PACIFIC POWER
A DIVISION OF PACIFICORP

825 NE Multnomah, Suite 2000
Portland, Oregon 97232

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VIA ELECTRONIC FILING

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities & Transportation Commission
133 S. Evergreen Park Drive SW
Olympia, WA 98504-7250

Re: Docket No. UE-061895, Rulemaking to Implement Initiative Measure No. 937 Comments of PacifiCorp

Dear Ms. Washburn:

In response to the Washington Utilities and Transportation Commission's ("Commission") June 15, 2007 Notice of Opportunity to File Written Comments ("June 15 Notice") PacifiCorp, dba Pacific Power & Light Company ("PacifiCorp") respectfully submits the following written comments on the Commission's second discussion draft of rules to implement the Energy Independence Act, RCW 19.285 (the "Act").

On June 26, 2007, the Commission rulemaking team held an all-party meeting at the Commission to discuss the second discussion draft of rules and respond to questions. PacifiCorp found this workshop to be a valuable forum for clarifying positions and asking questions. At the meeting, the Commission rulemaking team outlined criteria it considered when determining what language to include in the second draft of rules. For this round of comments, the rulemaking team requested that parties evaluate their comments against certain "screens". As PacifiCorp understands this request, the first set of screens aim to classify issues into one of three categories: (1) issues that the Commission must define or clarify in this rulemaking; (2) issues that need to be addressed but could be deferred until a later rulemaking; or (3) issues best left to an adjudicative process. The remaining screens relate to ensuring that the rules are consistent with the underlying statute and consistent with the Commission's long-standing policies and procedures. Further, if a party is proposing any departure from these policies and procedures, the party must provide a good rationale for the change.

Following its review of the second discussion draft of rules and incorporating the context and guidance provided by the rulemaking team at the June 26, 2007 meeting, PacifiCorp is providing comments in the areas where it feels it is necessary that the Commission incorporate revisions in the final rules from the second discussion draft. These comments should be read in conjunction

with the joint utility comments filed by PacifiCorp, Avista and Puget Sound Energy (the "Utilities") on May 18, 2007.

In several key areas, PacifiCorp believes it is important to not delay defining terms and clarifying procedure. Uncertainty in the areas discussed below will have an impact on how compliance is achieved, whether or not compliance is achieved, and the level of costs associated with compliance. These considerations in turn will have an impact on both the developing renewable markets and PacifiCorp's customers. One of the intentions stated in the Act is to stabilize electricity prices for Washington residents. Certainty and clarity in this round of rules is critical as utilities are planning and acquiring resources today toward achieving the proposed targets.

WAC 480-109-007 Definitions

"Annual Retail Revenue Requirement": PacifiCorp supports the proposed rules' use of a definition of annual revenue requirement that relies on existing practices and procedures for determining a utility's revenue requirement. The proposed rules recognize that revenue requirement should continue to be determined in a ratemaking proceeding rather than on an annual basis outside of that process. It is not efficient to reset a utility's revenue requirement on an annual basis solely for purposes of establishing the "cost cap" for implementation of the Act. To do so could result in a significant increase in workload that could resemble annual rate cases. There are existing procedures in place for resetting revenue requirement which ensure that utilities' tariffs provide an opportunity for a utility to earn a reasonable rate of return.

PacifiCorp believes that the definition should be refined to include only the utility tariffs that are related to its revenue requirement. As currently drafted, the proposed rules would include all of the utility's tariffs. However, the inclusion of all of the utility's tariffs would include certain surcharges and surcredits that are not part of a utility's revenue requirement. These surcharges and surcredits are pass-through tariffs such as the Bonneville Power Administration residential exchange program credit and the System Benefit Charge. The Utilities comments included proposed language that would address this issue. PacifiCorp continues to recommend adoption of the Utilities' proposed language for the final rules.

"Council" and "Conservation Council": The second draft rules contain a definition of Council that is different from that contained in the Act. PacifiCorp suggests using the same definition of "Council" for the final version of the rules to maintain consistency. Since the Act allows for using Pacific Northwest Electric Power and Conservation Council methodologies in setting conservation targets, PacifiCorp also suggests creating a definition of "Conservation Council" to refer to the Pacific Northwest Electric Power and Conservation Council.

"Real-Time Basis Without Shaping, Storage, or Integration Services": PacifiCorp believes it is in the best interest of customers to adopt a definition for this term as soon as possible. By not defining the term, the Commission would leave a utility with too much uncertainty related to the eligibility of any resource located outside the Pacific Northwest. As such, the amount and type of renewable resources available for satisfying the renewable targets would be effectively constrained to resources within the Pacific Northwest. Constraining the area of renewable energy and renewable energy certificate competition enhances the market power of developers within the constrained area, which is not in the best interest of the customers of utilities seeking to minimize costs. As discussed in detail below, there are certain legal aspects that the Commission must consider in defining this term.

At the March 26, 2007 workshop, Commissioner Jones expressed concerns that certain elements of the Act may be inconsistent with the Commerce Clause[1] and North American Free Trade Agreement ("NAFTA"). In particular, the definition of "[e]ligible renewable resource" in RCW 19.285.030(10) appears to facially discriminate between facilities located in the Pacific Northwest and those located in other states or countries. To be considered an eligible resource, a renewable facility located in the Pacific Northwest need only commence operation after March 31, 1999. In contrast, a facility located outside the Pacific Northwest must demonstrate that it is able to deliver power into Washington "on a real-time basis without shaping, storage, or integration services[.]" This latter requirement imposes additional restrictions upon non-Pacific Northwest facilities that increase the expense and burden on them to compete for the sale of renewable power to Washington utilities (assuming such facilities can meet these requirements). Depending upon how these restrictions are interpreted and implemented, they may present serious issues under the Commerce Clause and NAFTA. As discussed below, the Commission may have the flexibility to address the potential Commerce Clause and NAFTA issues in this rulemaking by narrowing the application of the restrictions through rules.

Commerce Clause Analysis: As discussed by the Industrial Customers of Northwest Utilities ("ICNU") in its May 18, 2007 comments at 4-5, the restrictions on non-Pacific Northwest renewable facilities arguably impose a disadvantage on economic interests outside the Pacific Northwest and thus may constitute a per se violation of the Commerce Clause.[2] This is so with respect to facilities and producers located in other states, as well as those located in Canada or Mexico.[3] Under applicable case law, it does not matter that the Act seeks to advance the

[1] Article I, section 8, clause 3 of the United States Constitution.
[2] *Maryland v. Louisiana*, 451 U.S. 725, 757-60 (1981) (state law that encourages energy investments to be made in one state rather than in other states violates Commerce Clause).
[3] U.S. Const. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce "with foreign Nations" as well as "among the several States"); *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 451 (1979) (striking down state property tax on foreign-owned shipping containers under the foreign commerce clause); *see also S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) ("It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny.")

economic interests of the Pacific Northwest and not just those of the State of Washington. State laws that advance regional interests at the expense of other regions still violate the Commerce Clause.[4]

NAFTA Analysis: The restrictions on non-Pacific Northwest renewable facilities may also conflict with the "national treatment" obligations under NAFTA, which expressly apply to energy regulatory measures. One of the fundamental concepts of NAFTA is "national treatment" of all parties to the Agreement. This basic assertion is set forth in Chapter 3, Article 301(2) of NAFTA, which provides that "national treatment" means, with respect to a state or province, "treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive or substitutable goods." While there are exceptions and annotations to this "national treatment" concept throughout the Agreement, it generally governs the rules of NAFTA. This concept is also incorporated into the provisions of NAFTA relating to electricity.[5] "National treatment" in Article 301(1) (as incorporated into Article 606(1)) applies to provinces and states (such as Washington), and as well as to the national governments of the NAFTA parties. PacifiCorp is not aware of any existing case law that deals with the treatment of the trade in electricity under Article III of GATT or under NAFTA. The principal question for "national treatment" consideration may be whether renewable energy and nonrenewable energy should be considered "like products" for NAFTA purposes. NAFTA arbitrators will often examine the processes and production methods ("PPMs") to determine if two seemingly identical products are actually different because of their process and production methods, and, therefore, are entitled to different treatment and regulation.

More specifically,

- Is imported electricity generated with a renewable resource, but not included in a state's renewable resources portfolio, a "like" electricity produced by a domestic producer within the renewables definition of that state?
- If arguably not, what is the defendable difference?

[4] *See Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982) (striking down reciprocity provision in Nebraska law that allowed Nebraska's ground water to be exported only to other states that allowed their ground water to be exported to Nebraska); *see also Northeast Bancorp, Inc. v. Bd. of Governors*, 472 U.S. 159, 174 (1985) ("There can be little dispute that the dormant Commerce Clause would prohibit a group of States from establishing a system of regional banking by excluding bank holding companies from outside the region . . . ."); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (Commerce Clause designed to prevent "economic Balkanization"); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (Commerce Clause designed to ensure that every producer has "free access to *every* market in the Nation") (emphasis added).

[5] Chapter 6, Article 606(1) and (2), for example, state that "energy regulatory measures" are subject to the disciplines of "national treatment," as provided in Article 301; and that parties must "seek to ensure that in the application of any energy regulatory measure, energy regulatory bodies within its territory avoid disruption of contractual relationships to the maximum extent practicable, and provide for orderly and equitable implementation appropriate to such measures."

This issue has been a significant factor in disputes between the provinces of Quebec and Ontario and the New England states, which buy much of their power from large scale hydro plants located in Canada. Since the renewable standards of many of those states exclude power from large scale hydro products as an "eligible" renewable resource (as does Washington, unless it is produced in the Pacific Northwest or meets other criteria), the Canadians are arguing that the standards discriminate against them in a way that violates the provisions of NAFTA. Recent news reports confirm that that the Canadian hydropower industry may seek legal recourse under NAFTA's dispute resolution panel to gain access to U.S. electric renewable power markets for their hydro power.

By mandating special requirements for "eligible renewable resources" located outside of the Pacific Northwest, the provisions of the Act appear to violate NAFTA and GATT. NAFTA and GATT have many exceptions, however, which would have to be examined, including some that validate trade restrictive measures that aim at environmental protection. These exceptions permit measures "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources." Whether those exceptions would be sufficient to validate the requirement in the Act that eligible renewable resources must be located in the Pacific Northwest, however, is unclear. It should also be noted that even these exceptions to the prohibitions have a cap, or "chapeau" (an exception to an exception) built into them. Article XX of GATT 1994, for example, would limit the impact of an environmental trade exception by requiring that a trade-related environmental measure shall "not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries whether the same conditions prevail" or as a "disguised restriction on international trade."

Another provision of NAFTA permits any of the parties to adopt "a standard, technical regulation or conformity assessment procedure" with respect to goods and services. The renewable standards in the Act could be considered such a standard. The language in NAFTA is very complex, however, and in some instances, standard-related measures are nonetheless subject to the national treatment provisions of Article 301. Moreover, Article 904(4) of NAFTA prohibits any Party to "prepare, adopt, maintain, or apply any standards-related measure with a view to or with the effect of creating an unnecessary obstacle to trade between the Parties."

Given the potential illegal discrimination and treaty violations involved with certain elements of the Act, the Commission could implement rules that reduce or eliminate any discriminatory or illegal impact. If there is a colorable argument that the statute is ambiguous, then the Commission may have the flexibility to narrow the application of the statute by rule to avoid the Commerce Clause and NAFTA issues.

The issue is the meaning to be given to the restrictions placed on a renewable facility located outside the Pacific Northwest, i.e., that such facility must also be able to deliver power into Washington "on a real-time basis without shaping, storage, or integration services[.]" It may be possible in a rule to implement this language in a manner that does not run afoul of the Commerce Clause or NAFTA. Courts give agencies broad latitude to interpret the language of a statute when there is perceived ambiguities. The courts are driven by a practical approach and consider the functional advantages of allowing a single, expert agency the power to issue rules to interpret all of the interrelated portions of a statute.[6]

In the case of these particular restrictions, the Commission may conclude that the statute used technical terms in a way that cannot, as a practical manner, be applied. In this circumstance, the Commission could adopt rules that reasonably interpret the technical terms, and in a manner that addresses the potential Commerce Clause and NAFTA issues. In this regard, it is not clear what meaning was to be given to the requirement that power must be deliverable into Washington "on a real-time basis without shaping, storage, or integration services." In their February 26, 2007 comments, the Renewable Northwest Project ("RNP") and the NW Energy Coalition ("the Coalition") emphasized that this restriction applies only to "eligible renewables that are located outside of the Pacific Northwest," and there is no similar restriction as to how utilities acquire eligible resources located within Washington, Oregon, Idaho and western Montana.[7] These parties proposed two requirements to ensure compliance with this provision: (1) the utility must dynamically schedule the power from the generator to Washington, and (2) the utility must have proof of a contractual right to transmit the purchased power on a transmission path into Washington.[8]

The Utilities proposed in their May 18, 2007 comments to define "real-time" in a manner that provides more flexibility than the strict interpretation offered by RNP and the Coalition.[9] According to the Utilities, the term "real time" is "adequately defined in our industry as any timeframe shorter than the 'day ahead' market," while the definitions of the terms "shaping, storage and integration services" are "in constant flux."[10] The Utilities' comments proposed to define "real time basis without shaping, storage or integration services" to mean that "energy deliveries may not exceed the lesser of (a) the hourly scheduled delivery quantity, or (b) the actual generation of the facility integrated during the scheduled hour."[11] According to the Utilities, even this "slightly more flexib[le]" definition still "significantly restricts the utilities' ability to cost-effectively import renewable energy from outside the Region."[12] RNP and the

[6] *USV Pharmaceutical Corp. v. Weinberger*, 412 U.S. 655 (1973).
[7] Comments of the Renewable Northwest Project and the NW Energy Coalition, February 26, 2007 at 2-3.
[8] *Id.* at 3.
[9] Avista Corp, PacifiCorp and Puget Sound Energy ("the Utilities") filed joint comments on May 18, 2007.
[10] Utilities' Joint Comments, May 18, 2007 at 5.
[11] Proposed section WAC 480-109-007(16).
[12] Utilities' Joint Comments, May 18, 2007 at 5.

Coalition recommend in their May 18, 2007 comments that the Commission "not draft any rules this year about the real time restriction."[13] According to their comments, "[t]here are enough resources in the Pacific Northwest to meet the standard if utilities feel they cannot meet the real time statutory requirements for resources outside the Northwest."[14] Alternatively, if the Commission determines that rules are needed, these parties maintain their original position: that "real-time" means that "the power must be dynamically scheduled with a SCADA signal in near real-time to the receiving control area, and the utility must show a proof of a contractual right to transmit the power into the state."[15]

The comments on "both sides" of this issue – from the Utilities, on the one hand, and from RNP, the Coalition and NEEC, on the other – illustrate the potential concerns under the Commerce Clause and NAFTA. The Utilities acknowledge that even the more flexible "real-time" definition which they propose "significantly restricts the utilities' ability to cost-effectively import renewable energy from outside the Region."[16] RNP, the Coalition and NEEC apparently do not deny the impact of this restriction, but seem to claim that the restriction is of no current consequence so long as "[t]here are enough resources in the Pacific Northwest to meet the standard."[17] This approach, of course, fails to consider the issue from the perspective of the out-of-region renewable facility that bears the burden imposed by the restriction and is thereby denied the ability to sell renewable energy on the same terms as in-region resources. The impact of these restrictions must be minimized if the Act is to withstand a challenge under the Commerce Clause or NAFTA. At a minimum, the Commission should adopt the proposed definition in WAC 480-109-007(16) offered by the Utilities in their May 18, 2007 comments, which minimizes the restriction on the ability to import renewable energy from outside the region.

If the plain language of the statute does not conclusively determine its meaning, then courts assume that the legislature intended to, and did, act constitutionally.[18] This construct of statutory interpretation would support a rulemaking by the Commission that applied a constitutional interpretation of the statute. Therefore, if the Commission can adopt a rule that saves the statute from violating the Commerce Clause or NAFTA and is not clearly contrary to the plain meaning of the statute, that rule will likely not be considered ultra vires.[19] Unless the statute in question

[13] Comments of the Coalition, the Northwest Efficiency Council ("NEEC") and RNP, May 18, 2007 at 3.
[14] *Id.*
[15] *Id.*
[16] Utilities' Joint Comments, May 18, 2007 at 5.
[17] Comments of the Coalition, the Northwest Efficiency Council ("NEEC") and RNP, May 18, 2007 at 3 (emphasis added).
[18] *See Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (2004).
[19] However, if a rule is contrary to the "plain meaning" of a statute, it will be considered outside the agency's authority. *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990); *Chevron v. NRDC*, 467 U.S. 837 (1984); *see, e.g.*,

here is considered ambiguous, the Commission may not adopt rules narrowing its scope to one that does not violate the Commerce Clause or NAFTA.[20]

WAC 480-109-010 Conservation Resources

Establishing the Conservation Target: The Utilities proposed rule language that would provide a range around a point target to evaluate compliance with achieving the conservation biennial target in WAC 480-109-010(5). Specifically, the Utilities proposed rule language that would enable a utility to be deemed in compliance with the biennial conservation target if energy savings are achieved in a range of 90% to 100% of the biennial target. In their May 18, 2007 comments, RNP, the Coalition and NEEC agreed with this deadband concept but proposed a range of 95% to 105%. This language was not included in the second draft rules. After discussion at the June 26, 2007 meeting, the Commission rulemaking team expressed that it believed that flexibility existed in setting the ten year potential conservation target and biennial targets without a prescribed deadband. PacifiCorp agrees with the Commission's interpretation that the statutory language provides this flexibility. It does not prescribe 20% or 1/5th for the amount by which the biennial target has to be established, but rather requires it to be a "pro-rata" share of the ten year conservation potential. The requirement outlined in the statute for setting the conservation targets does not preclude for example, setting the ten year conservation potential as a range and then the pro-rata share could also be a range. Presumably, the penalty would be assessed for missing the low end of the target range. If this is the Commission's intended reading of the statute and the premise for implementation, PacifiCorp supports the rules proposed in the second draft. In a given year a utility may achieve more or less toward the target due to availability, design, participation and other factors affecting success of a program. The rules should not set up such rigidity that a utility would be penalized for events outside of its control.

Timing of Setting the Conservation Target: In WAC 480-109-010(4)(b), the Utilities proposed rule language that would allow the Commission to conduct an expedited adjudicative proceeding to establish the ten year conservation potential target and biennial target. The intent behind this proposal was simply that a utility would be able to know its target by January 1 based on its October 1 report. Further, PacifiCorp supports rule language that the Commission would

Leedom v. Kyne, 358 U.S. 184 (1958) (striking down an NLRB bargaining unit that contained professional employees when the statute explicitly prohibited the inclusion of such employees in bargaining units).

[20] It should be noted that the Act also contains a severability provision that may come into play in the event the Commission is unable to resolve the Commerce Clause and NAFTA issues satisfactorily. Section 10 of the Act provides that "[i]f any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other person or circumstances is not affected." RCW 19.285.901. Given this severability provision, in the event a court determines that the Act violates the Commerce Clause or NAFTA due to the restrictions placed on out-of-region renewable facilities, these restrictions could be eliminated and the remainder of the act could continue to be implemented and enforced.

issue a decision approving the ten year and biennial conservation targets as part of its existing process and includes proposed rule language in the attached herein in WAC 480-109-010(4)(b).

WAC 480-109-020 Renewable Resources

PacifiCorp's electric generation portfolio already contains a significant percentage of renewable energy. Historically, this renewable energy has been in the form of hydro-electric generation, which the Act does not consider an eligible renewable resource. However, even before the passage of the Act, PacifiCorp has been adding other cost-effective renewable energy to its portfolio that is considered to be an eligible renewable resource. As a result, PacifiCorp does not anticipate significant difficulty in complying with the requirements of the Act, but to do so it must be able to understand what those requirements are.

It is a basic rule of fundamental fairness, and the underpinning of American jurisprudence, that a person subject to a legal requirement or proscription be fairly apprised of the requirement or proscription. From the discussion at the June 26, 2007 workshop, it is apparent that critical provisions of the Act lack the clarity necessary to apprise those subject to it of its requirements. Efficient and successful implementation of the public policy embodied within the Act necessitates clarification of these ambiguities.

The Commission has the Authority and the Responsibility to Clarify Statutory Ambiguities: The Commission, as the body charged with promulgating rules to implement the RPS, must do so in a manner that gives effect to the law's intent.[21] If a statute lends itself to more than one reasonable interpretation, then the Commission must employ principles of statutory construction.[22]

The Commission must give meaning and effect to each provision of the statute, taking into consideration the statute as a whole.[23] The Commission should avoid any interpretation that results in unlikely, absurd or strained results.[24] The Commission should favor an interpretation consistent with the spirit or purpose of the statute over a literal reading that renders the statute

[21] *Nationscapital Mortgage Corporation v. State of Washington Department of Financial Institutions*, 137 P.3d 78, 85 (Wash.App. Div 2, 2006).
[22] *Id.* at 86. Principles of statutory construction apply to all statutes, rules, regulations, etc. *Washington Cedar & Supply Company, Inc., v. State of Washington Department. of Labor and Industries,* 154 P.3d at 287, 290 (Wash. App. Div. 2. 2007).
[23] *Wachovia SBA Lending v. Kraft*, 158 P.3d 1271, 1274 (Wash.App. Div. 2, 2007).
[24] *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P.3d 655, 663 (Wash. 2002).

ineffective.[25] The Commission's goal should be to achieve a harmonious total statutory scheme and avoid conflicts between different provisions.[26]

Agencies charged with the administration and enforcement of a statute may interpret ambiguities within the statutory language through the rulemaking process.[27] Administrative rules may "fill in the gaps" in legislation if the rules are necessary to effectuate the general statutory scheme.[28] Administrative rules adopted pursuant to a legislative grant of authority are presumed valid and should be upheld on review if the rules are reasonably consistent with the statute being implemented.[29]

Courts reviewing an agency's rulemaking order afford the decision great deference.[30] Courts commonly overturn agency rulemaking decisions if those decisions violate the constitution or are arbitrary and capricious.[31] However, when an agency administers a special field of law and possesses quasi-judicial powers because of that expertise, the courts give substantial weight to the agency's statutory interpretation.[32] Courts give substantial deference on complex and technical factual matters, especially those at the heart of the agency's expertise.[33]

The Initial Year in Which Compliance Will be Required, and the Associated Impact Upon the Meaning of the Term "Year" as Used Throughout the Act Must be Clarified by the Commission: The most critical clarification the Commission can bring to the Act – and perhaps the most pervasive – is to specify the first year for which compliance will be required under RCW 19.285.040(2)(a). Subsections (2)(a)(i) through (iii) specify the annual targets as follows:

(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.

[25] *Nationscapital Mortg. Corp. v. State Dept. of Financial Institutions*, 137 P.3d at 86.
[26] *Id.*
[27] *Edelman v. State of Washington ex rel. Public Disclosure Commission*, 99 P.3d 386, 392 (Wash., 2004).
[28] *Green River Community College, District No. 10 v. Higher Education Personnel Board*, 622 P.2d 826, 829 (Wash., 1980).
[29] *Washington Cedar v. State Dept. of Labor*, 154 P.3d at 290.
[30] *Netversant Wireless Systems v. Washington State Department of Labor & Industries*, 138 P.3d 161,165 (Wash.App. Div 1, 2006).
[31] *Id*; RCW 34.05.570(3).
[32] *Washington Cedar v. State Dept. of Labor*, 154 P.3d at 290.
[33] *Nationscapital Mortg. Corp. v. State Dept. of Financial Institutions*, 137 P.3d at 86.

The reference in all three subsections to a single day in time, January 1, in relation to an "annual" target is obviously inapt. It is also at odds with the definitions of "load" and "year". The term "load" is defined in RCW 19.285.030(12) as a measurement over a year in time. The term "year" is defined in RCW 19.285.030(20) as a twelve-month period commencing January 1 and ending December 31.

RNP, the Coalition and NEEC attempt to reconcile this statutory conundrum by contending that the "year" for which "load" is to be measured for the purpose of the initial period of compliance under Subsection (2)(a)(i) is the twelve-month period January 1, 2011 through December 31, 2011. In other words, according to these groups, the first year of compliance is 2011, not 2012. While that is a plausible interpretation, it creates cascading interpretational problems. Examples include the following:

- It is a basic rule of statutory construction that identical words or phrases within a statute are to be interpreted to have the same meaning. Therefore, if the phrase "by January 1, 2012" in Subsection (2)(a)(i) actually refers to the year 2011, then the references in Subsections (2)(a)(ii) and (iii) to January 1, 2016 and January 1, 2020 must necessarily mean the years 2015 and 2019, respectively. But, that interpretation would mean that a utility would have two different targets applicable in 2015 [i.e., 3% under Subsection (2)(a)(i) and 9% under Subsection (2)(a)(ii)] and 2019 [i.e., 9% under Subsection (2)(a)(ii) and 15% under Subsection (2)(a)(iii)]. That result is not logical.
- If the phrase "by January 1, 2012" in Subsection (2)(a)(i) actually refers to the year 2011, then what is the "most recently completed year" for measuring load under RCW 19.285.030(12)?
- What are the "previous two years" for the purpose of averaging load to measure against the target under RCW 19.285.040(2)(c)? For example, would it be logical that 2011 is both a compliance year and also one of two "previous" years for measuring the 2011 target?
- What are the "previous three years" and "that year" for the purposes of RCW 19.285.040(2)(d)(i) and (iii), respectively?
- What are the "given year", "preceding year", and "subsequent year" for the purposes of RCW 19.285.040(2)(e)?
- What are the "preceding year" and "prior two years" for the purposes of RCW 19.285.070?

Whether the first year of compliance is 2012 as was represented in the referenda materials or 2011 as is now being suggested by RNP, the Coalition and NEEC, PacifiCorp is entitled to know which year it is and how that will impact the interpretation of other terms in the statute. PacifiCorp will comply with what is required but needs to understand the requirements with which it is to comply.

A statute, regulation or rule is unconstitutionally vague if framed in terms so vague that persons of "common intelligence must necessarily guess at its meaning and differ as to its application."[34] While a regulation may not be considered unconstitutionally vague if a person cannot predict with absolute certainty if certain conduct would be prohibited, the vagueness doctrine requires that citizens receive fair notice as to what conduct is proscribed, and to prevent the law from being arbitrarily enforced.[35] Fair notice is measured by common practice and understanding.[36]

Having assured the Commission that PacifiCorp will comply with the Act and associated Commission rules, it should be apparent that certain interpretations will create more compliance difficulties than other interpretations. For example, if 2011 is interpreted to be the first year of compliance as contended by RNP, the Coalition and NEEC, and the "previous two years" for the purpose of measuring the target under RCW 19.285.040(2)(c) are interpreted to be 2010 and 2011, it should be obvious that neither 2010 nor 2011 actual loads would have been known at the beginning of the compliance year. Indeed, actual 2011 loads will not be known until well after the compliance year is over.[37] This creates compliance risk; compliance risk creates an incentive to avoid penalties by over-complying; over-compliance increases the risk to customers that the utility will be forced into actions that are not cost-effective.

Other Proposed Rules Proposed by RNP, the Coalition and NEEC Render the Legislation Ineffective and Produce Strained Results: PacifiCorp strongly disagrees with the comments and proposed draft rules filed by RNP, the Coalition and NEEC and urges the Commission to reject their proposals.

RNP, the Coalition and NEEC would impose reporting and accountability requirements not contemplated by the statute. They would require a utility to demonstrate compliance with the

[34] *Haley, M.D. v. Medical Disciplinary Board,* 818 P.2d 1062, 1073 (Wash. 1991).
[35] *Id. at 1072-1073.*
[36] *Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. Washington State Human Rights Commission,* 557 P.2d 307, 310 (Wash. 1977).
[37] The process of acquiring actual load for the Washington service territory involves a robust process of collecting and testing data such that actual annual load data is not available until approximately 60 days after the end of the calendar year. At the end of each month, PacifiCorp assembles data from as many sources as possible for each of the available metering points. Meters are read on pre-established billing cycles. There is a natural lag between when usage occurs and the date that the meter is read and this cannot be expedited without replacement of the metering technology. Data for a particular metering point could be derived from a number of available data collection systems such as EnVision, PI, MV90, counterparties, billing invoices, and others. Once the data is gathered, data for each meter point is compared against the different data sources. Differences are investigated for possible meter error or abnormalities. Actual loads are then developed for individual areas, or load "bubbles" within Washington to calculate actual Washington jurisdictional load for the year. This process takes approximately two months to get final data at the end of the calendar year. Therefore actual load for November and December 2011 cannot be known by January 1, 2012.

RPS target for each year by June 1 of that year. Even under the RNP, the Coalition and NEEC interpretation of the targets, this is nonsensical. Assuming a utility provides "sufficient indicia" of ownership of, or contractual rights to, eligible renewable resources and/or RECs, it is entirely possible that a utility may not receive everything it contracts for. The statute allows a utility to meet the targets with RECs produced during the year, the preceding year, or the subsequent year. A utility will not know its shortfall, if any, for the compliance year until the next year.

Additionally, the statute expressly states that, beginning June 1, 2012, a utility must file a report to show its *progress* in meeting the targets.[38] The rules proposed by RNP, the Coalition and NEEC would also impose a penalty based on the June 1, 2012 report. Imposing a penalty for non-compliance without examining the entire year contravenes the statutory language requiring a utility to either pay a penalty for failing to comply with the *annual* renewable energy targets or to be able to demonstrate an alternative form of compliance.[39]

RNP, the Coalition and NEEC would also require a utility to demonstrate in the annual reports, beginning June 1, 2012, that it either chose an alternative compliance path or acquired sufficient eligible resources to meet the annual target from two years previous. Reviewing the RNP, the Coalition and NEEC proposed rules altogether would require a utility to demonstrate compliance with an annual target twice, and be twice subject to penalties for not meeting an annual target. Such a result is clearly not contemplated by the statute. The statute allows for the assessment of a $50/MWh escalating penalty for any shortfall if a utility does not demonstrate that it meets one of the alternative compliance paths.[40] This is an "either/or" proposition. A utility must comply with the annual target, whether through actual acquisition of adequate amounts of eligible resources or through an alternative compliance path or it must pay a penalty for shortfall. The statute does not require a utility to pay a per diem, or other cumulative measure of time, penalty for any annual target shortfall. Rather, it assesses a penalty per megawatt-hour of shortfall, based on the annual target. Nowhere does the statute contemplate multiple instances of assessing a penalty for one annual target. Conversely, the statute does not contemplate multiple instances for a utility to demonstrate compliance with an annual target. This particular provision of the statute is quite clear, leaving no gaps for the Commission to "fill in". RCW 19.285.060 does not say when the penalty would be assessed or applied, only that the Commission will determine compliance with the provisions of this chapter and assess penalties for noncompliance. This interpretation is unreasonable and costly.

The rules proposed by RNP, the Coalition and NEEC contain inconsistencies that render them difficult to implement from a practical perspective. As previously noted, the RNP, the Coalition and NEEC proposed rules would require a utility to have the necessary resources in place by

[38] RCW 19.285.070(1). Emphasis added.
[39] RCW 19.285.060(1) & (2). Emphasis added.
[40] RCW 19.285.060(1) & (2).

December 31, 2011, making 2011 the first compliance year. WAC 480-109-020(4) states, "In meeting the annual targets of this subsection, a utility shall calculate the annual load based on the average of the utility's load for the previous two years." If 2011 is deemed the first year of compliance, and the "previous two years" are deemed to be 2011 and 2010 as urged by RNP, the Coalition and NEEC, the utilities cannot reasonably know with certainty the target by January 1, 2012 when they would be assessed for compliance. This is because, as discussed above, annual load for the year 2011 will not be known by January 1, 2012. The previous two years of load should logically be the two years prior to the compliance year or 2010 and 2009.

The reporting requirement in RCW 19.285.070 states that on or before June 1, 2012 the utility will report on its progress in the "preceding year" in meeting the conservation and renewable targets and that the report will include "the utility's annual load for the prior two years." As noted previously, it is critical for the Commission to define these years in relation to the compliance year. Otherwise, a utility will not know its target January 1 for which it is being assessed for compliance with penalties at stake. An analogy of this situation would be if all the speed signs were removed from the roadways in the state of Washington and motorists had to drive at the speed they estimated would be required. If they guess wrong, they get pulled over and incur a fine. Precision is needed in setting the renewable target when there are penalties at stake.

WAC 480-109-030 Alternatives to the Renewable Resource Requirement

Alternatives to the Renewable Resource Requirement: RNP, the Coalition and NEEC have recommended that the rule language demonstrating an alternative compliance provision with the renewable target be removed from the draft rules based on the presumption that it is highly unlikely an investor-owned utility would satisfy these standards. Specifically, they take issue with the provision if a utility's weather-adjusted load for the previous three years did not increase. PacifiCorp supports the inclusion of sections WAC 480-109-030(1)(a)(i-iii) in the second draft rules. The position of RNP, the Coalition and NEEC on this issue is unsupported and in fact, as written, PacifiCorp would have met the load-based exemption for 2007, demonstrating that it is not as much of an unlikely possibility as they would suggest. Regardless, the statute provides an exception to meeting the renewable resource requirement and does not carve out any special application or inapplication for investor-owned utilities.

Incremental Cost Calculation: The Utilities proposed rule language reflective of the incremental cost calculation language in RCW 19.285.050(1)(b). This proposed language was not included in the second draft rules. However, the Commission rulemaking team indicated at the June 26, 2007 meeting that this may have been an oversight. PacifiCorp hopes this is indeed the case and that the Commission will include the clarifying language in the final draft rules in WAC 480-109-030.

In the same section, the Utilities also proposed rule language to clarify the method by which the cost cap would be calculated. Specifically, what costs would be included in the cap calculation? The proposed rule language included the cost of acquired renewable energy credits, recoverable penalties and other prudently incurred costs in the calculation of the incremental cost cap. These costs should be included in the calculation of the incremental cost cap as a way to ensure that utilities do not have a skewed incentive that could undermine the pursuit of the least cost option for the benefit of their customers.

WAC 480-109-040 Annual Reporting Requirements

Commission Determination of Annual Report: At the June 26, 2007meeting, it was noted by several parties that the draft rules did not include explicit language regarding a Commission decision. There seemed to be general agreement among the parties at the meeting to include rule language of this nature. PacifiCorp supports that addition and proposes language in the attached draft rules in WAC 480-109-040(2)(c).

Customer Notification of Report: PacifiCorp is concerned that the prescriptive language in the proposed rules in WAC 480-109-040(5) could be costly to customers over the long term. This language also goes beyond what is required in the statute. Per RCW 19.285.070, a utility must make the annual report available to customers and notify customers of its availability. PacifiCorp proposes rule language that mimics the Act. This maintains flexibility relating to the manner by which a utility could satisfy the requirement and allows the utility to work with the Commission to ensure the requirement is met in a cost effective and appropriate manner.

Conservation Target Reporting Information: The Utilities' comments included proposed rule language in WAC 480-109-040(1)(a) that clarified that the required expected and actual gross electricity savings from conservation that are reported toward achieving the biennial conservation target are measured using actual program participation levels tracked by each utility. This distinction is necessary to clarify that per unit savings will not be retroactively adjusted for results of program evaluations studies or changes to regionally accepted studies completed after the biennial target is established. This is consistent with existing Commission practices. The proposed clarification is intended to recognize that targets are set with the best information available at that time. As new information on energy savings is developed, it should be used to prospectively establish subsequent targets.

WAC 480-109-050 Administrative Penalties

Definition of "Year": PacifiCorp offers one recommendation to eliminate an ambiguity created in the Commission's draft WAC 480-109-050. The Commission uses Year 1 and Year 2 when referring to annual reports and assessing compliance with the targets of the Act. Utilities must

file annual reports beginning June 1, 2012, with the first report only capturing relevant activities for five months of 2012. The first report that will be filed to capture the activities for all of 2012 will be due June 1, 2013. The first report that will be filed to capture all of the relevant data to assess compliance with the 2012 target will be due June 1, 2014. Because of this, it is difficult to discern to which report "Year 1" and "Year 2" apply. It seems useful to include in the rules a description of how annual reports will be used to assess compliance with the RPS targets. The Commission should consider both defining "Year 1" and "Year 2" or choose other terminology to describe the annual compliance reports in this section of the rules.

WAC 480-109-060 Cost Recovery

Cost Recovery (WAC 480-109-060): RCW 19.285.050(2) requires the Commission to address cost recovery issues. The Utilities proposed the addition of a new section of the rules, WAC 480-109-060, to provide a framework for consideration of cost recovery issues associated with complying with the targets established. The proposed section was broken down into three subsections described below.

Subsection (1) permits a utility to recover in rates all prudently incurred costs associated with complying with the renewable portfolio standard. This provision is in the statute and should be included in the rules.

Subsection (2) allows all prudently incurred costs and offsets to costs to be passed through to customers at the same time. This will provide a matching of the costs and benefits of renewable resources that is equitable and consistent with regulatory principles of matching.

Subsection (3) allows a utility to use deferred accounting costs incurred in connection with acquisitions of eligible renewable resources to meet the renewable energy targets and to later seek recovery of these costs in rates. This proposed subsection appears to be included in the second draft rules with regards to the costs of administrative penalties in WAC 480-109-050(5).

Summary

PacifiCorp appreciates the opportunity to provide these comments and proposed revised rules and found the considerations recommended by the rulemaking team at the June 26, 2007 meeting helpful in focusing this round of comments on the items discussed above. PacifiCorp's goal is to satisfy the requirements established in the Act but to do this it needs to be able to know the targets by which compliance and penalties will be assessed in advance of when the target must be met. Clarification of ambiguities in the statute would be very helpful in the rule language. Additionally, it is PacifiCorp's belief that certain terms need to be defined now such as the definition of "real-time basis without shaping, storage, and integration" and "annual retail revenue requirement" so that a utility can continue to plan its operations to satisfy the targets.

Lastly, the statute appears to provide flexibility in certain areas and PacifiCorp respectfully requests the Commission adopt final rules in the areas discussed herein that preserve such flexibility.

Proposed rule revisions to the second draft rules discussed above are reflected in the attached red-lined version of the draft rules.

Sincerely,

Andrea Kelly

Andrea Kelly
Vice President, Regulation

And

Natalie Hocken
Vice President, General Counsel

cc: Nicolas Garcia
Dick Byers

PacifiCorp's DRAFT
(~~June 15~~July 9, 2007)

ELECTRIC COMPANIES—ACQUISITION OF MINIMUM QUANTITIES OF CONSERVATION AND RENEWABLE ENERGY AS REQUIRED BY THE ENERGY INDEPENDENCE ACT

WAC

WAC 480-109-001 Purpose and scope. (1) The purpose of this chapter is to establish rules that electric utilities will use to comply with the requirements of the Energy Independence Act, RCW 19.285.

WAC 480-109-002 Application of rules. (1) The rules in this chapter apply to any electric utility that is subject to the commission's jurisdiction under RCW 80.04.010 and RCW 80.28.

(2) Any affected person may ask the commission to review the interpretation of these rules by a utility by making an informal complaint under WAC 480-07-910, Informal complaints, or by filing a formal complaint under WAC 480-07-370, Pleading -- General.

(3) No exception from the provisions of any rule in this chapter is permitted without prior written authorization by the commission. Such exceptions may be granted only if consistent with the public interest, the purposes underlying regulation, and applicable statutes. Any deviation from the provisions of any rule in this chapter without prior commission authorization will be subject to penalties as provided by law.

WAC 480-109-003 Exemptions from rules in chapter 480-109 WAC. The commission may grant an exemption from the provisions of any rule in this chapter in the same manner and consistent with the standards and according to the procedures set forth in WAC 480-07-110 (Exemptions from and modifications to commission rules; conflicts involving rules).

WAC 480-109-004 Additional requirements. (1) These rules do not relieve any utility from any of its duties and obligations under the laws of the state of Washington.

(2) The commission retains its authority to impose additional or different requirements on any utility in appropriate circumstances, consistent with the requirements of law.

WAC 480-109-006 Severability. If any provision of this chapter or its application to any person or circumstance is held invalid, the remainder of the chapter or the application of the provision to other persons or circumstances is not affected.

WAC 480-109-007 Definitions. (1) "Annual retail revenue requirement" means the ~~normalized retail~~total revenue ~~supported by~~ the commission authorizes a utility an opportunity to recover in Washington rates pursuant to a general rate proceeding or other general rate revision. ~~utility's currently approved tariffs.~~

(2) "Commission" means the Washington utilities and transportation commission.

(3) "Conservation" means any reduction in electric power consumption resulting from increases in the efficiency of energy use, production, or distribution.

(4) "Cost-effective" has the same meaning as defined in RCW 80.52.030.

(5) "Council" means the ~~Pacific Northwest electric power and conservation council.~~ Washington state apprenticeship and training council with the department of labor and industries.

(6) "Conservation Council" means the Pacific Northwest Electric Power and Conservation Council.

(7)"Customer" means a person or entity that purchases electricity for ultimate consumption and not for resale.

(~~7~~8) "Department" means the department of community, trade, and economic development or its successor.

(~~8~~9) "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.

(~~9~~10) "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.

(~~10~~11) "High-efficiency cogeneration" means a cogeneration facility with a useful thermal output of no less than 33% of the total energy output, under normal operating conditions. Electrical output will be calculated as the kwh output of the facility over a period of time, converted to BTUs using the conversion factor of 3413 BTUs/kwh. Total energy output shall be calculating by summing all useful energy outputs of the cogeneration facility over the same period of time expressed in BTU units.

(~~11~~12) "Integrated resource plan" or "IRP" means the filing made every two years by an electric utility in accordance with WAC 480-100-238, Integrated Resource Planning.

(~~12~~13) "Load" means the amount of kilowatt-hours of electricity delivered in the most recently completed year by a qualifying utility to its Washington retail customers.

(~~13~~14) "Nonpower attributes" means all environmentally related characteristics, exclusive of energy, capacity reliability, and other electrical power service attributes, that are associated with the generation of electricity from a renewable resource, including but not limited to the facility's fuel type, geographic location, vintage, qualification as an eligible renewable resource, and avoided emissions of pollutants to the air, soil, or water, and avoided emissions of carbon dioxide and other greenhouse gases.

(~~14~~15) "Pro Rata" means the calculation used to establish a minimum level for a conservation target based on a utility's projected ten year conservation potential.

(~~15~~16) "Pacific Northwest" has the same meaning as defined for the Bonneville power administration in section 3 of the Pacific Northwest electric power planning and conservation act (94 Stat. 2698; 16 U.S.C. Sec. 839a).

(17) Energy delivered on a "Real-Time Basis Without Shaping, Storage, or Integration Services" means energy delivered in the time period following the time for which pre-schedules are finalized pursuant to industry practice.

(186) "Request for proposal" or "RFP" means the documents describing an electric utility's solicitation of bids for delivering electric capacity, energy, or capacity and energy, or conservation

(197) "Renewable energy credit" means a tradable certificate of proof of at least one megawatt-hour of an eligible renewable resource where the generation facility is not powered by fresh water, the certificate includes all of the nonpower attributes associated with that one megawatt-hour of electricity, and the certificate is verified by a renewable energy credit tracking system selected by the department.

(1208) "Renewable resource" means: (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 byproduct from paper production; (iii) wood from old growth forests; or (iv) municipal solid waste.

(2119) "Utility" means an electrical company that is subject to the commission's jurisdiction under RCW 80.04.010 and chapter 80.28 RCW.

(220) "Year" means the twelve-month period commencing January 1st and ending December 31st.

WAC 480-109-010 Conservation rResources. (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 Conservation Council in its most recent regional power plan. A utility may, with full documentation on the rationale for any modification, alter

the Conservation Council's methodologies to better fit the attributes and characteristics of its service territory.

(ii) The utility's proportionate share, developed as a percentage of its retail sales, of the Conservation 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 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 the Conservation Council's plan or the utility's IRP and acquisition process 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 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 used in the utility's most recent IRP or the Conservation Council's power plan.

(4) Commission staff and other interested parties may file written comments regarding a utility's projected achievable conservation potential or its biennial conservation target 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 is warranted of a utility's projected ten year conservation potential or biennial conservation target. If the commission determines that additional

review is needed, the commission will establish an adjudicative proceeding or other process to fully consider appropriate revisions

(5) The Commission will issue a decision determining the ten year achievable conservation potential and biennial conservation target before the beginning of the first year of each biennium.~~.~~

WAC 480-109-020 Renewable Resources. (1) Each utility shall use eligible renewable resources, or acquire equivalent renewable energy credits, or a combination of both, to meet the following annual targets.

(a) At least three percent of its load by January 1, 2012, and each year thereafter through December 31, 2015;

(b) At least nine percent of its load by January 1, 2016, and each year thereafter through December 31, 2019; and

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

(2) A renewable energy credit may be used to comply with the annual renewable resource target if it was produced during that target year, the preceding year or the subsequent year.

(3) A renewable resource within the Pacific Northwest may receive integration, shaping, storage or other services from sources outside of the Pacific Northwest and remain eligible to count towards a utility's renewable resource target.

(4) In meeting the annual targets of this subsection, a utility shall calculate its annual load based on the average of the utility's load for the previous two years.

WAC 480-109-030 Alternatives to the renewable resource requirement. (1) Instead of meeting its annual renewable resource target in WAC 480-109-020, a utility may make one of three demonstrations.

(a) A utility may demonstrate that:

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

(ii) All new or renewed ownership or purchases of electricity from non-renewable resources other than daily spot purchases 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.

(b) A utility may invest at least four percent of its total annual retail revenue requirement on the incremental costs of eligible renewable resources and/or the cost of renewable energy credits. If a utility elects to invest more than four percent, the incremental cost above the cost of complying with this chapter will be recoverable

pursuant to a prudence review. Eligible incremental costs shall be calculated at the time the utility commits to acquire the renewable resource. For purposes of meeting the incremental costs, a utility may include:

(i) the levelized incremental costs defined as the levelized difference between (a) the delivered portfolio cost with the eligible renewable resource and (b) the delivered portfolio cost with a reasonably available nonrenewable resource. The portfolio analysis used will be reasonably consistent with principles used in the utility's resource planning and acquisition analyses;

(ii) the cost of acquired renewable energy credits;

(iii) penalty payments as described in WAC 480-109-050(5) when the utility demonstrates the cost of the penalty is prudently incurred, and

(iv) all other prudently incurred costs.

(c) A utility may demonstrate that events beyond its reasonable control that could not have been reasonably anticipated or ameliorated prevented it from meeting the renewable energy target. Such 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.

WAC 480-109-040 Annual reporting requirements. (1) On or before June 1, 2012, and annually thereafter, each utility must file a report with the commission and the Department regarding its progress in meeting its conservation and renewable resource targets during the preceding year.

(a) This report must include the conservation target for that year, the expected and actual gross electricity savings from conservation and all expenditures made to acquire conservation. Savings will be measured using actual program participation levels tracked by each utility, but that per unit savings will not be retroactively adjusted for the results of program evaluation studies or changes to regionally accepted evaluations studies completed after the biennial target was set.

(i) The report may include electricity savings from any high efficiency cogeneration operating within the utility's service area during the preceding year. The electricity savings reported for each high efficiency cogeneration facility shall be the amount of energy consumption avoided by the sequential production of electricity and useful thermal energy from a common fuel source.

(b) This report must include the utility's annual load for the prior two years, the total number of megawatt-hours from renewable resources or renewable resource credits the utility needs to meet its annual renewable energy target, the ~~amount (in~~number of

megawatt-hours~~)~~ and cost of each type of eligible renewable resource acquired, the amount and cost of renewable energy credits acquired, the type and cost (per megawatt-hour) of the least-cost conventional resource available to the utility, the incremental cost 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 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.

(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) Commission staff and other interested parties may file written comments regarding 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 issue a decision describing its determination on the utility's annual report and compliance with the conservation and renewable energy targets.

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

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

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

WAC 480-109-050 Administrative penalties. (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) A utility shall pay an administrative penalty in the amount of fifty dollars for each megawatt-hour of shortfall 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. 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) Payment of administrative penalties:

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

(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) A utility that pays an administrative penalty under subsection (3), 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) 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. 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 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.

WAC 480-109-060 Cost Recovery. (1) A utility shall be permitted to recover all prudently incurred costs associated with compliance with the renewable portfolio standard, including the costs of purchasing energy from eligible renewable resources, owning eligible renewable resources, including but not limited to costs related to development, purchase of rights, land or equipment and capital construction, purchasing renewable energy credits, interconnection costs, costs associated with using physical or financial assets to integrate, firm or shape eligible renewable energy sources to meet retail electricity needs, and other costs associated with transmission and delivery of eligible renewable resources to retail electricity consumers.

(2) The commission shall permit all prudently incurred costs (e.g. capital costs, power purchase costs, fixed costs, variable costs) and offsets to costs (e.g., production tax credits) to be passed through to customers at the same time.

(3) A utility may account for and defer for later consideration by the commission costs incurred in connection with acquisitions of eligible renewable resources to meet the renewable energy standard, including operating and maintenance costs, depreciation, taxes, and cost of invested capital.