rule and “persons” under the CCA, whereas facilities are “reporters” under the proposed rule, but facility owners or operators are “persons” under the CCA.⁵ Further, a “facility” (as defined) refers to physical infrastructure, not a legal entity,⁶ so the “reporter” is the physical facility and not the entity that owns or operates it.

Ecology should revise this definition so that the types of “reporter” align with the types of “person” regulated under the CCA. Also, “reporter” should refer only to entities that actually report under the proposed rule, rather than relying on the vague phrase “subject to this chapter” in the proposed definition. These changes can be accomplished most easily by borrowing language from proposed WAC 173-441-050(2)(a)(i) (shown below), once the definition of “person” is aligned with the CCA as recommended above.

Recommended changes to proposed WAC 173-441-020(1)(o):

(o) "Reporter" means any person required to report or voluntarily reporting emissions under WAC 173-441-030 of the following subject to this chapter: (i) A facility; (ii) A supplier; or (iii) An electric power entity.

C. Ecology should replace many instances of “owner” and “operator” in the proposed (and existing) rule with “reporter” to align with the CCA.

Powerex recommends that Ecology review each provision that refers to an “owner” or “operator” and determine which entity should actually bear the obligation, given the CCA’s direction to require reporting by “persons”—which means EPEs and not their owners. Most existing references in WAC 173-441 to “owners and operators” no longer appear to work because only one of the three types of “person” regulated by the CCA includes owners and operators.

Ecology’s proposed definitions make various provisions of WAC 173-441 applicable to owners or operators *of EPEs*, rather than to EPEs themselves as the CCA directs (discussed above). For example, the proposed rule defines “owner” to include “any individual or organization who has legal or equitable title to... or control of a facility, supplier, *or electric power entity*” (except limited partners).⁷ Likewise, the proposed rule defines “operator” to include “any individual or organization who operates or supervises a facility, supplier, or electric power entity.”⁸

⁵ Proposed WAC 173-441-020(1)(o); compare RCW 70A.15.2200(5)(h)(iii).

⁶ Current WAC 173-441-020(1)(f) (renumbered as proposed WAC 173-441-020(1)(g)) (defining “facility” in terms of “physical property, plant,” etc.).

⁷ Proposed WAC 173-441-020(1)(l) (emphasis added).

⁸ Proposed WAC 173-441-020(1)(k).

Powerex recommends retaining most of the existing regulatory language, but in most provisions replacing “an owner or operator” or “an owner or operator of a reporter” with “a reporter” (once that term is defined to align with the CCA, as discussed above).⁹ In provisions that deal exclusively with EPEs, realignment consistent with the CCA requires only removal of the phrase “owners and operators,” as shown below.

Recommended changes to proposed WAC 173-441-030(3) (including changes for other reasons explained above):

(3) Electric power entity reporting. Reporting is mandatory for ~~an owner or operator of~~ any electric power entity with total GHG emissions that exceed the reporting threshold defined in (a) of this subsection. ...

Recommended changes to proposed WAC 173-441-124:

WAC 173-441-124 Calculation methods for electric power entities. ... ~~Owners and operators of e~~lectric power entities must follow the requirements of this section to determine if they are required to report under WAC 173-441-030(3). ~~Owners and operators of e~~lectric power entities that are subject to this chapter must follow the requirements of this section when calculating emissions. ...

(1) General requirements. An ~~owner or operator of an~~ electric power entity subject to the requirements of this chapter must report GHG emissions ...

(c) Alternative calculation methods approved by petition. An ~~owner or operator~~ electric power entity may petition ecology to use calculation methods other than those specified in this section...

D. Requiring reporting by EPEs, not their owners and operators, also reduces practical and policy problems.

Beyond the legal need to align the proposed rule with the statutory text, there are a number of reasons why requiring reporting by EPEs rather than their owners is also good policy.

Unlike a facility, an EPE can act on its own behalf. EPEs are the appropriate and logical reporting entity for their own activities. A “facility” is a physical plant, not a legal entity.¹⁰ By contrast, an EPE is a legal entity capable of fulfilling, and being held accountable for, its CCA obligations. Thus, it makes sense that the CCA would regulate facilities via their owners or operators, while regulating EPEs directly.

EPEs’ activities relate more directly to GHG emissions and the CCA than their owners’. EPEs are in a better position than their corporate parents to engage with Washington regulators and

⁹ Powerex tentatively suggests revising several such provisions in each of proposed rule sections 050, 060, 085, 086, and 140, but hesitates to draft exhaustive changes because this issue implicates facilities and suppliers in ways not applicable to Powerex.

¹⁰ See WAC 173-441-020(1)(f) (renumbered as proposed WAC 173-441-020(1)(g)).

comply with Washington regulations regarding EPEs' regulated activities. As an EPE, Powerex will engage directly in transactions relevant to the regulation of Washington's GHG emissions. Powerex holds transmission rights in Washington, is registered to do business in Washington, and is subject to FERC regulation under its MBR authority. Similarly, in California, Powerex participates in the cap-and-trade program and CARB regulates Powerex directly, not through its parent company. Many other EPEs will share these qualities. Accordingly, imposing the GHG reporting obligation on an EPE's parent company would needlessly complicate reporting and invite confusion.

Requiring reporting by EPE owners or operators would add unnecessary administrative burden and misalign with other jurisdictions. Like the text of the CCA, CARB's reporting requirements apply to EPEs directly, and not to the owners and operators of EPEs.¹¹ Powerex's requested changes will reduce needless burdens by allowing EPEs to report to both CARB and Ecology if and when the two programs link.

2. Ecology should plan to avoid double-charging for emissions subject to payments under other, sufficiently rigorous carbon pricing systems.

Ecology should structure the GHG reporting rules to retain the potential for future recognition of GHG payments made in non-linked jurisdictions to avoid double-charging importers for such emissions. Powerex's home province of British Columbia is a long-time leader in carbon pricing, having implemented a carbon tax in 2008 that now stands at \$45 CAD per tonne of CO₂e and climbing. All GHG reduction systems ultimately have the same goal of reducing climate-damaging GHG emissions. Ecology should craft the reporting rules to leave open the possibility for Ecology to potentially recognize, at a future date, other jurisdictions' GHG pricing programs, even if those programs are not linked to the Washington cap-and-invest system. In particular, Ecology should ensure a means for covered entities under the CCA to petition for recognition of GHG payments made elsewhere, if they can show that doing so is consistent with the goals of the CCA.

Other cap and trade systems have recognized GHG pricing in non-linked jurisdictions. In the brief period when California and Ontario had a linked cap and trade program, Ontario's reporting rule adjusted its regulated importers' emission factor for electricity imports from the Regional Greenhouse Gas Initiative ("RGGI") to recognize the cost of carbon there.¹² Other options likely exist, and could be preferable. Accordingly, Ecology should preserve the flexibility to recognize non-linked carbon pricing systems when appropriate by modifying the proposed rule to expressly provide for such consideration in the provision on alternative calculation methods for EPEs.¹³

¹¹ 17 Cal. Admin. Code § 95101(a)(1)(E).

¹² See sections ON.63 and ON.66 of the guidelines from Ontario's linkage with California, http://www.downloads.ene.gov.on.ca/envision/env_reg/er/documents/2017/013-1457_d_Guide.pdf at 64-65 and 68-69, defining adjustment factor "AF" in Equation 60-5 and using it to calculate electric emissions in Equation 60-1.

¹³ Proposed WAC 173-441-124(1)(c).

Further, the existing reporting rules only allow required reporters to use alternative calculation methods that appear in EPA’s mandatory greenhouse gas reporting regulation.¹⁴ However, unlike the entities already subject to Ecology’s GHG reporting, EPEs and their emissions are not addressed in the EPA regulations, and thus appear unable to secure approval of alternative calculation methods under the existing process. Ecology should therefore allow EPEs to petition for alternative methods under the broader criteria available to voluntary reporters under the current rules.¹⁵

Recommended changes (including changes for other reasons explained above)

WAC 173-441-124(1)(c):

Alternative calculation methods approved by petition. An ~~owner or operator electric power entity~~ may petition ecology to use calculation methods other than those specified in this section to calculate its ~~electric power entities~~ GHG emissions. ~~Such methods may include adjustments to recognize GHG pricing in other jurisdictions associated with imported electricity.~~ Such alternative calculation methods must be approved by ecology prior to reporting and must meet the requirements of WAC 173-441-140. ~~For electric power entity GHG emissions covered neither by any method adopted by the United States Environmental Protection Agency in its mandatory greenhouse gas reporting regulation nor by any method adopted in this chapter, Ecology must apply the criteria in WAC 173-441-14(2)(b) when evaluating an alternative calculation method.~~

3. Ecology should consider electricity sector-specific stakeholder sessions to review the practical implementation of its reporting regulations with industry and to identify issues for future regulatory attention.

The proposed rule includes multiple definitions of “electricity importer” and “imported electricity,” based closely on the text of the CCA, that will feed into stakeholders’ reporting and compliance obligations.¹⁶ These rules will create powerful economic signals for the electricity market, regional trade, and the development of new resources in the Northwest.

Washington State has a complex electricity system, which includes many balancing authority areas, some of which straddle state lines. Given that complexity, the important bilateral trading hub located at the Mid-Columbia, and the central position of the Bonneville Power Authority, Ecology should consider a stakeholder workshop to ensure that all stakeholders understand the practical application of the GHG reporting rules in the electricity context. Such a workshop could also identify the extent to which the CCA allow Ecology flexibility, and how Ecology can craft rules in those areas to foster a system that best meets the State’s policy goals.

¹⁴ WAC 173-441-140(1)(b)(iii) and (2)(a).

¹⁵ WAC 173-441-140(2)(b).

¹⁶ Proposed WAC 173-441-124(2)(a) and (d).

Additionally, Ecology should work with stakeholders to develop detailed carbon accounting standards for EIM power. Powerex is a participant in the EIM at the Canada-U.S. Border. As an out-of-state EIM entity, Powerex's EIM activity will not be regulated under the CCA. However, Powerex believes strongly in the benefits of well-structured organized markets that incorporate proper price signals, including GHG related price signals.

Powerex recommends that Ecology engage with stakeholders and examine issues of carbon accounting for power purchased through the EIM with great care to avoid unintended consequences and reporting requirements with results counter to the CCA's goals. When the California Independent System Operator ("CAISO") launched the EIM in 2014, it established carbon accounting mechanisms for EIM transfers into California. However, those initial rules did not work as intended, resulting in carbon leakage from the California cap and trade system. Powerex and others addressed the issue with CARB in 2015. CARB dealt with it in detail in two 2016 rulemaking proceedings, and CAISO made associated amendments to its tariff in 2018.¹⁷ Though the specific EIM-related issues were different than those now facing Ecology, the rulemaking records highlight the degree of complexity underlying carbon accounting issues in the EIM.¹⁸

Although the CCA gives Ecology and partner agencies until 2026 to adopt rules fully addressing imports from centralized electricity markets, RCW 70A.65.080(1)(c), the California experience suggests that the carbon accounting mechanism in the EIM is complex and such market issues will likely require several years of careful consideration. Powerex suggests that Ecology convene a stakeholder working group immediately to give these issues full consideration and to avoid any unintended carbon accounting issues through electricity imports through the EIM.

Powerex looks forward to working on all of these issues with Ecology in the years to come.

Kind regards,

/s/

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¹⁷ *California Independent System Operator Corporation*, 165 FERC ¶ 61,050 (2018).

¹⁸ The entire CARB rulemaking records are available at <https://www.arb.ca.gov/regact/2016/ghg2016/ghg2016.htm> and <https://www.arb.ca.gov/regact/2016/capandtrade16/capandtrade16.htm>.