BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RULEMAKING TO IMPLEMENT INITIATIVE MEASURE NO. 937 Second Comment Opportunity (CR 101)	DOCKET NO. UE-061895

THIRD COMMENTS OF PUBLIC COUNSEL (CR-101)

July 9, 2007

I. INTRODUCTION

Pursuant to the Notice of June 15, 2007, the Public Counsel Section of the Washington Attorney General's Office (Public Counsel) respectfully submits this third set of comments. The comments address and propose some revisions to the June 15, 2007, draft rules, WAC 480-109, referenced in the Notice.

II. COMMENTS

Public Counsel generally supports the approach reflected in the Commission's revised draft rules. As we said in our last round of comments, Public Counsel agrees that it is not necessary in this rulemaking to adopt a complex new regulatory framework at this stage of implementation.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

A. Definitions--- Retail Revenue Requirement Cash --WAC 480-109-007(1).

Public Counsel supported adoption of the definition proposed in the March 14 draft of WAC 480-190-007(17) which stated that the "retail revenue requirement" means "the normalized retail revenue supported by the general tariffs approved in a utility's most recent general rate case." The language in the June 15 draft now defines "annual retail revenue requirement" as "the normalized retail revenue supported by the utility's currently approved tariffs." If the intent of this change is to recognize that a regulated utility's authorized revenue level can change in between rate cases, for example, as a result of a PCA or a PCORC, this revision appears reasonable.

B. Conservation Resources.

1. Stakeholder Participation And IRP Matters -- WAC 480-109-010.

Public Counsel's earlier comments emphasized the importance of stakeholder involvement and we appreciate those aspects of the draft rules encouraging such participation. The March 14 draft version of WAC 480-109-010 specifically mentioned the permissive use of a "stakeholder advisor group" to assist in developing conservation resource projections. Public Counsel argued for amendments: (1) to make the use of stakeholder groups in the conservation projection process a requirement, and (2) to clarify that stakeholder advisory groups or individual stakeholders would have an opportunity to make separate alternative recommendations to the Commission.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

The language changes Public Counsel proposed to this effect in the March 14 draft WAC 480-109-010(1)(c) and (4) were:

> (c) When developing this projection, utilities must use methodologies that are consistent with those used by the council in its most recent regional power plan. A utility may, with full documentation on the rational for any modification, alter the council's methodologies to better fit the attributes and characteristics of its service territory. A utility ~~may~~ shall use a stakeholder advisor group to review the methodologies and assumptions used to develop its projected ten year conservation potential.
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> (4) Commission staff or other interested parties, including the stakeholder advisory group or individual stakeholders, may file written comments, including alternative recommendations, regarding a utility's projected conservation potential or its biennial conservation target within thirty days of the utility filing.

Neither of these recommendations has been included in the June 15 draft. Unfortunately, it appears the rules have gone in the other direction, removing any reference at all to the use of a stakeholder advisory panel, even on an optional basis. This appears to weaken the message of the rules regarding public participation.

Public Counsel respectfully restates its recommendation that the use of stakeholder advisory panels be mandatory. All of Washington's IOUs already have established and active stakeholder advisory groups. These groups have played and are now playing a constructive and productive role in utility planning, including conservation planning. Requiring use of these panels in these rules would place no additional burden on the utilities, and would add substance to the admonition in draft WAC 480-109-010 that participation by "the public" is essential. The statement that Commission Staff and

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

public participation is "essential" could be read as making such participation mandatory, but the term creates some unclarity. The current rule language leaves the door open for utilities to decrease the amount of public participation.

Since the advisory groups are a proven method for achieving public participation, mandating their use here would enhance the process. It would also make the comment opportunity provided for in draft WAC 480-109-010(4) meaningful. If the opportunity for public participation prior to the utility filing of its targets has been minimal, the right to comment has little value. It is not practical for a party to review and analyze the basis of the targets, obtain relevant data, and prepare useful comments within 30 days if there has been no prior involvement with the process. The Commission benefits by having the participation of an active and knowledgeable stakeholder group because it both improves the quality of the utility's filed end product and the quality of the comments that the Commission receives after the filing.

If the Commission does not wish to make the advisory group mandatory, as an alternative to the language Public Counsel proposed in its Second Comments, the rules could add the following sentence at the end of WAC 480-109-010(3)(a). "A utility can meet the public participation requirement of this subsection by using a stakeholder advisory group in developing its conservation metrics."

2. Commission Approval of Targets.

While the draft rules provide for additional scrutiny and review by the Commission of a utility's conservation potential and targets, WAC 480-109-010(4), the rules are silent about the Commission's final action in response to the utility filing. It may be appropriate for the rules to clarify whether the Commission will "approve" the filing, or simply "acknowledge" it, as is the

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

case in the IRP process. Because the targets, unlike IRP plans, have the potential for triggering penalties at a later date, it is important to establish the status of the target at this stage. A company should not be allowed to re-litigate the target level during a later penalty docket for failing to meet the target.

C. Annual Reporting Requirements – WAC 480-109-040.

Public Counsel continues to believe that the provisions governing availability of the annual report should be broader. The current draft only requires that reports "shall be available to a utility's customers." Read literally, this only requires the utility to have one copy on file for review by customers who are willing to visit the utility office. The term "customers" does not cover media, consumer groups, elected officials or their staff, or any other interested person. Public Counsel proposes that this provision be revised as follows to provide reasonable access to the current and historical reports:

> (4) All current and historical reports required in subsection (1) of this section shall be made available to a utility's customers and any other person by posting on the utility website. Any person may request a copy of the current report and of historical reports of the utility.

D. Administrative Penalties – WAC 480-109-050.

1. Customer notice – WAC 480-109-050(4).

In its Second Comments, Public Counsel proposed two modifications to the draft rule WAC 480-109-050 to improve customer notification regarding penalties imposed on their serving utility. The June 15 draft makes improvements to the rules on this issue, requiring individual written notice to customers of the penalties incurred by the company, unless another

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

form of notice is approved by the Commission. The new draft also requires that customers be told in the notice if their utility will seek to recover the penalty in rates. Public Counsel supports these changes to the rules.

2. Requests to Recover Penalties in Rates Cash --WAC 480-109-050(5).

Public Counsel reiterates its position that ratepayers are not responsible for paying penalties incurred by regulated utilities for failure to comply with state law. Existing law, policy, and precedent are clear that penalty amounts may not be collected in retail electric rates. The Energy Independence Act does not provide any guarantee or entitlement to regulated utilities that they will be allowed to recover penalty amounts from ratepayers. Previous comments on this issue are incorporated here again by reference.

It is important that these rules do not create an expectation of or an entitlement to recovery, whether directly, or indirectly through procedural mechanisms that create momentum toward recovery. Public Counsel believes the prior draft rule, WAC 480-109-050(4), was a reasonable interpretation of the statute. The Energy Independence Act does not create an entitlement to recovery, but simply creates a mechanism for the utility to present a request for deferral of penalties and recovery in rates, leaving the issue of recoverability to the Commission, under existing law.

Public Counsel has several concerns about the new draft of WAC 480-109-050(5). First, the specific reference to the filing of an accounting order should not create in implicit approval of later recovery. Public Counsel recommends that language be added to the rule to make that clear (see below).

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Second, the new draft rule adds new language that would allow a utility to seek recovery of penalties in a "power cost only type rate proceeding" generally known as a PCORC. Public Counsel opposes this provision. The PCORC is a limited purpose proceeding with an expedited procedural schedule. Only one company in Washington, Puget Sound Energy (PSE) is currently authorized to file PCORC proceedings at the present time. The primary purpose of the PSE PCORC, an adjunct to its PCA mechanism, is to allow inclusion of new generating facilities in rates without awaiting a full rate case, with a secondary purpose of allowing some update of PCA power costs.

The PCORC is not a "catch-all" rate proceeding. Indeed, concerns about the proper scope of the PCORC mechanism have led the parties to the current PSE PCORC docket to agree in settlement to establish a collaborative to review whether the mechanism should continue, and if so, whether its scope should be circumscribed.[1] Adding penalty recovery issues to a PCORC docket would expand the proceeding far beyond its original PCA-related purposes. The PCA and PCORC mechanism are exceptions to the rule against single-issue ratemaking that have been permitted within prescribed bounds for certain policy reasons. The request to recover penalties for violations of statutory and regulatory requirements has no claim to such an exception from the rule.

Public Counsel recommends two wording changes to make the draft rule more clear. The beginning of the third sentence should read: "If a utility seeks to recover

[1] *WUTC v. PSE*, Docket No. UE-070565, Settlement Agreement, ¶¶ 14-16 (filed July 5, 2007).

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

deferred administrative penalties in rates…" to make clear that the reference is to the immediately preceding sentence, not the first sentence (see redline below). In addition, the final sentence should begin: "When assessing a request for recovery of deferred administrative penalties…" (see redline below). The use of the term "cost recovery" in the draft is overly general, and may inadvertently be read as characterizing penalties as a recoverable cost.

Finally Public Counsel has a general concern with the interrelationship between the rules for assessing penalties, WAC 480-109-050(1)-(4), and for requests to recover penalties in rates. WAC 480-109-050(5). These two determinations will happen in different docketed proceedings at different times. It is possible that fact finding and legal determinations made in the penalty docket, however, may have a bearing on the later request to recover penalties in rates, on prudence issues or otherwise. Public Counsel and other interested parties who may not otherwise have reason to participate in the penalty docket may feel the necessity to participate to "pre-litigate" issues to protect the record for any rate recovery docket that might ensue. This is an undesirable outcome. While Public Counsel does not have specific language to propose on this issue, it would be helpful to make clear, perhaps in the adopting order for the rules, that the penalty proceeding is limited to the question of liability for the penalty and will not include any determination that the penalty is recoverable in rates.

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Public Counsel
800 Fifth Avenue, Suite 2000
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The following is a marked up version of new draft WAC 480-109-050 incorporating the changes recommended by Public Counsel above:

> (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. The approval of an accounting order to defer penalties does not constitute approval of recovery of penalties in rates. 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~~If a utility seeks to recover deferred administrative penalties in rates, 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~~ recovery of deferred administrative penalties, the commission will consider the intent of the Energy Independence Act, other laws governing commission actions, policies and precedents of the commission, and the commission's responsibility to act in the public interest.

III. CONCLUSION

Public Counsel appreciates the opportunity to submit this third set of comments. We look forward to continued participation in this rulemaking.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744