BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of a Proposed Rulemaking To Implement Initiative Measure No. 937	)	Docket No. UE-061895
	)	COMMENTS OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

I. INTRODUCTION

1 The Industrial Customers of Northwest Utilities ("ICNU") submits these comments in response to the Washington Utilities and Transportation Commission's ("WUTC" or the "Commission") Notice of Opportunity to File Written Comments issued on March 30, 2007. ICNU generally supports the draft rules, issued on March 14, 2007, which reflect a good first step towards implementing Initiative 937 ("I-937"). ICNU appreciates the opportunity to provide further comment and to assist the Commission in formulating final rules in this Docket.

II. BACKGROUND

2 The WUTC held a workshop on March 26, 2007, to discuss its draft rules. The workshop was very helpful in narrowing the issues to be resolved in this rulemaking proceeding. Comments on the WUTC's draft rules were originally due April, 20, 2007; however, at the request of the investor-owned utilities ("IOUs"), the WUTC extended the due date for these comments to May 18, 2007. The extension was granted to allow the IOUs and other stakeholders the opportunity to hold further discussions and attempt to reach consensus draft rule language. ICNU participated in these discussions and found the discussions helpful in understanding other stakeholders' concerns. The parties were

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unable to agree on several issues discussed, and a consensus document will not be submitted to the Commission at this time.

III. COMMENTS

3 ICNU's comments will address both the WUTC's draft rules and the issues raised in the stakeholder discussions. Part I of these comments will address the WUTC's draft rules, and Part II will address issues from the stakeholder discussions.

A. Comments on the WUTC's Draft Rules

1. The Commission Should Adopt General Rules Necessary for the Implementation of I-937 and Resolve Specific Details on a Case-by-Case Basis

4 Many parties at the workshop expressed concern over whether the rules should be as detailed as possible, or very general to allow the Commission flexibility in future proceedings. Flexibility should be a key consideration in any rules that the Commission adopts to implement I-937, as the future is highly uncertain. The Commission's rules should be limited to the requirements that are necessary to implement I-937. Instead of holding utilities to rigid rules that may or may not be workable in the future, the Commission should address specific details of utility compliance on a case-by-case basis when issues arise in specific factual situations.

2. The Commission Is Not Obligated to Adopt Rules to Implement I-937

5 At the workshop, Chairman Sidran asked the parties to address whether the Commission is obligated to adopt rules to implement I-937 pursuant to RCW § 19.285.080. The Commission is not obligated to adopt rules, but if it chooses to do so, the statute mandates that the Commission adopt rules by December 31, 2007.

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6 RCW § 19.285.080(1) states that "[t]he commission *may* adopt rules to ensure the proper implementation and enforcement of this chapter as it applies to investor-owned utilities."[1/] With regard to the Department of Community, Trade, and Economic Development ("CTED"), however, the statute states that CTED "shall adopt rules . . . ."[2/] In turn, RCW § 19.285.080(4) provides that "rules needed for the implementation of this chapter must be adopted by December 31, 2007." There does not seem to be any conflict in the language of these provisions. If the Commission decides that the adoption of rules is unnecessary, it need not take any action.

3. The Restrictions on Renewable Resources Located Outside the Pacific Northwest Violate the Dormant Commerce Clause and May also Violate the North American Free Trade Agreement ("NAFTA")

7 Commissioner Jones expressed concern over whether the provisions of I-937 conditioning the acquisition of renewable resources located outside the Pacific Northwest implicated the Commerce Clause, NAFTA, or any other trade agreement. RCW § 19.285.030(10) specifically limits "eligible renewable resources" to facilities located in the Pacific Northwest unless the electricity "is delivered into Washington state on a real-time basis without shaping, storage, or integration services[.]" On its face, I-937 discriminates against energy producers located outside the Pacific Northwest because energy producers located within the Pacific Northwest are not subject to the same restrictions.

1/ (Emphasis added).

2/ RCW § 19.285.080(2) (emphasis added).

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a. Under the Dormant Commerce Clause, the State Carries an Extremely High Burden to Justify a Facially Discriminatory Law

8 Article I, section 8, clause 3 of the United States Constitution gives Congress the sole power to regulate interstate commerce. Even when Congress does not exercise this power, the dormant commerce clause doctrine prevents individual states from regulating interstate commerce.[3/] The central evil sought to be prevented by the dormant commerce clause are laws discriminating against articles of commerce based on the point of origin to protect local economic interests.[4/] The United States Supreme Court has been consistent in striking down local laws that discriminate against the importation of out of state goods and services.[5/]

9 Courts engage in a two-step process in analyzing potential dormant commerce clause violations:

> First, we must determine whether the statute in question facially regulates or discriminates against interstate commerce, or has the direct effect of favoring in-state economic interests over out-of-state interests. We presume statutes that do either of these things are economic protection of in-state industry and strike them down without further inquiry, unless discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.
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> If the statute is facially neutral, however, and has only indirect effects on interstate commerce, we must look further to determine whether it amounts to economic

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3/ Mt. Hood Beverage Co. v. Constellation Brands, Inc., 149 Wn.2d 98, 109-10 (2003).

4/ C & A Carbone, Inc., et al. v. Town of Clarkstown, 511 U.S. 383, 390 (1994).

5/ See, e.g., Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (striking down New Jersey statute prohibiting the importation of out-of-state waste); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 352-53 (1977) (striking down North Carolina statute imposing additional fees on Washington apples).

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> protection of in-state industries. This second step involves determining whether the statute has a discriminatory purpose and whether the state's interest in the regulation is legitimate. We then carefully balance whether the burden on interstate commerce clearly exceeds the local benefits.[6/]

10 Because I-937 treats Pacific Northwest resources[7/] different than those located outside the Pacific Northwest, I-937 facially discriminates against interstate commerce and is *per se* invalid absent a demonstration that there are "no other means to advance a legitimate local interest."[8/] Based on comments from the sponsors of I-937, it seems the initiative was intended to keep the economic benefits of renewable energy development local. While such an effect may help offset the increased cost of electricity to the Washington economy, that effect is exactly the sort that the dormant commerce clause was intended to prohibit. Although facially unconstitutional, the Commission should attempt to dampen the effect of I-937 by broadly interpreting the term "real-time basis without shaping, storage, or integration services" so as to prevent discriminatory application. RCW § 19.285.030. ICNU believes that the most cost-effective renewable resource should be acquired regardless of its location.

b. I-937 May Also Violate the Provisions of NAFTA

11 Chapter Six of NAFTA concerns the trade of energy. The goal of NAFTA with regard to the trade of energy is to "strengthen the important role that trade in energy . . . plays in the free trade area and to enhance this role through sustained and gradual

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6/ Mt. Hood Beverage Co., 149 Wn.2d at 110 (internal citations and quotations omitted).

7/ The Commerce Clause analysis does not change based on the regional limitation of I-937 rather than an in-state limitation. See Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 472 U.S. 159, 174 (1985) ("little dispute" that a law drawing a regional distinction would violate the dormant Commerce Clause).

8/ C & A Carbone, Inc., 511 U.S. at 392.

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liberalization."[9/] NAFTA prohibits imported products from being treated differently than domestic products; therefore, because I-937 treats Pacific Northwest renewable resources different than those that could be imported from Canada, I-937 may violate the provisions of NAFTA.

12 NAFTA specifically applies to state actions that discriminate against the imports of electricity from Canada. NAFTA subjects "energy regulatory measures" to the national treatment provisions, import and export restrictions, and export tax provisions.[10/] "Energy regulatory measures" are defined as "any measure by federal or *sub-federal* entities that directly affects the transportation, transmission or distribution, purchase or sale, of an energy . . . good."[11/] Although not defined by NAFTA, "sub-federal entities" most likely includes state authorities.

13 I-937 may violate the national treatment provisions of NAFTA. The national treatment provisions require states to treat electricity from Canada "no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods . . . ."[12/] Because I-937 gives preferential treatment to local Pacific Northwest electricity, I-937 may be in direct conflict with NAFTA.

[9/] NAFTA, Article 601.
[10/] Id. at Article 606.
[11/] Id. at Article 609 (emphasis added). Although electricity is not a "good" in Washington, NAFTA may classify electricity in a different manner. RCW § 19.29A.010(11).
[12/] Id. at Article 301(2).

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5. *Proposed* WAC § 480-109-030(c) Provides Utilities Needed Flexibility when Faced with Unforeseen Circumstances and Is Consistent with the Statutory Language

14 *Proposed* WAC § 480-109-030(c) provides that utilities may demonstrate that events beyond a utility's control prevented the utility from meeting the renewable energy target. The proposed rule further states that "[s]uch events *may* include weather-related damage, mechanical failure, strikes, lockouts, or actions of a governmental authority that adversely affect the generation, transmission, or distribution of an eligible renewable resource owned by or under contract to a qualifying utility."[13/] At the workshop, parties expressed concern that the statute was intended to be limited to *only* those events, and objected to the inclusion of "may" in the proposed rule. The Commission should adopt its proposed rule and afford utilities the needed flexibility to deal with unpredictable future circumstances that may prevent a utility from meeting its renewable resource targets.

15 RCW § 19.285.040(2)(i) states that "[s]uch events include weather-related damage, mechanical failure, strikes, lockouts, or actions of a governmental authority that adversely affect the generation, transmission, or distribution of an eligible renewable resource owned by or under contract to a qualifying utility." Such language does not require the Commission to limit events exclusively to those listed.[14/] Moreover, adoption of the proposed rule language leaves it open for the Commission to determine on a case-

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13/ (Emphasis added).

14/ See, e.g., Anderson v. State of Washington, 159 Wn.2d 849, 862-63 (2007) (rejecting argument that the list of deductions contained in RCW § 72.09.480(7) is exclusive absent language explicitly stating so).

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by-case basis what unforeseen circumstances should exempt a utility from compliance. For example, the listed events do not include the possibility that a shortage of wind turbines due to such high demand could prevent a utility from obtaining the resources necessary to meet the renewable targets. The proposed rule language ensures that utilities, and potentially ratepayers, will not needlessly bear the burden of penalties due to circumstances beyond a utility's control.

6. ICNU Supports Giving Utilities Additional Time to Meet the Renewable Targets

16 *Proposed* WAC § 480-109-050 gives utilities until December 31 of the next year to acquire additional renewable energy credits ("RECs") to meet the previous year's renewable target. Concerns were expressed at the workshop over giving utilities time beyond the target year to achieve compliance. RCW § 19.285.040(2)(e), however, allows utilities to meet a year's renewable target with RECs produced in the subsequent year. The proposed rule allows utilities the time provided by law. Such an approach is entirely consistent with the statutory requirements and gives utilities needed flexibility to avoid the payment of penalties.

7. Utilities Should Not Be Allowed to Recover Penalties in Rates

17 *Proposed* WAC § 480-109-050(4) leaves open the possibility that a utility may recover the costs of penalties in rates. There is absolutely no precedent in Washington for allowing the recovery of penalties in rates.[15/] Requiring utilities to

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[15/] See, e.g., WUTC v. PSE, WUTC Docket No. U-061239, Order No. 02 at ¶ 53 (Jan. 22, 2007) (prohibiting rate recovery for penalties assessed for the unlawful release of customer information); RCW § 80.04.380 (no provision for the recovery of penalties in rates).

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comply with the renewable targets is no different from requiring utilities to comply with any other regulatory requirement. Under no circumstances should utilities be allowed to recover penalties in rates. Ratepayers have no control over the utilities' ability to meet the provisions of I-937. Thus, ratepayers should not be responsible for failures on the part of the utility.

8. The Commission Should Clarify That Notice to Customers Is Required Whenever a Utility Is Required to Pay Penalties

18 *Proposed* WAC § 480-109-050 requires utilities to notify customers within three months of paying an "administrative penalty under subsection (4)." Subsection (4), however, relates to the recovery of penalties in rates. Thus, *proposed* WAC § 480-109-050 seems to require utilities to give notice only when a utility seeks to recover the cost of penalties in rates. RCW § 19.285.060(3), however, requires a utility to give customers notice within three months *anytime* the utility is assessed penalties for non-compliance. The proposed rule should be clarified accordingly.

19 Should the Commission ultimately allow utilities to seek the recovery of penalties in rates, the Commission must require utilities to furnish additional notice to customers when a utility decides to do so. Such notice should include the reasons why the utility believes customers should bear the cost of any penalty. In addition, once the Commission reaches a decision on a utility's request to recover penalties in rates, the utility should be required to give customers an additional notice stating whether the

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Commission granted or denied the utility's request, and, if granted, the effect recovery of the penalty will have on rates.

9. ICNU Supports the Commission's Definition of "Pro Rata"

20 I-937 requires utilities to identify achievable cost-effective conservation for a ten-year period, and to achieve a "pro rata" share of that potential every two years.[16/] *Proposed* WAC 480-109-007(12) defines "pro rata" as "the calculation used to establish a minimum level for a conservation target based on a utility's projected ten year conservation potential." As large sources of achievable cost-effective conservation may not be available until the later years of the ten-year period, achieving a literal pro rata share every two years may be very difficult, if not impossible, for utilities to meet. The Commission's definition accounts for this reality and should be adopted.

B. Comments on the Stakeholder Discussions

1. The Commission Should Adopt Its Proposed Definition of "Annual Retail Revenue Requirement"

21 The sponsors of I-937 advocate for a definition of "annual retail revenue requirement" that changes every year based on a utility's annual forecast. The WUTC's proposed definition defines "retail revenue requirement" as "the normalized retail revenue supported by the general tariffs approved in a utility's most recent general rate case."[17/] The WUTC's proposed definition captures the widely recognized meaning of "retail revenue requirement" and provides utilities with more flexibility in planning to meet the renewable resource targets.

[16/] RCW §§ 19.285.040(1)(a) and (b).
[17/] *Proposed* WAC § 480-109-007(17).

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22 The commonly understood meaning of "revenue requirement" is the level of revenue needed to justify a change in rates.[18/] It would be inconsistent with ratemaking principles to annually adjust a utility's revenue requirement for purposes of I-937 when the utility's rates do not change. Moreover, a utility's proposed "revenue requirement" in a rate case is subject to public scrutiny and is typically reduced in the final order establishing rates. Using a utility's projected figures without any sort of review will not accurately reflect a utility's true "revenue requirement."

23 Further, with a set "revenue requirement" that does not change until a utility completes another rate filing, utilities will have a better ability to plan the acquisition of renewable resources to meet the targets. With a constantly changing figure, utilities will be left scrambling to figure out whether their planned acquisitions of renewable resources will meet the 4% cost cap in a given year.

2. Specific Cost Recovery Rules Should Not Be Included

24 I-937 allows utilities to "recover all prudently incurred costs associated with compliance with this chapter."[19/] The WUTC's draft rules are silent on cost recovery. The IOUs, however, apparently viewed the stakeholder discussions as an opportunity to build consensus on broad rules regarding cost-recovery. I-937 envisions the recovery of prudently incurred costs in the context of normal ratemaking procedures; specific cost-recovery provisions are not necessary to the implementation of I-937. Any cost-recovery mechanism advanced by the utilities that reduces oversight, the due process

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[18/] See Leonard Saul Goodman, The Process of Ratemaking 224 (Public Utilities Reports, Inc. 1998).
[19/] RCW § 19.285.050(2).

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rights of ratepayers, and a thorough review of a utility's costs would be strongly opposed by ICNU.

25 Included among the IOUs' proposals were these specific provisions: 1) recovery of amounts invested that *exceed* the 4% cost cap subject to a prudency review; 2) a deferral mechanism for penalties; 3) defining "compliance" with I-937 as including interconnection costs, integration costs, costs associated with transmission, and costs associated with development and purchase of land, equipment, and capital construction; 4) a form of an automatic adjustment clause permitting costs to be passed through to customers at the same time; and 5) a deferral mechanism for the costs incurred in meeting the renewable energy targets.

26 I-937 does not provide for any of the IOUs' proposals. If the IOUs need an increase in rates due to costs incurred to meet the renewable energy targets, then the IOUs should be required to go through normal ratemaking procedures, i.e., filing a general rate case. There is no provision in I-937 suggesting that the initiative was intended to change the WUTC's ratemaking procedures. The Commission should not adopt any proposal designed to subvert the ratemaking process and allow the IOUs to use I-937 as an opportunity to increase earnings for shareholders.

3. Penalties Should Not Be Recoverable, No Matter What the Circumstances

27 In addition to a deferral mechanism, the IOUs also proposed the specific recovery of penalties incurred when the cost of the penalty is less than the cost of compliance. As previously discussed, there is no precedent for allowing a utility to

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recover penalties in rates. Moreover, the IOUs' proposal makes the payment of penalties a form of alternative compliance. I-937, however, specifically defines the methods by which the IOUs are able to achieve alternative compliance, which does not include the payment of penalties. The Commission should not be misled by the IOUs' arguments regarding the costs of compliance in the context of penalties. A penalty is a penalty.

IV. CONCLUSION

28 ICNU appreciates the opportunity to submit these comments and looks forward to further working with the WUTC and other stakeholders to formulate rules necessary for the implementation of I-937.

Dated this 18th day of May, 2007.

Respectfully submitted,

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