



ATTORNEY GENERAL OF WASHINGTON

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July 15, 2022

Joshua Grice
Rule Making Lead
Washington Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503

Re: *Comments on Rulemaking - Chapter 173-446 WAC, Climate Commitment Act Program*

Dear Joshua Grice:

The Public Counsel Unit of the Washington State Attorney General's Office (Public Counsel) respectfully submits these comments regarding the Department of Ecology's (Ecology) Cap-and-Invest Program (Program) draft rule (Draft) pursuant to Chapter 173-446 of the Climate Commitment Act (CCA). Public Counsel represents residential and small business interests in investor-owned natural gas and electric utility proceedings before the Washington Utilities and Transportation Commission (UTC or Commission). Public Counsel appreciates the opportunity to comment. We also appreciate Ecology's engagement with the Washington Utilities and Transportation Commission Staff (Staff) on the application of the rule towards electric and natural gas investor-owned utilities (IOUs). Our comments are primarily focused on the need for improvements to clarify the determination and usage of no cost allowances to electric and natural gas IOUs.

A. Ecology's Requirement for a Four-year Forecast of Utility Emissions for the Distribution of No Cost Allowances.

The CCA establishes four-year compliance periods starting in 2023 and ends in 2026, and Ecology will determine the generation resource fuel type forecasted to be used to provide retail electric load for a utility for the compliance period. The proposed rule contemplates a number of sources for the forecast including a forecast approved by the UTC for this purpose and utility Clean Energy Implementation Plans (CEIP). Public Counsel has several concerns regarding a requirement for an inflexible, four-year forecast using these sources.

It is Public Counsel's understanding that, if Ecology relies upon a forecast created and approved by the UTC for this purpose, Ecology will require a full four-year forecast to determine annual allowance budgets as required under RCW 70A.65.070.¹ The UTC currently uses annual load and power cost forecasts for its electric utilities. These forecasts could be used for the CCA if Ecology provides some flexibility in the rule to allow for the use of updated annual forecasts. At

¹ [RCW 70A.65.070](#).

To: Joshua Grice, Ecology
Re: Comments on Rulemaking Chapter 173-446 WAC, Climate Commitment Act Program
Date: July 15, 2022
Page 2 of 4

the moment, given the significant workload and staffing constraints at the UTC, it seems unlikely that a four-year forecast could be reviewed adequately or without significant stakeholder protest in the required time frame.

Several issues arise if Ecology uses forecasts included in utility CEIPs.² First, CEIPs run on a different four-year compliance period that begins in 2022 and ends in 2025. The first compliance period for the CCA begins in 2023 and ends in 2026. The submission and approval of two CEIPs have been delayed which creates greater uncertainty for Ecology in its energy burden and allowance budget estimate for electric utilities. This misalignment of compliance periods could potentially mean the CEIP and CCA use different load and emissions forecasts which produces potential conflicts and inefficiencies across the two regulatory schemes. Second, the CEIP targets currently are not granular enough to be effectively used for this purpose. Third, under the CEIP rules, any stakeholder can request adjudication to consider the filing, which can significantly shift the approval timeline for the CEIP. Fourth, the proposed rules allow Ecology to use a forecast from a CEIP that has been *submitted* to the UTC but does not specify the CEIP must be approved.³ Public Counsel has significant concerns with this language because it allows Ecology to potentially use a contested forecast that has yet to be approved by the UTC and is potentially subject to litigation.

Two major utilities are currently facing contention in regards to their CEIPs. Puget Sound Energy's (PSE) CEIP is currently under litigation, and its renewable energy targets, which are a crucial element of estimating the Company's emissions, are a point of contention amongst the parties. PSE's CEIP adjudication schedule indicates that the case may not be resolved until early next year. PacifiCorp currently has a Motion to Consolidate the CEIP review in Docket UE-210829 with a Complaint Docket UE-220376 (Complaint), which is pending before the Commission. The Complaint imposes penalties for alleged violations of the Clean Energy Transformation Act (CETA) statute, Commission rules, and a Commission order regarding the failure to include the social cost of greenhouse gas emissions in PacifiCorp's CEIP. PacifiCorp filed a Motion to Dismiss the Complaint and a Motion to Stay Penalties, both of which also are pending before the Commission. The pendency of these Dockets renders any forecasted emissions estimates for PacifiCorp stated in its CEIP uncertain, because there is no schedule in either Docket indicating when the CEIP would be finalized.

Ecology's current draft of WAC 173-446-260(3) distributes no cost allowances to electric and natural gas utilities annually on October 24th for the following vintage year. Public Counsel suggests that Ecology include language that allows for an annual adjustment of the allowances for electric and natural gas IOUs ahead of the annual October 24th distribution using the most recently approved CEIP, Integrated Resource Plans (IRP), or other UTC-approved forecast. This would allow Ecology to use more accurate power cost model estimates and allow disputed CEIPs

² See WAC 173-446-230(1)(b)(ii) (Proposed).

³ See WAC 173-446-230(1)(b)(ii) (Proposed).

To: Joshua Grice, Ecology
Re: Comments on Rulemaking Chapter 173-446 WAC, Climate Commitment Act Program
Date: July 15, 2022
Page 3 of 4

and IRPs to be resolved ahead of allowance distribution. Public Counsel believes that this is within the parameters outlined in RCW 70A.45.020 which states, “Nothing in this subsection precludes the department from making additional adjustments to annual allowance budgets as necessary to ensure successful achievement of the proportionate emission reduction limits by covered entities.” Additionally, Ecology could consider restricting the percentage of an electric utility’s allowances that may be consigned to auction when its CEIP is undergoing litigation or a dispute. The draft of WAC 173-446-300(2)(b)(iii) currently states that, “Electric utilities may choose at any time to consign up to 100 percent of their allowances to auction.” With a restriction in place, it creates a safety mechanism to prevent consignment of emissions allowances that are based on potentially disputed forecasts.

Public Counsel recommends that Ecology continue working with UTC Staff to find a solution that properly addresses the timing and forecasting limitation issues.

B. Use of Non-approved CEIPs for Determining the Distribution of No Cost Allowances.

Proposed WAC 173-446-230(1)(b)(ii) currently states that Ecology could base its generation resource fuel type forecast on “The clean energy implementation plan for a utility that is submitted pursuant to chapter 19.405 RCW, the Washington Clean Energy Transformation Act.” As mentioned above, this language allows Ecology to base its cost burden analysis on contested information that has merely been submitted but not approved by the Commission. Additionally, while a CEIP and its related targets may be approved by the Commission through an open meeting process, the UTC rules allow stakeholders to request adjudication of the CEIP. Any aspect of the CEIP, including the targets and forecasts, could be a contested issues in that adjudication. Ecology’s reliance on a CEIP that is merely submitted would be premature and inappropriate. Public Counsel therefore recommends the proposed rule be modified in the following manner.

WAC 173-466-230(1)(b)(ii) The clean energy implementation plan for a utility that is ~~submitted~~approved pursuant to chapter 19.405 RCW, the Washington Clean Energy Transformation Act.

C. Jurisdiction over the definition of “for the benefit of ratepayers”

Public Counsel foresees the definition of “for the benefit of ratepayers”⁴ becoming a potential point of contention that will require significant stakeholder engagement beyond the discussion in this rulemaking. Firstly, allowances “consigned to auction for the benefits of ratepayers”⁵ is extremely broad, and the statutory language does not provide limitations on what is considered beneficial; thus, the definition could be stretched and potentially abused. Secondly, there are open questions regarding how much is a reasonable amount to go towards bill assistance, decarbonization, conservation, or other types of benefits. Thirdly, “for the benefit of ratepayers”

⁴ See *draft* Chapter 173-446 WAC Climate Commitment Act Program Rule WAC 173-446-230(5) at 42, WAC 173-446-240(3) at 44, and WAC 173-446-300(2)(b)(i) at 47.

⁵ *Id.*

To: Joshua Grice, Ecology
Re: Comments on Rulemaking Chapter 173-446 WAC, Climate Commitment Act Program
Date: July 15, 2022
Page 4 of 4

requires a measurement or evaluation of such benefits. The methods used for measurement or evaluation could be another point of contention.

With regards to IOUs, the proper venue for these discussions is the UTC. However, the proposed rules do not specify that the UTC maintains jurisdiction over the parameters surrounding consignment of allowances for the benefit of ratepayers of IOUs. Engagement with stakeholders will be crucial to address these concerns, and the UTC has intervenor funding mechanisms that would enable greater participation of stakeholders, particularly organizations representing highly impacted and vulnerable communities. Therefore, we recommend that the proposed rules clarify that the UTC has explicit jurisdiction over the consignment of allowances for the benefit of ratepayers of IOUs.

D. Correct Language Regarding the Use of Allowance Proceeds

Ecology states in its draft of WAC 173-446-300(2)(b)(i) that, “All proceeds from the auction of allowances consigned by electric power entities will be used for the benefit of ratepayers.” This language does not accurately mirror the language of the statute. RCW 70A.65.120(4) states, “The benefits of all allowances consigned to auction under this section must be used by consumer-owned and investor-owned electric utilities for the benefit of ratepayers, with the first priority the mitigation of any rate impacts to low-income customers.” The proposed rule lacks the prioritization language included in the statute. Public Counsel recommends including this language in the rule.

Public Counsel also believes that WAC 173-446-300(2)(b)(iv) was originally intended for natural gas utilities to reflect RCW 70A.65.130(2)(b), and language should be added to clarify this rule applies to natural gas utilities.

Again, Public Counsel appreciates the opportunity to provide input to Ecology on this rulemaking. If you have any questions or would like to discuss these comments, please contact Nina Suetake at (206) 389-2055 or Nina.Suetake@ATG.WA.GOV, or Aaron Tam at (206) 471-8296 or Aaron.Tam@ATG.WA.GOV.

Sincerely,

/s/ 

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