

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Commission’s Policies
Relating to Implementation of RCW
19.285

DOCKET UE-111016

POLICY STATEMENT
REGARDING PROCESSES FOR
DETERMINING WHETHER
PROJECTS ARE “ELIGIBLE
RENEWABLE RESOURCES”
UNDER RCW 19.285 AND
WAC 480-109

- 1 This Policy Statement describes (1) how the Washington Utilities and Transportation Commission (Commission), through its staff, will provide technical assistance to utilities and developers of renewable energy projects regarding whether electric generation projects qualify as “eligible renewable resources under RCW 19.285 and WAC 480-109 and (2) how utilities and developers of projects may file petitions for declaratory orders with the Commission on whether such projects are “eligible renewable resources.”

INTRODUCTION

- 2 In the 2006 general election, Washington voters approved Initiative 937, the Energy Independence Act (EIA), now codified in Chapter 19.285 of the Revised Code of Washington (RCW). Among other measures, the EIA established a Renewable Portfolio Standard for electric utilities in the state of Washington serving more than 25,000 customers. The law states:

Each qualifying utility shall use eligible renewable resources or acquire equivalent renewable energy credits, or a combination of both, to meet the following annual targets:

- (i) At least three percent of its load by January 1, 2012, and each year thereafter through December 31, 2015;
- (ii) At least nine percent of its load by January 1, 2016, and each year thereafter through December 31, 2019; and

- (iii) At least fifteen percent of its load by January 1, 2020, and each year thereafter.¹

The Commission is responsible for determining investor-owned utilities' compliance with the EIA and for assessing penalties for noncompliance.² The Commission has adopted rules to implement the EIA in WAC 480-109.

3 RCW 19.285.030(18) and WAC 480-109-007(18) list nine types of "renewable resources":

- (a) Water;
- (b) Wind;
- (c) Solar energy;
- (d) Geothermal energy;
- (e) Landfill gas;
- (f) Wave, ocean, or tidal power;
- (g) Gas from sewage treatment facilities;
- (h) Biodiesel fuel as defined in RCW 82.29A.135 that is not derived from crops raised on land cleared from old growth or first-growth forests where the clearing occurred after December 7, 2006; and
- (i) Biomass energy based on animal waste or solid organic fuels from wood, forest, or field residues, or dedicated energy crops that do not include
 - (i) wood pieces that have been treated with chemical preservatives such as creosote, pentachlorophenol, or copper-chrome-arsenic;
 - (ii) black liquor by-product from paper production;
 - (iii) wood from old growth forests; or
 - (iv) municipal solid waste.

¹ RCW 19.285.040(2)(a).

² RCW 19.285.060(6).

- 4 A utility may use a renewable resource to meet the EIA targets only if it is an “eligible renewable resource.” Under RCW 19.285.030(10) and WAC 480-109-010(9), “eligible renewable resource” means:
- (a) Electricity from a generation facility powered by a renewable resource other than fresh water that commences operation after March 31, 1999, where:
 - (i) The facility is located in the Pacific Northwest; or
 - (ii) the electricity from the facility is delivered into Washington state on a real-time basis without shaping, storage, or integration services; or
 - (b) Incremental electricity produced as a result of efficiency improvements completed after March 31, 1999, to hydroelectric generation projects owned by a qualifying utility and located in the Pacific Northwest or to hydroelectric generation in irrigation pipes and canals located in the Pacific Northwest, where the additional generation in either case does not result in new water diversions or impoundments.
- 5 Investor-owned utilities and developers may be investigating the use of technologies or resources that are not expressly described in RCW 19.285.030 and WAC 480-109-007, but which, nevertheless, may be “eligible renewable resources.” The Commission recognizes that uncertainty creates impediments for financing, establishment of project partnerships, and commitments of renewable research and development funding, such that utilities and developers may desire assurance that a specific project would qualify as an “eligible renewable resource” under the EIA if it were built as proposed.
- 6 Recognizing that utilities, developers and other entities seek this assurance, the Commission issues this Policy Statement under RCW 34.05.230 to describe options available to these entities for determining whether a proposed project would qualify as an “eligible renewable resource.” First, the Commission Staff has joined with staff of the Department of Commerce (Commerce) to establish an informal technical working group to provide non-binding technical analysis for guidance as to whether their proposed technology or resource is an “eligible renewable resource” under the EIA. Second, as some entities may desire more assurance than technical analysis or

guidance from the technical working group, this Policy Statement describes a process through which interested persons may seek a binding determination from the Commission on whether a proposal would qualify as an “eligible renewable resource” under RCW 19.285.030 and WAC 480-109-007.

POLICY STATEMENT

- 7 The authority under the EIA to adopt rules and determine compliance is distributed between three agencies, where the Commission has authority over the EIA as it applies to investor-owned utilities (IOUs) and the Department of Commerce and the State Auditor’s Office (Auditor) share authority relating to consumer-owned utilities (COUs).

Informal, Non-Binding Technical Assistance

- 8 Commerce staff and Commission Staff acknowledge that renewable energy projects vary greatly and the law must be applied on a case-by-case basis. To support renewable energy development, the Commission Staff has joined with Commerce staff to establish an informal technical working group, which will provide non-binding technical analysis to project developers.³ As noted above, we believe this cooperative effort will foster consistency in providing technical assistance to entities seeking answers about whether their proposed technology or resource is an “eligible renewable resource” under the EIA. Because the opinions of the Commission Staff are not binding on the Commission, and the Auditor, not Commerce, determines compliance for COUs, the technical working group will only provide technical analysis, not a binding legal opinion. Inquiries to the technical working group may be sent by email to i937@commerce.wa.gov. Commerce will distribute inquiries among working group members and responses will be posted on Commerce, Commission and Auditor websites, as appropriate.⁴

³ The Commission has the authority to provide such technical assistance pursuant to RCW 43.05.020 (requiring all regulatory agencies to develop programs to encourage voluntary compliance with statutory requirements), as well as the more general provisions in the Administrative Procedure Act relating to policy statements (RCW 34.05.230) and under the Commission’s general authority. *See* RCW 80.01.040(1) (the Commission shall ... [e]xercise all the powers and perform all the duties prescribed by this title and by Title 81 RCW, or by any other law).

⁴ Persons submitting inquiries should not send confidential or proprietary information via e-mail

Formal Declaratory Orders

- 9 For those entities that seek a more formal, binding opinion on the eligibility of their proposed project, there is an option under the Washington Administrative Procedure Act. Under the Act, any person may petition the Commission for a declaratory order with respect to the applicability to specified circumstances of a statute or rule enforceable by the Commission, such as RCW 19.285 or WAC 480-109-007. RCW 34.05.240(1) specifies what must be included in the petition:

The petition shall set forth facts and reasons on which the petitioner relies to show:

- (a) That uncertainty necessitating resolution exists;
- (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
- (c) That the uncertainty adversely affects the petitioner;
- (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and
- (e) That the petition complies with [the Commission's declaratory order rule, WAC 480-07-930].

- 10 The Commission has issued declaratory orders with respect to matters under its jurisdiction in the past and is prepared to continue doing so.⁵ The Commission will consider a properly-presented petition for a declaratory order as to whether a proposed project qualifies as an eligible renewable resource under RCW 19.285.030 and WAC 480-109-007. Persons with standing to file such petitions may include investor-owned utilities and entities that propose to sell projects, project output, or RECs from projects to investor-owned utilities.

without first determining whether the information would be exempt from disclosure under the Public Records Act, RCW 42.56.

⁵ Examples of proceedings in which the Commission has issued declaratory orders are *In re TECWA Power, Inc.*, Docket UE-991993, and *In re U.S. West Communications, Inc.*, Docket UT-961596. Both orders and some associated documents are available on the Commission's website, <http://www.utc.wa.gov>.

- 11 Neither RCW 34.05.240 nor WAC 480-07-930 requires the petitioner to submit evidence proving that the petition accurately describes the project. The Commission will base any determination on whether a proposed project qualifies as an eligible renewable resource on the facts as described in the petition. However, if a completed project differs from the description in the petition, the declaratory order will not provide assurance that the completed project qualifies as an eligible renewable resource.
- 12 The Commission may only enforce the EIA as it applies to investor-owned utilities. The Commission does not enforce the EIA against consumer-owned utilities.⁶ Nor does the Commission enforce the rules that the Washington Department of Commerce has adopted to guide consumer-owned utilities' compliance with the EIA in WAC 194-37. Thus, the Commission will not issue a declaratory order as to whether a proposal qualifies as an eligible renewable resource under WAC 194-37-040. Nor will the Commission issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.⁷
- 13 Persons filing a petition for declaratory order with the Commission must do so in writing, following the filing and format guidelines in WAC 480-07-370 and WAC 480-07-395. Persons filing a petition should mail or deliver the petition to

Executive Director, Washington Utilities and Transportation Commission
P.O. Box 47250
1300 S. Evergreen Park Drive, S.W.
Olympia, Washington 98504-7250.

Both the post office box and street address are required to expedite deliveries by the U.S. Postal Service. The Commission requests that persons filing a petition for declaratory order also provide the Commission with an electronic copy of the petition through the Commission's Web Portal (www.utc.wa.gov/e-filing) or by e-mail delivery to records@utc.wa.gov. Persons with questions about the information

⁶ See RCW 19.285.060(7).

⁷ RCW 34.05.240(7).

necessary to include in a petition may contact David Nightingale, Regulatory Analyst, at (360) 664-1154, or dnightin@utc.wa.gov. Persons with questions about the filing process should contact the Commission's Records Center at (360) 664-1234 or record@utc.wa.gov.

DATED at Olympia, Washington, and effective June 7, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner