Comments of the NW Energy Coalition (NWEC),
the Northwest Energy Efficiency Council (NEEC) & the
Renewable Northwest Project (RNP)
Docket No. UE061895

Submitted by:
Danielle Dixon, NWEC
Ken Dragoon, RNP
Ann English Gravatt, RNP
Stan Price, NEEC

July 9, 2007

Table of Contents

RNP, NWEC and NEEC submit these comments in response to the Washington Utilities and Transportation Commission ("WUTC" or "Commission") June 15 notice inviting comments on the second draft rules ("Second Draft Rules") issued to implement the provisions of the Energy Independence Act ("Act"), codified at RCW 19.285.

I. INTRODUCTION

As WUTC staff explained to stakeholders at the June 26, 2007 informal meeting, two key criteria must be followed in developing the final rules for implementation of Initiative 937:

> (1) the rules must be consistent with the law; and,
>
> (2) if the law allows for flexibility, the rules must be consistent with existing WUTC policies and procedures or be supported by a strong rationale if they diverge from existing policies.

Staff also repeated the Commission's interest in addressing some issues in near-term rules, some through rules adopted later, and some on a case-by-case basis. In addition to the Commission principles, we believe that the rules should be straightforward and encourage prudent and compliant utility conduct. The following comments reflect these guidelines.

There are three important, substantive issues that are not properly addressed in the Second Draft Rules, creating uncertainty for all parties and potentially leading to unintended consequences.

First, the compliance deadline for meeting the renewable energy standard is clearly and unambiguously stated in the Act—utilities must comply "by January 1" of the compliance year. However, the Second Draft Rules do not require compliance by this deadline and therefore, create a conflict with the Act. Utilities need to know that the deadline included in the Act is when they must comply in order to plan appropriately and prudently. Changes to the Second Draft Rules are necessary to be consistent with the Act.

Second, in the case of energy efficiency, we are concerned that the Commission may interpret the statute to provide flexibility in areas where that flexibility does not exist. Discussions at the June 26 informal workshop regarding the meaning of the terms "pro rata" and "target" indicate these phrases may be broadly interpreted well beyond what the plain meaning of these words would bear. Further, the Second Draft Rules too broadly interpret the flexibility accorded the commission and the utilities in determining conservation targets. And the provision in the Second Draft Rules regarding application of high efficiency cogeneration towards a utility's savings target does not reflect the law.

Finally, while we appreciate that certain issues don't need rules this year, we are concerned that in some cases, the lack of rules will create uncertainty. Of primary concern in this regard is the lack of draft rules interpreting the provisions of the cost cap alternative compliance mechanism within the renewable energy standard. As with the compliance deadline, utilities should be provided with clear guidelines for using the alternative compliance mechanism in lieu of meeting an annual renewable energy target. We, therefore, ask the Commission to

open an investigation or rulemaking to provide direction to utilities on the cost cap issue following this rulemaking.

Our comments are organized as follows: first, we discuss the three key issues raised above; each discussion includes proposed rule language. Second, we discuss other issues that should be addressed in the rulemaking by rule number; again, each discussion includes proposed rule language. Finally, a complete set of the marked up rules is included as Attachment A; letters discussing forward contracting and subsequent verification of RECs in support of our interpretation are attached as Attachment B; and a white paper, "Renewable Resource Target Forecasting and Compliance Under RNP/NWEC/NEEC Proposed Compliance Rules", is included as Attachment C .

II. COMPLIANCE ISSUES – RENEWABLE ENERGY

WAC 480-109-007, WAC 480-109-020; WAC 480-109-040; WAC 480-109-050

A. Renewable Energy Standard Requires Compliance "By January 1, 2012"

The Second Draft Rules fail to require compliance with the first annual target (and subsequent years) as the Act requires. Accordingly, we propose substantial modifications to require compliance "by January 1, 2012" as set forth in the statute. In considering how these proposals fit with the Act, the Commission must be guided by the rules of statutory construction.[1] The Commission's overriding objective in interpreting the statute should be to advance the legislative purpose of the Act.[2] We respectfully submit that there is only one interpretation that satisfies the applicable rules of statutory construction and advances the legislative purpose of the Act—utilities must be in compliance with the annual targets by January 1, 2012, or face mandatory statutory penalties.[3]

1. The "Plain Meaning" of the Act Requires Compliance "by January 1, 2012"

In interpreting the words of a statute, courts look to the plain and obvious meaning of the words in the statute.[4] Here, the statute provides:

---

[1] *See Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973) (stating that rules of statutory construction apply to initiatives as well as to legislative enactments).

[2] *See Dep't of Transp. v. State Employees' Ins. Bd*., 97 Wn.2d 454, 458-59, 645 P.2d 1076 (1982).

[3] *See Edelman v. State Ex Rel. P.D.C*., 152 Wn.2d 584, 591, 99 P.3d 286 (2004) (stating that agencies may not promulgate rules that amend or change legislative enactments).

[4] *See Young v. Estate of Snell*, 134 Wn.2d 267, 279, 948 P2d 1291 (1997); *State ex rel. Royal v. Board of Yakima County Comm'rs*. 123 Wn23 451,451, 869 P2d 56 (1994) (meaning of a statute must be derived from the wording of the statute itself where the statutory language is plain and unambiguous).

> "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 *** at least three percent of its load by January 1, 2012 ***." RCW 19.285.040(2)(a)(i).

Looking carefully to the words in the statute, the statute requires that the utility must "**use**" eligible renewable resources or "**acquire**" renewable energy credits ("RECs") to meet the target "**by**" January 1, 2012 (and by January 1 of subsequent years). Thus, the utility is required to do something ("use" or "acquire") **BY** January 1, 2012.

The Second Draft Rules restate this statutory requirement in WAC 480-109-020; however, the rules then provide the utility an additional two years after the January 1, 2012, deadline, to meet the target. *See* Second Draft Rule WAC 480-109-050(3)(b)(i)-(v). No penalties would be imposed for non-compliance until 15 days after the end of the Commission's review of the Year 2 report. Staff has acknowledged that the Second Draft Rules would permit a utility to do nothing by the compliance deadline of January 1, 2012, purchase RECs to meet the target on December 31, 2013 and avoid any penalty.[5] In other words, rather than requiring 3% of electricity to be from eligible renewable resources by January 1, 2012, the Second Draft Rules will not require the 3% target to be met until almost two full years later, in direct conflict with the Act.

The Act requires utilities to "use" eligible renewable resources or "acquire" RECs by January 1, 2012. No party has raised issues with the interpretation of the "use" of eligible renewable resources. The common sense meaning of these words is unambiguous—the utility must have an eligible renewable resource available for use through ownership or contract for output and reasonably expected to operate during the compliance year to count that resource towards the compliance target.[6]

The apparent source of the confusion regarding the compliance deadline is the statutory reference to a utility's ability to meet its annual target with renewable energy credits "produced during that year, the preceding year, or the subsequent year." RCW 19.285.050(2)(e). Staff has taken the position that in order to give meaning to the ability of utilities to meet an annual target with a subsequent year REC, the commission must wait until the subsequent year has elapsed to determine compliance with the standard. As a result, the Second Draft Rules subordinate the "acquire by" requirement to the ability to use "subsequent year" RECs.

---

[5] While the "doing nothing" hypothetical is an extreme example, the statute would be no less offended by partial compliance by January 1, 2012 with the option to wait until December 31, 2013 to finalize "acquisition" of the remainder of the RECs and/or eligible renewable resources to meet the compliance target.

[6] We note that the Act does not permit an eligible renewable resource to count towards the annual targets where the associated renewable energy credits are owned by a separate entity. RCW 19.285.040(2)(f)(i).

There is a better interpretation of the plain meaning of the words of the Act that gives meaning to all parts of the Act[7] and advances the intent of the statute.[8]

The ordinary meaning of the word "acquire" is "to come into possession, control or power of disposal of often by some uncertain or unspecified means".[9] The ordinary meaning of the "by" in reference to specified dates is "not later than" and "at or before".[10] Giving these words their plain meaning, the utility must own or control RECs not later than January 1, 2012 (and/or use other eligible renewable resources) sufficient to meet the annual target.

Reading RCW 19.285.040(2)(a)(i) and RCW 19.285.040(2)(e) together then: the utility must "**acquire**" RECs to meet the target "**by"** January 1, 2012, but the RECs so acquired can be "**produced**" during the year 2013. Giving each word its plain meaning reveals the underlying intent of the statute—the fact that the energy that will be used to create the REC will be produced in the next year makes the REC a "subsequent year" REC that can be used for complying with the 2012 target; it does not move the unequivocal target for compliance to the "subsequent year." The Second Draft Rules conflate one method for compliance (*i.e*. acquisition of subsequent year RECs) with the time for compliance ("by January 1, 2012").

Finally, the fact that the REC itself is not "produced" until the energy is generated is not a rational basis to reject this interpretation and move an otherwise unambiguous target for compliance to a later date. First, the legislation requires the utility to acquire a REC by January 1, 2012, and states that the utility can rely on RECs produced during the subsequent year. The Commission can give meaning to both the target and the subsequent year reference by recognizing that the utility can, "by" January 1, 2012, "acquire" (i.e., own or *control a right to*) a REC that will be "produced" (*i.e*., when the energy is generated) in the subsequent year.

This construction of the law also reflects the reliance upon future RECs in the emerging renewables markets. In fact, utilities purchase the right to subsequent year RECs routinely in both long and short-term agreements or for specified years. These agreements acknowledge the need for attestation or verification that the REC is actually produced in subsequent years, nevertheless, utilities rightly take the position they have acquired the rights to RECs over the

---

[7] *See Cement Masons v. Hillis Homes*, 26 Wn. App. 224, 232, 612 P.2d 436 (1980), *Jordan v. O'Brien,* 79 Wn.2d 406, 410, 486 Pl2d. 290 (1971) ("Statutes should be construed so as to give effect to every word.") *Clark v. Payne,* 61 Wn. App. 189, 193, 810 P.2d 931 (1991).

[8] *See Morgan v. Johnson,* 137 Wn2d 884, 891-92, 976 P.2d 619 (1999) (in considering a statute, a court must "assume that the legislature means exactly what it says").

[9] *See* Webster's Third New International Dictionary 18 (2002); *see also American Legion v. Walla Walla,* 116 Wn.23 1, 8, 802 P.2d 784 (1991) (court relies on dictionary definition for plain meaning of word).

[10] *See* Webster's Third New International Dictionary 306-07 (2002). Indeed, the Washington "Bill Drafting Guideline 2007" states that the word "by" should be used when meaning to refer to "not later than".

next 20 years (or other term) under such an agreement.[11] Attached as Attachment B are two letters from organizations engaged in the business of REC sales and trading, supporting this concept.

2. Objections to Plain Meaning of the Act Are Misplaced

Two primary concerns with our interpretation of the Act have been raised: (1) the utilities will not know their precise load until sometime after the compliance deadline and therefore, they argue, it would be inappropriate to hold them to a standard that they cannot know with certainty; and, (2) the proposed interpretation will encourage utility over compliance to the detriment of utility ratepayers. These arguments do not support an interpretation of the statute contrary to its plain meaning and intent.

Utilities are in the business of meeting their loads, indeed, they have a statutory obligation to serve, and are capable of accurately predicting within a very small degree of error what 3%, 9% and 15% of their loads will be by the relevant target dates. Further, the Act allows a utility to calculate its load based on the "average of the utility's load for the previous two years." RCW 19.285.040(2)(c). The ability to average 24 months of generation – two years of seasonal variability – facilitates the utility's ability to accurately predict the generation needed to meet the target.

To support our position, Ken Dragoon, RNP's Research Director, prepared a paper analyzing this argument with examples of the de minimis margin of error in predicting load and utilities' ability to manage that uncertainty under the proposed rules, attached as Attachment C. Because the target is based on two years' worth of load data, as the utility approaches the target for compliance, the amount of unknown load becomes a smaller and smaller portion of the total of known, available data. The proposed rules provide ample flexibility (including reliance on RECs over a range of years) to manage the de minimis amount of uncertainty approaching the compliance deadline – far in excess of the flexibilities utilities have to manage their responsibilities to meet their full retail loads.

[11] Recognizing this industry practice, WREGIS and other tracking systems permit transfer of certificates prior to generation. WREGIS permits the owner of the generating unit to transfer a "Forward Certificate" in advance of generation of energy. Under the Forward Certificate Transfer, the transferor will not ever have rights to the Certificate, which will pass immediately to the transferee upon creation. What's more, the transferee can in turn transfer its right to that Certificate on to another entity (in advance of production), who can transfer it onto to another entity, etc. Thus, while the certificate will be produced in a later year, the right to the certificate can be traded and those trades are verified through the tracking system, as is the certificate upon creation. Through these forward purchases, a utility can thereby "acquire" or gain control of or the right to a REC as defined in the statute. RCW 19.285.030(17).

Utility representatives contend that the fear of uncertain loads may lead a utility to "over-comply" with a given standard[12] in order to avoid a penalty. As the examples show, this fear is unfounded because the amount of uncertainty is very small, and the proposed compliance mechanism allows considerable flexibility to move RECs among compliance years—analogous to how very large storage reservoirs on hydro systems allow utilities to move energy from one year to the next. For the most part, shortfalls in one year can be made up from RECs acquired for the next compliance year, and conversely, surplus RECs can usually be used for the next compliance year. The proposed rules also allow such shortfalls or surpluses to be traded in REC markets. There is virtually no circumstance under the proposed rules that would force a utility to plan above any reasonable target forecast in order to comply with the law.

Finally, the utility who found itself in an "over compliance" situation could sell excess RECs into the market, thereby increasing the liquidity of REC markets which would redound to the benefit of ratepayers through offsetting revenue and increased liquidity. Alternatively, the utility could simply retain the excess generation or designate the RECs for a future year compliance. In any event, if the Commission believes this compliance is a legitimate concern, the Act permits the Commission to consider providing incentives for utilities to exceed the standard, another way of looking at "over compliance". RCW 19.285.060(4).

3. As a Policy Matter, the Commission Should Not Create a Loophole from a Safety Net

The plain meaning of the statute is unambiguous as demonstrated above. However, if the Commission disagrees with that interpretation, it is nevertheless obligated to choose the meaning of an otherwise ambiguous statute that best serves the legislative intent.[13] The intent of the statute is clear: more renewable energy serving Washington customers.

---

[12] The utilities' contention that over-compliance is a significant issue and may harm ratepayers is especially curious given that many utilities have included wind and other renewable resources as a substantial part of their integrated resource plans. For example, PacifiCorp will more than comply with the Washington renewable standard as well as the standards in its Oregon and California service territories with the 1,400 - 2,000 MW of renewable resources it has identified as part of the least cost portfolios in every Integrated Resource Plan it has published since 2003. *See* PacifiCorp 2003 IRP at 2. The amount of renewable energy in Avista's least cost portfolio increased more than seven-fold in 2005 over its 2003 plan. *See* Avista 2005 IRP at Table 2, page VIII. Finally, PSE is forecasting in its 2007 IRP that it will comply with the 15% by 2020 standard of the Act. PSE is also planning to meet the 3% standard early - in fact, it already meets it (see 2007 IRP, Figure 5-4) - and likely will meet the 9% standard early as well. *See* PSE's 2005 IRP, Executive Summary (p. 6), says "PSE's actions will include the following... acquire cost-effective renewable resources to achieve PSE's target of 10 percent by 2013." That reiterates PSE's commitment initially established in its 2003 IRP.

[13] *See State v. Gilbert*, 33 Wn. App. 753, 755-56, 657 P2d 350 (1983) ("Where a statute could be interpreted two ways, that which best advances the legislative purpose should be adopted."); *Strenge v. Clarke*, 89 Wn.2d 23, 29, 569 P.2d 60 (1977); *see also Janovich v. Heron*, 91 Wn.2d 767, 772-73, 592 P.2d 1096 (1979) ("[S]pirit or purpose of legislation should prevail over expressed but inept language.") (internal citations omitted).

The reality of the renewable market in the West today calls for earlier compliance, not later. While we don't buy the scare tactics depicted at the March Commission workshop as the "huns are at the gate", the demand for Pacific Northwest renewables is significant. Both California and Oregon now have renewable energy standards, and some Northwest wind projects are already sold to California utilities. Obviously, renewable projects will be sold to those utilities willing to enter into advance purchases. We think many of Washington's utilities recognize this reality, as they are acquiring significant new wind resources. The Second Draft Rules, on the other hand, encourage the opposite – waiting until the last minute to comply.

Allowing an additional two years to comply with the law could result in fewer megawatts of renewable energy serving Washington customers. When voters said Yes on 937 last November, they were expecting an increase in the amount of wind, solar and geothermal resources to meet their electricity needs.[14] If delayed compliance results in fewer resource options to utilities and potentially increased costs, the utilities could reach the 4% cost cap more quickly, so fewer resources could be used to meet the targets. The intent of the law is more clean energy serving Washington customers. RCW 19.285.020. The rules should be consistent with that intent.

The statutory language permitting reliance on three years of RECs was included to provide a "safety net" for utility compliance. It was not designed to delay the renewable standard. The drafters recognized that renewable generation output varies and production may not be exactly as anticipated, even with careful and prudent utility planning. Being able to rely on a subsequent year REC allows a utility both flexibility in meeting the compliance deadline and to make up unexpected shortfalls in resources or RECs relied upon for compliance. Conversely, ability to rely on a previous year REC effectively eliminates forced "over-compliance". These provisions also support a robust REC trading market.

The Second Draft Rules, on the other hand, interpret this safety net provision as a loophole in the compliance date, allowing utilities to file a compliance report in which they have done nothing. The utility can wait to comply with the 2012 3% target until December 31, 2013 and buy all of the RECs it needs for compliance. Under the Second Draft Rules, no penalties will be imposed because the utility is entitled to rely on subsequent year RECs. This is an unacceptable reading of the law and contrary to its intent and good public policy.

B. Reliance on Alternative Compliance Mechanisms must be Adjudicated

We appreciate that the Commission believes that alternative compliance mechanisms might be best reviewed on a case-by-case basis. However, the Second Draft Rules do not guarantee parties the right to an adjudicative proceeding, or even oral comments, when a utility is relying on an alternative compliance mechanism. In light of the fact that reliance on an

[14] Indeed, prior to this rulemaking, the utilities' own discussion of the annual targets in public documents, such as IRPs, included reference to a 3% target by 2012, not 2014. *See, e.g.*, PacifiCorp 2007 IRP at 44 ("In November 2006, Washington voters approved ballot initiative I-937, which would establish an RPS with the schedule of at least 3% of load by January 1, 2012 ***."); PSE 2007 IRP at 2-4 (The Act "requires the state's electric utilities to meet the following targets: 3% of load from qualifying renewables by 2012***").

alternative compliance mechanism means that fewer MWs of renewable energy will be acquired, we submit that an adjudication should be mandatory whenever a utility purports to rely on an alternative compliance mechanism. This requirement is particularly important given that the rules will not include additional specificity on interpretation of the cost cap. Due to the potential for the intent of the legislation to be thwarted by overbroad readings of the alternative compliance mechanisms, an adjudication with the right for discovery and to present and cross-examine testimony is necessary.

On the other hand, a lengthy and/or contentious adjudication may not be warranted or efficient to review each annual report for all utilities, particularly where the utility is filing "routine" compliance reports. Our organizations support the notice and comment process proposed in the Second Draft Rules where the Commission will determine the necessity of a hearing as it relates to routine compliance reports.

C. Because Penalties for Unexcused Non-Compliance Are Mandatory, There Is Need for Only One Commission Proceeding to Determine Compliance and Penalties

There has been general agreement amongst the commenters in this proceeding that the annual report should be the mechanism for determining compliance with the annual conservation and renewable energy targets. The Second Draft Rules are confusing in this regard to the extent that WAC 480-109-040 includes the reporting obligation and the process for commission review of the report, but does not include any determination by the Commission regarding compliance or non-compliance. That determination appears to be located in WAC 480-109-050. We propose that the rules should state a coherent process from filing of the report, to review by the Commission, to compliance determinations regarding the report, together in one section of the rules rather than spread across two sections as in the current draft.

The Act dictates that the Commission must determine whether the utility complied with the annual target. Once compliance and/or non-compliance is determined, and any amount by which the target was missed is established, the imposition of penalties is not discretionary. Therefore, there is no need for an additional proceeding to determine the level of the penalty.[15] It will be more efficient to have a single proceeding to determine compliance. Because determining compliance will require measurement of the eligible renewable resources and renewable energy credits used and acquired by the utility compared to the target, all of the necessary information to determine the compliance or deficiency will be available in that proceeding and the necessary determinations should be made at that time.

The Act does permit the Commission to consider whether penalties should be recovered in rates. RCW 19.285.060(4). We propose that consistent with the Commission guidelines proposed in this rulemaking, the Commission should rely on its long-standing rate-setting

[15] The relevant provisions provide that the Commission "**shall determine compliance** with the provisions of [the Energy Independence Act] **and assess penalties for noncompliance** as provided in subsection (1)" of RCW 19.285.060. *See* RCW 19.285.060(6) (emphasis added). RCW 19.285.060(1) in turn provides that "**a utility that fails to comply with the targets shall pay an administrative penalty**" in an amount specified in the statute. (Emphasis added).

mechanisms – deferred accounting and general rate case proceedings – to determine whether penalties should be recovered. This approach is more efficient than inventing a new and, most likely, lengthy and contentious proceeding under these rules to determine cost recovery for penalties. All determinations relevant to whether costs should be recovered in rates should be made in that rate-setting proceeding and not in the compliance proceeding.

D. Proposed Rule Language for Compliance Issues

As discussed above, the clear intent of the statute was to enforce compliance as of January 1, 2012. Our proposed rules require compliance by, and measure compliance as of, January 1 of the compliance year. The proposed rules therefore set up a process whereby compliance as of January 1 is measured based on the report filed on June 1 in that same year.[16] In its review of that report, the Commission determines whether the utility complied with the annual target by the compliance deadline or whether an alternative form of compliance is applicable. If the utility is not in compliance, the proposed rules would require that the amount (in megawatt hours) of the "compliance deficiency" be determined by the Commission during that same process. As discussed above, penalties for non-compliance are mandatory, and would be paid pursuant to the timelines set forth in proposed WAC 480-109-050.

While the utilities are required to be in compliance by January 1 of the compliance year or pay penalties, it is possible that an eligible renewable resource or renewable energy credit upon which the utility relied to demonstrate compliance could fail to perform due to some unexpected event during the compliance year[17] (such as underperformance of a generating resource). Absent remedial action, such underperformance would cause the utility to fail in actual fact to produce the renewable energy or ensure that the REC was produced that was used to satisfy the annual target for that compliance year. Our proposed rules provide the utility the opportunity to use more eligible renewable resource generation during the compliance year or purchase more renewable energy credits during the compliance year or subsequent year to make up for any "underperformance shortfall"[18]. The commission would measure the remaining underperformance shortfall not remedied by the utility during the review of the annual report after the end of the subsequent compliance year (e.g., in June 2014 for 2012 target year) and assess a penalty for any underperformance shortfall not remedied by the utility. This proposal gives meaning to the statutory requirement to comply at the start of the compliance year while also ensuring actual production of the energy or REC and also gives meaning to being able to rely on subsequent year RECs.

---

[16] This interpretation also gives meaning to the statutory directive that the report address "progress" made in the "preceding year" to meet the annual targets. Because utilities must be in compliance "by January 1", obviously they must take steps in the preceding year to meet that deadline.

[17] A subsequent year REC used to comply with the statute would, most likely, fail, if at all during the year after the compliance year.

[18] If the reason for underperformance satisfied the definition of a "force majeure", the utility would obviously not be required to make up the underperformance. However, such force majeure would be reported in the subsequent annual report and reviewed by the commission pursuant to the process set forth in the rules.

Finally, we propose deleting Subsection (4) of the Second Draft Rules. We cannot discern the purpose of this subsection. Utilities should not be permitted to file changes to their report outside of the commission process for comment and review contemplated in the rules. To the extent the subsection was intended to capture what happens in actual fact to the resources relied upon by the utility to establish compliance, that concept is subsumed in our proposed subsection 4. If the subsection was meant to serve some other purpose, we ask that that purpose be specified and we reserve comment on what that purpose may be.

Proposed Rule Language:

WAC 480-109-007

(##) "Acquire" means to own or purchase or to contractually commit to own or purchase.

(##) "Compliance Deficiency" means the amount (in megawatt-hours) by which a utility failed to achieve the annual renewable energy and conservation targets by the statutory deadline, not otherwise excused by Commission determination of the applicability of an alternative compliance mechanism.

(##) "Underperformance Shortfall" means the amount (in megawatt-hours) by which the eligible renewable resources and/or renewable energy credits relied upon by a utility to comply with an annual renewable target failed to actually perform during the relevant time period. The relevant time period for eligible renewable resource performance will be the compliance year. The relevant time period for renewable energy credits will be the compliance year, one year prior to the compliance year, or one year subsequent to the compliance year.

(##) "Use" means to have available through ownership of a generating facility or contract to purchase output from a generating facility.

WAC 480-109-040

(1)(b) This report must include the utility's annual load for the prior two years, the total number of megawatt-hours from eligible renewable resources and/or renewable ~~resource~~ energy credits the utility needed ~~s~~ to meet its annual renewable energy target by January 1 of the reporting year, the amount (in megawatt -hours) and cost of each type of eligible renewable resource ~~acquired~~ used, the amount (in megawatt hours) and cost of renewable energy credits acquired, the type and cost (per megawatt-hour) of substitute resources reasonably available to the utility that do not qualify as eligible renewable resources, ~~the least-cost conventional resource available to the utility,~~ the incremental cost, if any, of eligible renewable resources and renewable energy credits, and the ratio of this investment relative to the utility's total annual retail revenue requirement.

(i) This report must state if the utility is ~~using~~ relying upon one of the alternative compliance mechanisms provided in WAC 480-109-030 ~~WAC~~ instead of meeting its renewable resource target. A utility using an alternative compliance mechanism must include sufficient

data, documentation and other information in its report to demonstrate that it qualifies to use that alternative mechanism. If the utility is relying on WAC 480-109-030(c) for partial compliance with its annual target, the utility must provide information to demonstrate compliance with the remainder of the annual target.

~~(c) The report must describe the steps the utility is taking to meet the renewable resource requirements for the current year. This description should indicate whether the utility plans to use or acquire its own renewable resources, plans to or has acquired contracted renewable resources, or plan to use one an alternative compliance mechanism.~~

(2) Except as provided in subsection (3) of this section, Commission staff and other interested parties may file written comments regarding the ~~a~~ utility's report within thirty days of the utility filing.

(a) After reviewing any written comments, the commission will decide whether to hear oral comments regarding the utility's filing at a subsequent open meeting.

(b) The commission, considering any written or oral comments, may determine that additional scrutiny of the report is warranted. If the commission determines that additional review is needed, the commission will establish an adjudicative proceeding or other process to fully consider appropriate revisions.

(c) The Commission will determine based on the information in the utility's annual report and any additional commission process set forth in subparts (a) and (b) whether the utility complied with its conservation and renewable resource targets by the statutory deadline. If the utility is not in compliance, the Commission will determine the amount in megawatt hours by which the utility was deficient in satisfying its annual conservation and renewable resource targets. The utility is subject to penalties for the total Compliance Deficiency under WAC 480-109-050.

(3) If the utility's report indicates that the utility is relying on an alternative compliance mechanism instead of meeting its annual target, the commission will establish an adjudicative proceeding to determine whether the utility qualifies for the alternative compliance mechanism. If the commission determines that the utility does not qualify for the alternative compliance mechanism upon which the utility relied, or if the utility is relying upon the alternative compliance mechanism specified in WAC 480-107-030(c) and does not satisfy the entire annual target, the commission must make the determination set forth in subsection 2(c) above in its decision.

~~(4) If a utility revises its report, it shall submit the revised final report to the department~~.

(4) Beginning in 2014, the utility must include in its report a statement and information demonstrating whether the eligible renewable resource generation used and renewable energy credits acquired by the utility upon which the utility relied to demonstrate compliance with annual targets in prior years were actually acquired, produced and/or generated. The utility may acquire renewable energy credits or use additional generation from eligible renewable resources in the compliance year and/or acquire renewable energy credits in the subsequent year to make

up for any Underperformance Shortfall. The Commission will determine whether the utility remedied any Underperformance Shortfall in the annual proceeding conducted pursuant to subpart 2 or 3 above as applicable. The utility is subject to penalties for any Underperformance Shortfall that is not remedied by the use of eligible renewable resources or acquisition of renewable energy credits pursuant to this subsection.

(~~4~~5) All current and historical reports required in subsection (1) of this section shall be available to a utility's customers.

(~~5~~6) Each utility must provide a summary of this report to its customers by bill insert or ~~other suitable method~~ any other approach approved by the commission. This summary must be provided within 90 days of final action by the commission on this report. The summary must include information regarding how a customer can view the full report.

WAC 480-109-050

~~(1) The commission will determine whether a utility fell short of its conservation and renewable resource targets based on that utility's annual report, filed in accordance with WAC 480-109-040, and any additional commission process conducted pursuant to WAC 480-109-040(2)(b).~~

(~~2~~1) A utility shall pay an administrative penalty in the amount of fifty dollars for each megawatt-hour of ~~shortfall~~ Compliance Deficiency ~~in meeting its energy conservation target established in WAC 480-109-010, or its renewable energy target established in WAC 480-109-020, or one of the three alternatives to meeting the renewable target provided in WAC 480-109-030,~~ and for each Underperformance Shortfall not remedied under WAC 480-109-040(4), as determined by the commission pursuant to WAC 480-109-040(2) or (3). The commission will adjust this penalty annually, beginning in 2007, to reflect changes in the gross domestic product-implicit price deflator, as published by the bureau of economic analysis of the United States department of commerce or its successor.

(~~3~~2) Payment of administrative penalties:

(a) Administrative penalties associated with ~~failure to achieve a conservation target~~ Compliance Deficiencies are due within 15 days of commission action on the utility's annual report.

(b) Administrative penalties associated with Underperformance Shortfalls which are not remedied are due within 15 days of commission action on the utility's annual report two years after the compliance year in which the underperformance occurred.

~~(b) The commission will use the following process to collect administrative penalties associated with a utility's failure to achieve its renewable resource target.~~

~~(i) At the conclusion of the review of a utility's year 1 annual report, the commission will determine, whether that utility fell short in meeting its renewable resource target.~~

~~(ii) Through December 31 of year 2, the utility may acquire additional renewable energy credits to reduce or eliminate that shortfall.~~

~~(iii) The utility, in its year 2 annual report, must document the amount of renewable energy credits it acquired, if any, to offset the utility's shortfall in meeting its renewable energy target identified in its year 1 annual report.~~

~~(iv) The commission will update the utility's shortfall in meeting its year 1 renewable resource target during the review of the utility's year 2 annual report.~~

~~(v) Administrative penalties associated with failure to achieve the year 1 renewable resource target are due within 15 days of the commission's final action on the utility's year 2 annual report.~~

(~~4~~3) A utility that pays an administrative penalty under subsection (~~3~~2), must notify its retail electric customers within three months of incurring a penalty stating the size of the penalty, the reason it was incurred and whether the utility expects to seek recovery of the penalty amounts in rates. Such notice shall be provided in a bill insert, a written publication mailed to all retail electricity customers, or any other approach approved by the commission.

(~~5~~4) A utility may request an accounting order from the commission authorizing the deferral of the cost of any administrative penalty assessed per this section. A utility may seek to recover deferred administrative penalties in a general rate case or power cost only type rate proceeding pursuant to existing Commission practices and regulations. As part of such a request, the utility must demonstrate the prudence of its decisions and actions ~~when it failed to meet the renewable energy targets~~ associated with its Compliance Deficiency or Underperformance Shortfall or one of the compliance alternatives provided in WAC 480-109-030~~, or the energy conservation targets~~. When assessing a request for cost recovery, the commission will consider the intent of the Energy Independence Act, other laws governing commission actions, policies and precedents of the commission, and the commission's responsibility to act in the public interest.

III. COMPLIANCE ISSUES – CONSERVATION WAC 480-109-007, WAC 480-109-010

A. Undefined Terms "Pro Rata" and "Target" Used in the Conservation Provisions of the Law Must Be Construed According to Their Plain Meaning

The definition of "pro rata" in WAC 480-109-007 and its subsequent use in WAC 480-109-010(3)(b) are not based on the plain meaning definition of the term and are inconsistent with a reading of the provision of the law as a whole. Moreover, the definition proposed will not result in the development of the most aggressive achievable conservation goals as required by the statute. The common sense definition of the term "pro rata" is ratified by the dictionary definition, which provides that pro rata means "proportionately according to some exactly

calculable factor."[19] This same dictionary defines the root word, proportion, as "the equality of two ratios."[20] Some stakeholders have asserted that pro rata could be interpreted to mean unequal division of the 10 year plan into a biennial target. For support, they argue that the statute could have simply said the biennial report is 20% of the 10-year plan. While the statutory language could certainly have referenced 20% as the equal ratio of 5 biennial goals over a 10-year timeframe, it nevertheless provided for the same outcome by using the words "pro rata." Because a different phrase with the same meaning could have been used is not legally sufficient to justify rejecting the common meaning of the chosen phrase.

This common sense interpretation of the pro rata calculation of biennial performance targets (i.e. 20% in each 2 year period) is further supported when considered within its statutory context.[21] RCW 19.285.040(1)(b) requires utilities to set biennial targets that are no lower than "at a minimum" the utility's "pro rata share" of its 10-year plan. To give meaning to both phrases ("at a minimum" and "pro rata share") [22], the target must be no lower than a set equal proportion. If the statute contemplated allowing a utility to set any performance target in a biennial period, there would have been no need to make reference to a minimum. Indeed, under the proposed definition in the Second Draft Rules, the utility could propose a calculation that would result in a zero target for a biennial target.

Finally, the proposed definition should be rejected because it is inconsistent with the intent of the Act. The Act plainly intended to set a commonly defined floor (i.e. the minimum being the pro rata share of the 10-year plan). The plain language of the statute allows the utility the flexibility to set a target above the minimum level. The proposed rule allows the utility to manipulate or eliminate the minimum target. This flexibility in target setting would be inconsistent with the language and intent of this statutory provision. The rules should be clarified to establish the requirement that each biennial performance target will be at a minimum 20% of the 10-year cost effective and achievable conservation potential.

Likewise, the definition of target has been called into question. Section 2 of WAC 480-109-010 refers to a utility's biennial conservation target. RCW 19.285.040(1)(b) requires each qualifying utility to "establish and make publicly available a biennial acquisition target for cost-

---

[19] *See* Webster's Third New International Dictionary 1820 (2002); *see also American Legion v. Walla Walla*, 116 Wn.23 1, 8, 802 P.2d 784 (1991) (court relies on dictionary definition for plain meaning of word).

[20] *See* Webster's Third New International Dictionary 1819 (2002).

[21] *See supra* note 6; *see also Stone v. Sewer Dist.*, 116 Wn. App. 434, 439-40, 64 P.3d 1230 (2003) (affirming an allocation of costs to property owners in equal proportion under a provision requiring property owners to pay a "fair pro rata share" and explaining in *dicta* that the addition of word "fair" before "pro rata share" would have permitted the municipality to allocate the costs among property owners "taking into consideration different uses and benefits to properties").

[22] *See Washington State Human Rights Comm'n ex rel. Spangenberg v. Cheney School Dist. No. 30*, 97 Wn. 2d 118, 641 P.2d 163 (1982) (holding that each part of a statute should be construed in connection with every other part so as to produce a harmonious whole).

effective conservation … and meet that target …" Some stakeholders assert that a target can be set as a range rather than a point estimate. The law does not provide for that flexibility. The dictionary definition of "target" is a "mark to shoot at" or "a goal (as a date, figure, production level, or quota) set or proposed for achievement."[23] Moreover, the interpretation of a target as a range instead of a point estimate would make other provisions of the law impossible to administer.[24] Specifically, the biennial target "must be no lower than" the pro rata share of the 10-year plan. RCW 19.285.040(1)(b). The possible minimum biennial target becomes non-sensical if the 10-year target could be a range, which must be split pro rata into biennial ranges, and then those ranges are compared to a minimum. Second, RCW 19.285.060(1) imposes penalties on a utility for failure to meet its conservation target, levied on a per MWh basis. In order to give meaning to the ability to levy a penalty for non-compliance, the level of compliance must be established at a set number.

Other parties raised concerns about the inability of a utility to control customer participation in its energy efficiency programs, suggesting the Commission maximize implementation flexibility within the rules. It is important to note that the statute addresses this concern in two ways. First, requiring utilities set biennial rather than annual targets allows some flexibility from year to year in customer participation. Second, focusing on cost-effective conservation means that a threshold exists beyond which a utility will no longer have to ensure customer participation in a program because it no longer meets the cost-effective criterion.

Proposed Rule Language:
WAC 480-109-007

(14) "Pro rata" means in equal proportion ~~the calculation used to establish a minimum level for a conservation target based on a utility's projected ten year conservation potential~~.

(##) "Target" means a point estimate.

WAC 480-109-010(2)(b)

The biennial conservation target shall be no lower than a pro-rata share of the utility's ten year cumulative achievable conservation potential. ~~Each utility must fully document how it pro-rated its ten year cumulative conservation potential to determine the minimum level for its biennial conservation target.~~

B. The Commission May Only Substitute Its Policies on Cost-Effectiveness in Setting the Conservation Target

Section 1(b) of the Second Draft Rules permits a utility to assess its 10-year conservation potential either by using methodologies consistent with the Northwest Power and Conservation Council or altering the Council's methodologies to better fit the characteristics of the utility's

[23] *See* Webster's Third New International Dictionary 2341 (2002).

[24] *See Scott v. Cascade Structures*, 100 Wn. 2d 321, 617 P.2d 415 (1980) (holding that statutes should not be interpreted in a manner that would lead to an unreasonable result).

service territory as long as the utility provides full documentation on the rationale for any modification. That optionality is unlawfully broader than the flexibility afforded the Commission in the Act.[25] Under RCW 19.285.040 (1)(d), "the commission may determine if a conservation program implemented by an investor-owned utility is **cost-effective** based on the commission's policies and practice." (Emphasis added.) While that provision in law provides the Commission with flexibility, it is limited to substitution of a commission policy or practice for a council method related to "cost-effective[ness]".[26] Implicit in the commission's ability to substitute its own policies regarding cost-effectiveness to judge implementation of a conservation program is the commission's ability to permit a utility to assess cost-effectiveness in the planning of the program consistent with the commission's policies. Such a reading of the law is necessary to make the obligations imposed harmonious. In other words, the utility should not be required to follow the NPCC's methodology for cost-effectiveness and then be judged by the WUTC's determination of cost-effectiveness. We propose changes to WAC 480-109-010 to limit the ability to substitute the IRP for the NPCC methodology to issues related to cost-effectiveness.

Proposed Rule Language:
WAC 480-109-010

(1) Beginning January 1, 2010, and every two years thereafter, each utility must project its cumulative ten year conservation potential.

(a) This projection need only consider conservation resources that are cost-effective, reliable and feasible.

(b) This projection must be derived from and reasonably consistent with the one of two sources:

(i) The utility's most recent IRP, including any information learned in its subsequent resource acquisition process, or the utility must document the reasons for any differences. When developing this projection, utilities must use methodologies that are consistent with those used by the Council in its most recent regional power plan. A utility may, with full documentation on the rationale for any modification, alter the Council's methodologies to better fit the attributes and characteristics of its service territory by substituting Commission policies and practices related to cost-effectiveness.

[25] While our joint comments originally supported this interpretation as part of our partial negotiated agreement with utilities, we no longer support this interpretation because it is inconsistent with the statute. The statute does not provide flexibility to adopt this broader substitution of commission policy for Council methodology. The Commission's guiding principles in this docket, which require adherence to the Act where flexibility is not granted to the commission, also dictate our position.

[26] The intent is clear that private and public utilities across the state should be consistent in their conservation analyses. Generally, the investor-owned utilities should not deviate from the Power and Conservation Council's methodologies in assessing their achievable conservation potential. In instances where such deviation might occur specific to cost-effectiveness, the Second Draft Rules appropriately require utilities to fully document any modification to the Power and Conservation Council's methodologies.

(ii) The utility's proportionate share, developed as a percentage of its retail sales, of the Council's current power plan targets for the state of Washington.

(2) By January 1, 2010, and every two years thereafter, each utility must establish a biennial conservation target.

(a) The biennial conservation target shall identify all achievable conservation opportunities.

(b) The biennial conservation target shall be no lower than a pro-rata share of the utility's ten year cumulative achievable conservation potential. ~~Each utility must fully document how it pro-rated its ten year cumulative conservation potential to determine the minimum level for its biennial conservation target.~~

(3) ~~On or before~~ By October 1, 2009, and every two years thereafter, each utility must file with the commission a report identifying its ten year achievable conservation potential and its biennial conservation target.

(a) Participation by the commission staff and the public in the development of the ten-year conservation potential and the two-year conservation target is essential. The report must outline the extent of public and commission staff participation in the development of these conservation metrics.

(b) This report must identify whether only the Council's plan or the Council's methodologies but with the commission's policy and practice substituted for assessing cost-effectiveness were the source of its ten-year conservation potential. The report must also clearly state how the utility pro-rated this ten-year projection to create its two-year conservation target.

(c) If the utility uses its integrated resource plan and related information to determine the cost-effectiveness of its ten-year conservation potential, the report must describe the technologies, data collection, processes, procedures and assumptions the utility used to develop these figures. This report must describe and support any changes in assumptions or methodologies related to cost-effectiveness from those used in the utility's most recent IRP or the Council's power plan.

C. The Second Draft Rules Must Be Modified to Ensure Consistency with the Law Regarding Counting of Savings from High Efficiency Cogeneration

Section 1(a)(i) of WAC 480-109-040 establishes a reporting path for savings from high efficiency cogeneration facilities operating within a utility's service territory. This subsection needs to be revised significantly to comply with RCW 19.285.040(1)(c). While the law provides flexibility for a qualifying utility to count certain savings from high efficiency cogeneration facilities in meeting its conservation targets, the critical components of that provision must be reflected in this section of the rules:

- The high efficiency cogeneration must be "owned and used by a retail electric customer to meet its own needs." RCW 19.285.040(1)(c). Conservation means "any reduction in electric power consumption resulting from increases in the efficiency of energy use, production or distribution." RCW 19.285.030(4). In the case of high efficiency cogeneration, a customer is reducing its load on the utility by using the cogeneration output to meet its own needs, and the focus on high efficiency cogeneration ensures an increase in efficient production. The Second Draft Rules improperly refer to savings from "any high efficiency cogeneration operating within the utility's service area."
- The amount of savings shall be based on the difference between the "fuel chargeable to power heat rate of the cogeneration facility compared to the heat rate on a new and clean

basis of a best-commercially available technology combined-cycle natural gas-fired combustion turbine." RCW 19.285.040(1)(c)(i). In other words, a utility can only count towards its savings target the incremental efficiency gains from the cogeneration facility, not the entire output of that facility. The Second Draft Rules improperly refer to the electricity savings being calculated as "the amount of energy consumption avoided by the sequential production of electricity and useful thermal energy from a common fuel source."

- "The reduction in load due to high-efficiency cogeneration shall be … counted towards meeting the biennial conservation target in the same manner as other conservation savings." *Id.* In accordance with long-standing Commission policies and practices (as well as commonly accepted methodologies, including those used by the Northwest Power and Conservation Council), conservation savings are counted in the first year of program implementation based on the number of units expected to be delivered multiplied by the expected savings per unit. Historical conservation is not counted on a going forward basis. Thus, the rules must clarify that only high-efficiency cogeneration units that commence operations after January 1, 2010 can count towards a utility's conservation target. Further, a utility can only count the savings in the biennium in which the cogeneration facility comes on line. The Second Draft Rules are silent on these conditions.

Proposed Rule Language:
WAC 480-109-040(1)(a)(i)

The report may include electricity savings from high efficiency cogeneration ~~operating within the utility's service area during the preceding year~~ owned and used by a retail electric customer of the utility to meet its own needs. A utility may count savings towards the utility's biennium conservation target only during the first biennium of the high efficiency cogeneration facility's operations, in the same manner as other conservation savings are counted. The electricity savings reported for each high efficiency cogeneration facility shall be the difference between the fuel chargeable to power heat rate of the cogeneration facility compared to the heat rate on a new and clean basis of a best-commercially available technology combined-cycle natural gas-fired combustion turbine ~~amount of energy consumption avoided by the sequential production of electricity and useful thermal energy from a common fuel source~~.

IV. THE COST CAP RULES SHOULD BE SPECIFIED VIA SUBSEQUENT PROCEEDING
WAC 480-107-030(1)(b)

We are concerned that the rule language addressing the "cost cap" alternative compliance mechanism is very limited, basically restating the statutory provision that a utility is in compliance if it invests 4% of its total annual retail revenue requirement on the incremental costs of eligible renewable resources. We believe all stakeholders would benefit from additional Commission direction as to how the cost cap should be calculated. We are comfortable with reliance on a system cost analysis to determine the incremental cost, as we proposed in May. But we were not in accord with the utilities on specific costs that are appropriate to include in the calculation, such as "dry hole risk" costs or the inclusion of recoverable penalties in the cost cap calculation. Given that there is limited time in this proceeding to address this level of detail, we

suggest that the Commission initiate a subsequent rulemaking or informal policy guidance proceeding devoted to the cost cap analysis.

Finally, we reiterate our point above that any reliance on the cost cap must trigger an adjudicative proceeding at the Commission.

V. SECTION BY SECTION ANALYSIS

A. WAC 480-109-007 "Definitions"

See discussion in Sections II and III above.

"Annual Retail Revenue Requirement"

We support the proposed definition for annual retail revenue requirement with one clarification. The term "normalized" as it is used in the industry refers to adjustments for weather and load. Because this definition refers to the "annual" retail revenue requirement, we assume the inclusion of the word "normalized" in the definition means that the utilities retail revenue requirement will be adjusted annually for weather and load normalization. To the extent the inclusion of the word "normalized" is not intended to refer to its common meaning, we request that the commission explain its purpose. We would also then expect to recommend conforming changes to the definition of "annual retail revenue requirement" to capture these concepts.

"Council"

The term "council" already is defined in RCW 19.285.030(6) to mean the Washington state apprenticeship and training council within the department of labor and industries. To avoid confusion, the Commission should select a different term in its rules when referencing the Pacific Northwest Electric Power and Conservation Council. We have proposed "NPCC":

Proposed Rule Language:

(##) "~~Council~~ NPCC" means the Pacific Northwest electric power and conservation council.

"Distributed Generation"

We recommend adding a sentence to the definition of distributed generation that defines integrated cluster.

Proposed Rule Language:

(7) "Distributed generation" means an eligible renewable resource where the generation facility or any integrated cluster of such facilities has a generating capacity of not more than five megawatts. An integrated cluster refers to co-located projects owned or controlled by the same developer that feed into the same substation. If several 5 MW

or smaller projects are located in the same immediate area but are owned or controlled by different developers, each qualifies as a separate, independent distributed generation project.

B. WAC 480-109-010 Conservation Resources

See discussion in Section IV above.

In addition, we recommend that the Commission add language to the rule regarding Commission action on the qualifying utility's proposed conservation target. Such language should be consistent with the statute, RCW 19.085.040(d), which requires the Commission to approve the utility's proposed target. This change is in keeping with existing Commission regulations in which the Commission states the action it will take on a utility filing. *See, e.g.*, WAC 480-107-015(3)(b).

Proposed Rule Language:
WAC 480-109-010(4)(c)

If the Commission determines that additional scrutiny is not warranted, the Commission will approve the utility's projected ten year conservation potential and biennial conservation target within thirty days after the close of the comment period.

Finally, subsections (1), (2), and (3) may cause confusion by referencing three timeframes connected with a utility determining its achievable conservation potential and its biennial target (i.e., "beginning January 1, 2010", "by January 1, 2010", and "on or before October 1, 2009"). RCW 19.285.040 (1)(a) requires a qualifying utility to identify its 10-year conservation potential by January 1, 2010 and every two years thereafter, and (1)(b) requires the utility to establish and make publicly available its biennial acquisition target beginning January 2010 and every two years thereafter. RCW 19.285.040(1)(e) further provides that "the commission may rely on its standard practice for review and approval of investor-owned utility conservation targets." In order for an IOU to begin meeting its two-year target in January 2010, the Commission must take advance action to approve that target. The reference to targets being approved "by October 1, 2009"[27] and every two years thereafter is consistent with existing Commission practice. Although we have not proposed a specific revision, we recommend revising the rules to reference only that October deadline with respect to a utility proposing and filing its conservation potential assessment and biennial target, which may result in sections 1, 2, and 3 being condensed into a single section. The rules also should continue to include a timeline for making the final approved biennial conservation target publicly available, i.e., in January 2010 and every two years thereafter.

C. WAC 480-109-020 "Renewable Resources"

See discussion in Section II above.

[27] The Second Draft Rules say "On or before October 1, 2009". In order to be consistent throughout the rules and with drafting guidelines, we propose also to change the "on or before" reference to "by October 1, 2009". *See supra* note 9.

We also reiterate our comments submitted in this docket in May with regard to cofiring applications and use of biodiesel. With regard to co-firing, we propose a short addition to the rule that requires an independent, third party expert (e.g., a professional engineer) to certify the percent of eligible renewables used in a co-firing process. With regard to biodiesel, we suggest language for preserving the intent of the no old-growth restriction rather than detailing the process at this time for certifying forest products that do not contain old growth or first growth timber. We hope that level of detail will be addressed in a future Commission rulemaking.

Proposed Rule Language:
WAC 480-109-020

(#) Biodiesel fuel and biomass energy qualify as eligible renewable resources for the prorated share of non-old growth forest output.

(#) Eligible renewable resources used in co-firing applications qualify towards meeting the renewable energy target for the prorated share of the eligible renewable resource. An independent, third-party expert such as a professional engineer must certify the percent of eligible renewables used in a co-firing process.

D. WAC 480-109-030 "Alternatives to the renewable resource requirement"

See discussion in Section III above.

We also propose certain clean-up changes to the Second Draft Rules to make them consistent with the Act. These proposed changes are necessary so as not to impermissibly change the intent and scope of the alternative compliance mechanisms.

Proposed Rule Language:
WAC 480-109-030

(a) A utility may demonstrate all of the following that:

(i) Its weather-adjusted load for the previous three years on average did not increase.;

(ii) After December 7, 2006, ~~A~~ all new or renewed ownership or incremental purchases of electricity from non-renewable resources other than on a daily spot price basis were offset by equivalent renewable energy credits.; and

(iii) It invested at least one percent of its total annual retail revenue requirement that year on eligible renewable resources and/or renewable energy credits.

E. WAC 480-109-040 Annual Reporting Requirements

1. Conservation Reporting

See discussion in Section IV above.

We also suggest clarifying in section (1)(a) the intent of the term "actual gross electricity savings", as that term could be interpreted in different ways.

2. Renewable Energy Reporting

See discussion in Section II above.

We also delete the reference to providing data related to the "least-cost conventional" resource available to the utility. We understand this reference to be an attempt to acquire information relevant to the cost cap. However, the proposed language does not track the statutory language and might later be interpreted as intending to provide meaning to the cost cap at this point in time even though the Commission appears to prefer to deal with this issue on a case-by-case basis. Therefore, we propose a clarifying change to track the language of the statute.

Finally, section (5) proposes that a utility will provide a summary of its report to its customers "by bill insert or other suitable method." Consistent with WAC 480-109-050(4), the rule should specify "… by bill insert or any other approach approved by the commission."

Proposed Rule Language:
WAC 480-107-040

(1)(b) This report must include the utility's annual load for the prior two years, the total number of megawatt-hours from eligible renewable resources and/or renewable ~~resource~~ energy credits the utility needed ~~s~~ to meet its annual renewable energy target by January 1 of the reporting year, the amount (in megawatt -hours) and cost of each type of eligible renewable resource ~~acquired~~ used, the amount (in megawatt hours) and cost of renewable energy credits acquired, the type and cost (per megawatt-hour) of substitute resources reasonably available to the utility that do not qualify as eligible renewable resources ~~the least-cost conventional resource available to the utility~~, the incremental cost, if any, of eligible renewable resources and renewable energy credits, and the ratio of this investment relative to the utility's total annual retail revenue requirement.

***

(5) Each utility must provide a summary of this report to its customers by bill insert or ~~other suitable method~~ any other approach approved by the commission. This summary must be provided within 90 days of final action by the commission on this report.

F. WAC 480-109-050 "Administrative Penalties"

See discussion in Section II above.

VI. CONCLUSION

Thank you for consideration of these comments. We look forward to continuing to work with the commission and stakeholders on these issues.