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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 Energy Independence Act Comments of Puget Sound Energy, Inc.

Dear Ms. Washburn:

In response to June 15, 2007 Notice of Opportunity to File Written Comments, Puget Sound Energy, Inc. ("PSE or the Company") provides the following written comments on the June 15 Draft Rules to implement the Energy Independence Act, RCW 19.285 (the "Act"). In addition to the comments contained herein, PSE is filing herewith proposed revisions to the June 15 Draft Rules.

Definitions: WAC 480-109-007

(1) We have revised the definition for "Annual Retail Revenue Requirement." This proposed definition reflects the fact that an "annual retail revenue requirement" has no defined meaning other than in the context of a general rate case or a power cost only rate case. The fact that the term "revenue requirement" was used in the Act indicates an intention to tie calculations for determining the 1% cap in RCW 19.285.040(2)(d) and the 4% cap in RCW 19.285.050(1)(a) to the annual retail revenue requirement that was set each utility's most recent rate proceeding. The definition contained in the June 15 Draft Rules does not adequately tie "annual retail revenue requirement" to the most recent rate proceeding.

(10) We added a definition for "Gross electricity savings." This phrase is found in WAC 480-109-040(1)(a). The definition is intended to make clear that, for purposes of reporting on progress in meeting conservation targets, savings will be measured using actual program

participation levels tracked by each utility, and per unit savings will not be retroactively adjusted for the results of program evaluation studies or changes to regionally accepted deemed evaluation studies completed after the two-year target was set.

(13) While PSE has proposed no changes to the definition of "Load", it should be noted that PSE's annual calculation of load will not include the transported energy for its retail wheeling customers.

(17) We added a definition for the phrase "real time basis without shaping, storage, or integration services" that is consistent with the industry definition. 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”, with regard to renewable resources, are in constant flux, at the time the Act was drafted and passed, these terms were best defined by integration products offered by the Bonneville Power Administration and a few utilities, where renewable energy was delivered to the purchasing utility "in block" and in time-frames of a week, and up to a month, following the actual generation at the facility. The proposed definition represents a compromise to bridge differing views of how to define real time and associated services. The compromise language restricts the utilities’ ability to cost-effectively import renewable energy from outside the Region, yet it does provide slightly more flexibility than the strict interpretation originally promoted by the sponsors. PSE believes that there is a benefit in adopting a broader definition of "real time" to allow more regional renewable resources to be brought into PSE's service territory. Adopting a broad definition may deter challenges to this provision of the Act that have been threatened by other stakeholders, based on alleged violations of the Commerce Clause or NAFTA. It is important for the Commission to define this now, so that PSE may take into consideration this requirement prior to issuing its upcoming Request for Proposals ("RFP").

WAC 480-109-010 Conservation resources.

Timing of Reports of Ten Year Achievable Potential and Biennial Conservation Target (WAC 480-109-010 (1) – (3): There are inconsistencies between the June 15 Draft Rules and the Act in terms of when the ten year conservation potential and the biennial acquisition target must be identified, and when reports of these must be filed. The Act states that "*by January 1*, 2010," a utility must identify its ten-year achievable cost-effective conservation potential through 2019, and "*[b]eginning January 2010"* each qualifying utility shall establish and make available it biennial acquisition target. *See* RCW 19.285.040(1)(a),(b) (emphasis added). In contrast, the June 15 Draft Rules state that "[b]eginning January 1, 2010, a utility must project its cumulative ten year conservation potential," and "[b]y January 1, 2010 each utility must establish its biennial conservation target." *See* WAC 480-109-010(1)(a), (2) (emphasis added). Further, the June 15 Draft Rules require each utility to file a report identifying its ten year achievable conservation potential and its biennial conservation target *[o]n or before October 1, 2009, see* WAC 480-109-

010(3), which would require the report to be filed before the statutory deadline for identifying the targets. PSE's draft rules correct for this inconsistency by making the timing for identification of ten-year achievable potential and the biennial conservation target consistent with the Act, and requiring the report to be filed on January 31, 2010.

Methods for expedient action by commission (WAC 480-109-010(4)): This clarifies that the Commission may approve a utility's two-year target as filed if it is at least 19% of the ten-year conservation potential, or the Commission may hear additional comments before making a decision. Nothing in this rule would preclude utilities from filing, or the Commission from approving, a two-year target that is less than 19% of its ten-year potential if that is the amount demonstrated to be cost-effective, reliable, and feasible to achieve in the biennial target period. The purpose for this proposed rule language is to allow the Commission an expedient path for review of a utility's biennial conservation target if the biennial target falls within certain parameters.

If the Commission rejects this opportunity for expedited review, then, in the alternative, PSE supports section 010(1)(b)and (2)(b) of the June 15 Draft Rules regarding conservation potential and the establishment of the biennial target based on the pro rata share of the ten-year potential, coupled with the definition of "pro rata" in section 007(14).

Deadband (WAC 480-109-010(5)): In their May 18 comments to the Commission on the first draft rule, the Investor Owned Utilities ("IOUs") and the NW Energy Coalition/Northwest Energy Efficiency Council/Renewable Energy Project each submitted revised rule language that would allow compliance with the conservation target based on a "deadband" range. This language proposed by the IOUs and supported herein by PSE provides that "[a] utility shall be considered in compliance if it achieves energy savings in a range of 90% to 100% from the biennial target established." The June 15 Draft Rules are silent on the deadband issue. PSE believes that allowing some flexibility around the target is good policy and is consistent with past Commission practices. The Act recognizes that the Commission may follow its past practices in reviewing and approving conservation targets. *See* RCW 19.285.040. PSE is currently allowed a deadband around its conservation targets for the purposes of assessing administrative penalties and (for electric efficiency) incentives. *See WUTC v. Puget Sound Energy, Inc.* Docket Nos. UE-060266 and UG-060267 Order 08 (Jan. 5. 2007) at 49-55. The rationale for establishing a deadband is eloquently summed up by Joelle Steward of Commission Staff in testimony admitted into evidence in PSE's 2006 General Rate Case. *Id.*, (Exhibit No 561(JRS-1T) at 27):

"Projecting savings on a program level is an imperfect science: assumptions are made on such things as the rate of customer replacement or adoption of a measure. Factors outside of the Company's control, such as the economy, influence whether a customer will invest in a more energy-efficient appliance or undertake a renovation to upgrade lighting, for example, even with incentives from the utility. Therefore,

I do not believe we should penalize the Company for not perfectly estimating the savings it could achieve in a given year. A 10 percent deadband is a reasonable cushion. It recognizes the difficulty of making a projection but still encourages the Company to adapt or modify its programs to achieve results, as conditions warrant."

This rationale applies to the determination of the ten-year conservation potential as well as the establishment of the target. The conservation potential is, by definition, an estimated projection of achievable future savings from energy efficiency. As with any projection of complex markets, the development of ten-year conservation potential is an imperfect science, based on assumptions about the future. This projection is based on recognized industry standards and practices as well as the best information available at that time, but is still subject to some uncertainty. A deadband range around the determination of compliance with the target mitigates the uncertainty inherent in the process of determining achievable potential as establishing a biennial target, while also setting limits around the amount of flexibility that a utility is allowed.

If the Commission rejects this language allowing a deadband and instead determines that it is appropriate to set the compliance threshold at 100% of the target, then we would encourage the Commission to allow for some flexibility in setting the ten-year conservation potential and biennial target. One way of doing this is to allow the ten-year potential and the biennial target to be established as a range rather than a single point estimate. We see nothing in the June 15 Draft Rules or the Act that prohibits the setting of a target range.

WAC 480-109-020 Renewable resources.

Calendar Year Targets (WAC 480-109-020(1): The rules must provide additional clarity as to the dates by which the renewable targets must be met and the method for meeting the statutory requirements. PSE's proposed revisions to the rules provide this clarify and are consistent with the intent of the Act.

The Act speaks to *annual* requirements and defines a year as a *calendar year*. *See* RCW 19.285.030(20) (defining a year as a calendar year); RCW 19.285.040(2), (3) (describing compliance with the targets for any given *year*); *see also* RCW 19.285.010 (requiring utilities to obtain 15% of their electricity from renewable resources by 2020). Thus, the stated annual target for a given year is applicable for that calendar year. For example, by the calendar year January 1 through December 31 2016, nine percent of a utility's load must be met with renewable resources. To meet the load for that calendar year a utility may rely on RECs that were generated during the target year, the year preceding the target year, or the year after the target year. The RECs may be generated from resources the Company owns or they may be acquired. Because the Act provides for this three-year compliance time-period, a utility's compliance with calendar year 2016 targets will not be known until the end of 2017, and will be fully reported in the June 1, 2018 annual report, as discussed in more detail below.

The Commission should reject the "two-gate" system that has been proposed by certain stakeholders because (1) it is based on a strained interpretation of the Act, (2) it is unnecessarily complicated, and (3) it includes features that are inconsistent with the spirit of the law.

One problem with this two-gate system is that it draws an improper distinction between RECs generated by an eligible renewable resource owned by a utility and RECs generated by an eligible renewable resource not owned by the utility. The law does not treat a REC differently just because it may be generated by a resource owned by a utility. Rather, the Act allows use of RECs from the target year, the preceding year and the subsequent year, in order to meet the renewable energy requirement regardless of whether such RECs are generated from a resource owned by a utility. *See* RCW 19.285.040(2)(3). The Commission cannot enact a rule that takes away a utility's right to use a REC produced by an eligible renewable resource in a target year, a preceding year or a subsequent year—based on whether or not the REC is generated from a renewable resource that is owned by the utility.

The "two-gate system is also inconsistent with the language of the Act and is overly complicated because, for each target year it sets two opportunities for penalties to be imposed—once at the beginning of the target year and a second time at the close of the year subsequent to the target year. There is nothing in the Act supporting this double imposition of fines. Rather, as discussed above, the Act allows a utility to use RECs generated during the target year, the preceding year and the subsequent year, and to apply these RECs to the renewable energy requirement. It violates basic legal principles to allow a "double-jeopardy" system for imposition of fines—particularly when the Act does not expressly (or implicitly) allow for a utility to be subjected to fines at two different times for each target year. The Commission should reject this overly complicated system for determining compliance, which is not grounded in the language or the spirit of the Act.

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

Determination of incremental costs on which the four percent cost cap is based: PSE believes it is helpful to clarify how the "incremental costs" are defined and calculated for application of the 4% cost cap. PSE's proposed language reflects the current practice of analyzing potential resources based on their impact on the utility's portfolio, rather than attempting to analyze such resources in a vacuum. As stated in the rule, the portfolio analysis will be reasonably consistent with principles used in the utility's resource planning and acquisition analyses.

Further, this section clarifies that RECs, recoverable penalties and other prudently incurred costs may be included 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 customers benefit from least cost options

Although the June 15 Draft Rules are not inconsistent with the above interpretation, we think it would add clarity to include this express language in the rules.

WAC 480-109-040 Annual reporting requirements.

PSE proposes to replace subsection (5) with the language of the Act. Subsection (5) imposes requirements beyond what is required by the Act. The Act requires a utility to notify its customers in published form within three months of incurring a penalty. "Published form" includes many forms other than those specified in subsection (5) including bill print messages and newspaper notices.

WAC 480-109-050 Administrative penalties.

Clarification of timing for demonstrating compliance with targets (WAC 480-109-050(1)(a), (b)): PSE's proposed language clarifies the dates of the annual progress reports by which a utility must begin to show compliance with conservation and renewable energy targets or face a penalty. The Act requires the first *progress* report (for conservation and renewable energy) to be filed on or before June 1, 2012. *See* RCW 19.285.070(1). In this progress report, a utility will be required to demonstrate compliance with its first biennial pro rata share of the ten-year conservation target or face a penalty. However, the 2012 progress report will only measure a utility's *progress* towards the renewable energy target given that (1) the utility will be less than halfway through its first renewable energy target year, and (2) the utility may count RECs from the year preceding and subsequent to its target year to meet that year's renewable energy requirement. Thus, in addition to reporting on its compliance with the biennial conservation target, the progress report filed on or before June 1, 2012 will include important factors such as the load for the preceding two years on which the renewable energy target will be based, progress toward acquiring renewable resources and RECs, etc., but it will not include a determination of whether the 2012 renewable energy target has been met (unless the utility happens to have met the target at that point in time). The "year 1 annual report" referenced in WAC 480-109-050(3)(b) will be due after the close of calendar year 2012 (on or before June 1, 2013), and that progress report will determine whether the utility fell short in meeting its renewable energy target in the target year. However, the "year 2 annual report"—that is the annual progress report by which a utility must demonstrate compliance with the 2012 target or elect one of the alternate methods of compliance in order to avoid administrative penalties—is the annual progress report due on or before June 1, 2014.

This interpretation of the timing of the annual progress reports gives meaning to the language requiring that a utility report on its *progress* toward meeting annual targets and also gives meaning to the language of the Act that allows a utility to rely on RECs generated in the year preceding and subsequent to the target year to meet its renewable energy target. *See* RCW 19.285.040(2)(3).

Recovery of Penalties in Rates (WAC 480-109-050(4)(a): PSE proposes adding a subsection that expressly allows a utility to recover in rates any administrative penalties imposed if the utility can demonstrate the cost of the administrative penalty is less than the prevailing cost of renewable energy credits or eligible renewable resources. This would serve as a buffer should conditions be such that paying the penalty would be the least cost option for meeting the targets and would prevent ratepayers from being unduly burdened with excessive costs. While we believe the express language of the Act allows such recovery, we think it is helpful to expressly clarify in the rules that this is a basis for a utility to recover administrative penalties in rates.

Mitigation of penalties for failure to meet biennial target (WAC 480-109-050(6): This proposed addition allows utilities to seek mitigation of administrative penalties if events beyond the utilities' control prevent them from meeting their conservation targets. The intent is to include an express provision allowing such mitigation, similar to the express "force majeure" language in RCW 19.285.040(2)(i) that applies to failure to meet renewable energy targets. The Commission has previously approved the opportunity for mitigation of administrative penalties for failure to meet conservation targets when events outside the utility's control prevent it from meeting its target. For example, PSE has been subject to administrative penalties for failure to meet its conservation targets since 2002, but the Commission has also approved a provision that allows relief from penalty payments for reasons beyond the Company's control. *See WUTC v. Puget Sound Energy, Inc.*, Docket Nos. UE-011570 and UG-011571, Twelfth Supplemental Order (June 20, 2002) Appendix A , Exhibit F (Settlement Stipulation for Electric and Common Issues) ¶ 42.. Additionally, the Commission allows utilities to timely file a mitigation application for relief of penalties in other situations when the penalty is due to unusual or exceptional circumstances for which the utility's level of preparedness and response was reasonable. *See In re Puget Sound Power & Light*, WUTC Docket Nos. UE-951270 and UE-960195, Fourteenth Supplemental Order Accepting Stipulation and Approving Merger at 33 (Feb. 1997) (involving failure to meet service quality benchmarks); *see also In Re Application of U S WEST, Inc*, Docket No. UT-991358, Twelfth Supplemental Order Denying Petition for Modification of Ninth Supplemental Order and Mitigation of Credit Amount at 3 (March 2002) (considering petition for mitigation of service quality performance measures); *In re Penalty Assessment Against Tel West Communications, LLC*, WUTC Docket No. UT-040572 at note 3 (Sept. 2004) (stating that the APA and Commission rules allow for a "brief adjudication" to consider petitions for mitigation).

It is wrong to conclude that mitigation of conservation penalties is not allowed because the Act does not expressly include a "force majeure" provision for conservation, while it does include such express language for renewables. The Act treats conservation targets differently from renewable energy targets because the Commission has been effectively regulating conservation programs for several years. RCW 19.285.040 recognizes that the Commission has been reviewing and approving utilities' conservation programs prior to the Act, and allows the Commission to rely on its standard practice for review and approval of conservation targets. As

discussed above, one such standard practice has been that a utility could seek mitigation from its conservation target by demonstrating that a significant even beyond the utility's control significantly impacted customer participation in its conservation programs, and this standard practice should be codified in the rules to avoid confusion.

In addition to being consistent with existing Commission practice, it is good policy to allow utilities to seek such mitigation of penalties when outside events prevent utilities from meeting conservation goals. It is unfair to a utility's customers to require a utility to pay a penalty for failure to meet a conservation target and then seek recovery of that penalty in rates, for a circumstance where, in the case of renewable resources, no penalty would be assessed at all.

Although we believe that PSE has the ability to file a petition for mitigation of penalties relating to the failure to meet its conservation target even without PSE's proposed language, we believe it will lessen confusion in the future if the Commission expressly states in these rules that such mitigation is permitted.

Incentives: The Act provides that the Commission may consider providing positive incentives for an investor-owned utility for both conservation and renewable energy. RCW 19.285.060(4). Further, the Act provides that the Commission may rely on its standard practice for review and approval of utility conservation targets. Incentives should be handled on a case by case basis, and nothing in the Act or these rules should preclude the Commission from authorizing incentives in the same manner that incentives have been authorized in the past for conservation; nor should the Act or the rules preclude the Commission from the creative use of incentives to encourage conservation and renewable energy programs by utilities.

WAC 480-109-060 Cost Recovery.

RCW 19.285.050(2) entitles a utility to recover its prudently incurred costs associated with complying with this Act. It further requires the Commission to address cost recovery issues. Cost recovery is an important issue for utilities and their customers. It seems reasonable that the rules implementing the Act include a section addressing "Cost Recovery" as PSE has proposed. The proposed section WAC 480-109-060 seeks to provide a framework for consideration of some of the cost recovery considerations for this rulemaking. The proposed section is broken down into three subsections as follow:

Subsection (1) permits a utility to recover in rates all prudently incurred costs associated with complying with the renewable portfolio standard.

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. This is important, for example, if a utility has a Power Cost Adjustment (PCA)

mechanism that does not include capital costs of the resource but permits the energy component to flow through the PCA. This example creates a mismatch and an incentive to purchase power agreements even if they are not the least cost option. Moreover, a utility's earnings may be negatively impacted between general rate cases as new renewable investments are made for which there is no cost recovery, but from which customers realize a power cost reduction through the PCA.

Subsection (3) allows a utility to defer all costs associated with compliance with the Act, but makes clear that creation of a deferral account does not by itself determine whether these costs are prudent. Various renewable portfolio standards in the Northwest and across the entire U.S. are creating significant market pressures. As a result, utilities may be able to capture cost savings for customers by moving further up the development cycle. Such activity, however, does create an element of risk. For example, utilities may acquire options that will facilitate development of wind resources at a given site, but some fatal flaw may be discovered in the permitting process that prevents the utility from moving forward with development of the wind resource at that site. There are a number of different kinds of expenditures that might fall into this category, including options on land, options on development rights, options on wind turbines, etc. Cost savings to customers may be significantly greater than the costs put at risk by moving higher up the development cycle.

The Act allows utilities to recover potential development costs. Section 5 (2) states: "An investor-owned utility is entitled to recover all prudently incurred costs associated with compliance with this chapter." Thus, as long as utilities are able to demonstrate costs were prudently incurred in compliance with the Act, such costs must be recoverable in rates.

Issues To Be Addressed Later by the Commission

Use of Conservation Credits: The Act addresses the use of Renewable Energy Credits but is silent on the use of Conservation Credits. PSE requests that on or before June 30, 2009, the Commission establish rules defining "Conservation Credits" and addressing the use of conservation credits to meet the conservation target. Such rules shall include the verification, trade, and tracking of conservation credits and other related issues.

Thank you for your consideration of these important issues.

Very truly yours,

Sheree S. Carson

cc: Nicolas Garcia