BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complaint, v. PUGET SOUND ENERGY, INC., Respondent.	DOCKET NO. UE-100177 PUBLIC COUNSEL RESPONSE TO MOTIONS FOR SUMMARY DETERMINATION

I. INTRODUCTION

1. Pursuant to the Prehearing Order in this matter, Public Counsel files its responses to the Motion for Summary Determination filed by Puget Sound Energy, Inc. (PSE), Commission Staff (Staff) and Northwest Energy Coalition (NWEC). Public Counsel respectfully requests that the PSE motions be denied. Public Counsel believes the motions of Staff and NWEC are well taken and should be granted.

2. Far from respecting the "letter and spirit" of the Energy Independence Act (EIA or Act) as PSE claims to do,[1] PSE's motion argues a distorted interpretation of the statute and rules and presents highly misleading factual assertions. PSE's past history regarding energy efficiency has been a commendable one, with well-developed and well-run programs, and inclusive public participation through the Puget Sound Energy Conservation Resource Advisory Group (CRAG) and Integrated Resource Plan Advisory Group (IRPAG). The reasoning behind PSE's recent

[1] PSE Motion for Summary Determination (PSE Motion(s)), ¶ 2.

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actions, however, is unclear. The current strategy threatens to tarnish the positive track record that began with the Settlement Stipulation in UE-011570[2].

II. PUBLIC COUNSEL RESPONSE TO PSE MOTIONS

A. Overview.

1. PSE's Motion disregards the core requirement of the EIA.

3. At the March 11, 2010, Open Meeting, Tom DeBoer, PSE's Director of Federal and State Regulatory Affairs, announced in his presentation that a ruling on the propriety of PSE's I-937 compliance filing[3] would require the Commission to first determine certain unspecified threshold legal issues. PSE's fleshed out the meaning of this statement in its list of legal issues filed on March 29 and the Motion for Summary Determination to which this pleading responds. As Public Counsel, Commission Staff and NWEC observed when filing their own issues list in this case, PSE has "framed the issues more narrowly than is appropriate."[4] This is an understatement.

4. The fundamental and overarching issue with respect to PSE's Compliance Report is whether the filing complies with the requirements of the EIA[5] and the implementing rules adopted by the Commission.[6] All of PSE's motions and supporting arguments must be viewed in this context. The EIA policy declaration in RCW 19.285.020 identifies the numerous benefits

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[2] *WUTC v. PSE*, UE-011570, UG-011571 (PSE 2001 GRC), Exhibit F to Settlement Stipulation, Settlement Terms for Conservation, June 3, 2002.

[3] Hereinafter referred to as PSE's Compliance Report.

[4] Legal Issues List of Complainant Washington Utilities and Transportation Commission Staff, Public Counsel, and Intervenor NW Energy Coalition, ¶ 2.

[5] RCW Chapter 19.285.

[6] WAC Ch. 480-109.

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that will come from "increasing energy conservation" and "[m]aking the most of our plentiful local resources."

RCW 19.285.010, which states the intent of the Act, provides that:

> This chapter concerns requirements for new energy resources. This chapter *requires* large utilities to obtain fifteen percent of their electricity from new renewable resources such as solar and wind by 2020 and *undertake cost-effective energy conservation.* (emphasis added).

This makes clear that the EIA creates a legal requirement to pursue cost-effective conservation. This is not merely an aspirational policy goal to be pursued or not at the utility's discretion. The provisions of the EIA "are to be liberally construed to effectuate the intent, policies, and purposes of this chapter."[7]

5. In clear and unequivocal language, RCW 19.285.040 translates the stated intent of the Act into a specific fundamental obligation for each utility with respect to energy efficiency.

> Each qualifying utility *shall pursue all available conservation that is cost-effective, reliable and feasible.* (emphasis added).

Under the law, therefore, PSE "shall pursue all available conservation that is cost-effective, reliable, and feasible." Period. The statute does not say "may pursue ...within the utility's discretion." The requirement is stated without qualification.

6. In furtherance of this requirement, the Act imposes the obligation on the utility that it "shall identify its achievable cost-effective conservation potential through 2019."[8] In doing so the utility must use "methodologies consistent with" the "most recently published" Council plan.

[7] RCW 19.285.900.
[8] RCW 19.285.040(1)(a).

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The Company, in addition, "shall establish" a biennial target for cost-effective conservation consistent with the ten year potential identified.[9]

7. As permitted by the Act, the Commission adopted administrative rules "to ensure the proper implementation and enforcement" of the Act as it applies to investor owned utilities.[10] The purpose was "to establish rules that electric utilities will use *to comply* with the requirements of the Energy Independence Act, chapter 19.285, [11] which as stated above include the requirement to pursue all available, cost-effective, reliable, and feasible conservation. The Commission rules do not relieve any utility of any of its duties and obligations under Washington law, including the EI A.[12]

8. Consistent with the Act, the Commission rules require that the "biennial conservation target *must identify all achievable conservation opportunities*" and be at a minimum a pro rata share of the "ten year cumulative *achievable* conservation potential."[13] The report filed on or before January 31,2010, is required to identify the utility's "ten-year *achievable* conservation potential [.]"[14]

9. Thus, both the Act and the rules contain a clear and fundamental requirement that utilities must pursue all achievable cost-effective conservation. This is the framework against which the PSE filing must be measured.

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[9] RCW 19.285.040(1)(b).
[10] RCW 19.285.080(1).
[11] WAC 480-109-001 (emphasis added).
[12] WAC 480-109-004(1).
[13] WAC 480-109-010(2)(a) and (b)(emphasis added).
[14] WAC 480-109-101(3)(emphasis added).

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2. PSE has not shown that its ten-year potential and biennial target comply with the core requirement of the EIA.

10. Public Counsel's Comments filed on March 5, 2010, in response to PSE's I-937 Compliance Report contain a detailed discussion of the flaws in PSE's filing. The Comments are provided as an attachment to this response, adopted by the Second Declaration of Stefanie Johnson. The Comments make several key points which are relevant to the assertion in PSE's motions that the Company has done everything required to show compliance with the EIA and the Commission rules.

- Inadequate information. PSE has not provided any information to enable the Commission to determine that its proposed ten-year conservation potential and biennial targets meet the statutory requirements.
- Missing analysis. In the IRP development process, the Company closely analyzed available and feasible cost-effective conservation opportunities, based on PSE"s service territory and avoided costs. This was not done by PSE for the output of the Fifth Plan. [15]
- Outdated assumptions. The assumptions of the Fifth Plan are outdated, as the Company itself acknowledged. Changes in prices, technology and other factors which have a considerable impact on the assessment of conservation potential have not been taken into account.[16]
- Quality of the IRP. The IRP is a more accurate statement of what the Company projects for conservation achievement because, inter alia, it is based on the

[15] Public Counsel Comments, ¶ 13.
[16] *Id.*, ¶ 14.

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utility's long term resource portfolio and is customized for local conditions. The Council itself recommends use of the utility's own IRP process in preference to its calculator as a more accurate measure. PSE has an up-to-date IRP filed with the Commission in late July 2009, and a two year conservation target based on that IRP filed in December 2009 as part of its Energy Efficiency Services filing.

- Wide Disparities. There are startling differences between the Fifth Plan results filed by PSE and the Company's IRP projected performance. As the comparison charts in Public Counsel's Comments show, the PSE projections based on the Fifth Plan are roughly 50 percent lower than the ten-year potential in the IRP and minimum of 39 percent below the two year IRP estimates.[17] The PSE Compliance Report fails this "reality check."
- Historically Achieved Conservation. PSE's Compliance Report fails a second "reality check," a comparison with the conservation it has actually achieved in the past. PSE's new biennial target of 42.2 aMW is dramatically lower than its actual achieved savings in 2008-2009 of 66.4 aMW, and even falls below the actual savings of 44.4 aMW in 2006-2007.[18]
- Budget Comparison. PSE's conservation budget further reflects the flawed nature of the filing. At its new biennial target level of 42.2 aMW, with its current budget PSE will collect approximately $100 million more from customers than it did in 2006-2007 to achieve fewer energy savings.[19]

[17] Public Counsel Comments, ¶¶ 21-22 (charts, p. 13).
[18] Public Counsel Comments ¶¶ 23-24 (chart, p. 15).
[19] *Id.*

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- No Cost-effectiveness Showing. PSE provided no information related to the cost-effectiveness of its programs or the biennial target in the Compliance Report. Using PSE's own data, the cost per aMW for the 2010-2011 biennial target would be more than double the cost in 2008-2009 and seventy percent higher than the cost per aMW to achieve the 71.0 aMW on which the Energy Efficiency Services tariff filing was based. This calls into question the cost-effectiveness of the savings projected in the Compliance Report.[20]

Rather than acknowledge or address any of these factors, PSE's seeks to receive approval for its filing based on a strained and narrow legal analysis. PSE's position as argued in the motions has little if any relation to its own history of achieved conservation, to the statutory requirements, or to the policy goals of the EIA.

B. The "Four Uncertainties" Are Irrelevant to the Analysis of the Target.

11. PSE's motion seeks to explain its sudden change of direction regarding conservation analysis by listing what might be termed "the Four Uncertainties." PSE, in effect, reads the Act to say that a utility need only pursue all achievable cost-effective conservation to the extent it has no concerns about rate impact, program cost, lost margins, or penalties. The flaw in this argument is that the EIA contains no such list of exceptions or caveats, nor has PSE identified any such provision.

12. Moreover, in addition to lacking statutory support, the "Four Uncertainties" do not stand up to individual examination.[21] With regard to uncertainty about expenditures, PSE references

[20] *Id.*, ¶¶ 24-25.

[21] PSE provides little factual support or discussion of these factors. The discussion in the motion simply restates the statements in the declaration of Eric Englert, ¶¶ 18-20.

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the Staff investigation of its Energy Efficiency Services (EES) tariff filing initiated at the December 23, 2009, Open Meeting, to which PSE raised no objection. Notwithstanding the investigation, PSE continued to pursue and ultimately received approval for an update to the Schedule 120 tariff rider to recover a budget based upon a one-year share of the two-year conservation targets derived from the IRP process.[22] Apparently there was not sufficient uncertainty to cause PSE to reduce the size of the tariff rider request or the budget to reflect the lower target filed on January 29.

13. PSE, has filed frequent rate cases since 2002. It has announced that it intends to file a rate case every year for the foreseeable future. Nevertheless it professes concern here regarding customer tolerance for upward pressure on rates. This assertion is hollow indeed given that PSE sought approval for and will be collecting funds to pursue the IRP-based conservation targets. PSE's legal memorandum is silent on this glaring disparity.

14. Furthermore, while it is true that rising utility rates, including conservation costs, are a legitimate cause of concern for customers, PSE overlooks the fact that demand-side resources included in the IRP are required by law to be "least cost" resources.[23] As such, these resources are beneficial to customers and to the Company, and if correctly identified as a least cost resource, have a lesser rate impact on customers than acquisition of supply side resources (plants,

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[22] Appendix B, EES Conservation Rider/Tracker Savings Goals and Budgets, 2010-2011.

[23] WAC 480-100-238, the IRP rule, requires *inter alia* an evaluation comparing energy supply resources with conservation using "lowest reasonable cost" criteria. WAC 480-100-238 (2)(b) and (3)(e).

PPAs) to meet load. As PSE's current Integrated Resource Plan (IRP) states:

> **Acquiring demand-side resources – as much as possible – as soon as possible is still the best strategy for avoiding both costs and risks.** Natural gas prices and potential carbon emissions costs affect portfolio costs more than any other factors tested in this analysis. Because energy efficiency consumes no fuel and produces no emissions, it continues to be a cost-effective resource over the long term, even though it is becoming more expensive to acquire.[24]

15. PSE also lists the uncertainty about recovery of lost margins as a reason for not relying on its IRP. Notably, this uncertainty did not prevent PSE from allowing its conservation incentive pilot program to expire at the end of 2009. Presumably the incentive amounts PSE collected through this mechanism ($4.3 million for 2009[25]) provided an offset towards any lost margins. By terminating the program, PSE itself contributed to the asserted uncertainty.

16. The EIA does not say "you may tailor your conservation goals based on whether or not you expect to get lost margin recovery." Lost margin recovery, decoupling, or incentive payments are legal and policy matters which are entirely separate from the analytic question of what constitutes achievable, cost-effective conservation. These issues are not new but are long-standing and in some cases controversial. These issues were raised long before the passage of I-937 and still exist today. They are not intended to be resolved as part of the conservation target setting process, but have been and will be addressed in other fora. If PSE is holding its conservation goals hostage in an effort to create leverage for lost margin recovery, that is improper and contrary to the requirements of the Act.[26]

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[24] PSE Integrated Resource Plan (July 2009), Executive Summary, p. 1-2 (bold emphasis in original).

[25] Energy Efficiency Services Program Results January – December 2009, p. 3, filed February 16, 2010, Docket No. UE-970686.

[26] PSE also relies on the assertion that the IRP process does not take into account customer rate concerns or lost margin issues, appearing to say that it could not therefore, use the IRP target for I-937 purposes and was forced to choose the Fifth Plan. PSE does not provide any evidence that the Fifth Plan calculator *does* take these factors into account, so this is a curious rationale.

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17. Finally, PSE expresses concern about the "treatment of penalties for failing to achieve the conservation targets," without any real explanation of the basis of its concern. The statutes and rules already clearly explain when penalties would apply. No penalties have been assessed against PSE. On the contrary, PSE in the recent past exceeded its conservation targets and received payments under its now-abandoned incentive mechanism. In any event, the question is premature, since penalties, if any, would not come into play until after 2012. Any suggestion by PSE that is permissible for a utility so set its targets artificially low with an eye to avoiding penalties should be rejected as a directly contrary to the statutory purpose.

18. PSE has not made a persuasive case that the "Four Uncertainties" are a valid basis for modifying its conservation analysis. Under the IRP rule, under the EIA generally, and in the Council's methodology for the Northwest Power Plan, the process of developing sound projections of conservation, and determining whether that conservation is achievable and cost-effective, is a technical analytic process based as much as possible on empirical analysis, designed to reach an objective outcome guiding the development of the utility's resource portfolio. Factors such as rate impact and lost margins are issues that are properly raised elsewhere if there is a need to address asserted impacts of the empirically determined projections. PSE's argument that its policy concerns should affect the actual analysis itself undermines the important objectivity of the projections and serves to create an outcome-oriented process.

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C. PSE's Threshold Legal Issues Regarding The Ten Year Conservation Potential.

1. Alternative bases for potential and target projections.

PSE's statement of issue:

> Whether WAC 480-109-010(1) allows a utility to project its cumulative ten-year conservation potential using either (1) the most recent IRP, or (2) the utility's proportionate share of the Conservation Council's current power plan targets for the state, regardless of which source provides the higher projection?

19. The cited WAC plainly allows the utility two options for I-937 purposes. However, the Company formulation of the issue mis-states the rule. The rule does not state that the law "allows a utility to project... *using*" either the IRP or the Council plan. Instead, the rule states that the projection "must be *derived from and reasonably consistent* with one of two sources [.]" The rule also states, initially and separately, the basic requirement that by January 1, 2010, "each utility must project its cumulative ten-year conservation potential." This is a requirement that the utility itself, not a third party, makes the projection process. Together with the use of the phrase "derived from and reasonably consistent with" this implies that the Company, in developing its projection, is performing a bona fide analysis of its own conservation potential. This is different than stating that the Company can simply pick a number from a third party's calculator. Notably, the Council itself advises that its calculator is intended only to provide an "approximation" and states:

> Individual utility conservation goals are best established through utility integrated resource planning processes which can better account for local conditions and legal requirements. Nevertheless, the results of this calculator can be used as rough guidance for utility conservation program planning until such time as a utility completes its own integrated resource plan or other similar process.[27]

[27] Full quotation and source citations in Comments of Public Counsel, ¶ 17, attached to Second Declaration of Stefanie Johnson.

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20. PSE's assertion that there are "no additional steps" is incorrect. This reduces the mandate of I-937 to "*pursue all available conservation that is cost-effective, reliable and feasible* to a simplistic mechanical act of operating the Plan calculator. It also eliminates any role for the Commission in determining whether a utility has complied with the statute. The Commission review would be reduced to the ministerial act of merely ascertaining that the calculator number had been filed.

21. The question of whether the Company must choose the method with the highest level is a red herring. The issue is whether the projection of achievable cost-effective conservation is accurate, not whether it is higher or lower. PSE is wrong that there is "no constraint" on its choice. Its choice is constrained by the fundamental requirement of the Act to pursue all achievable cost-effective conservation. Ultimately, PSE's choice of a projection must be shown to be consistent with that statutory obligation. The Company cannot avoid the import of the statute by relying on a narrow mechanical reading of the law.

2. Explanation requirement.

PSE statement of issue:

> Whether WAC 480-109-010(3) requires a utility to explain why it identified the source of its ten-year conservation potential as either (1) the most recent IRP or (2) the utility's proportionate share of the Conservation Council's current power plan targets for the state.

22. As a general matter, Public Counsel defers to Staff's response on this issue. It is reasonable to observe, however, that PSE has the burden to establish that it is in compliance with the EIA. If it chooses to file projections and targets for I-937 purposes which have no relation to the projections and targets actually developed for resource planning and acquisition, PSE bears the burden of explaining the rationale for this disconnect.

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3. The current plan.

PSE statement of Issue:

> Whether the option in WAC 480-109-010(1)(a)(ii) to derive a ten-year projection from the "conservation council's current power plan" allows a utility to use the plan that is currently in effect as of the date the projection is filed with the WUTC.

23. PSE's argument seeks to divert the Commission and parties into a debate about which plan is current. While this issue does not determine the ultimate validity of PSE's filing, it is noteworthy that the Plan which is now the main focus of current discussions and analysis of energy efficiency is the Sixth Plan, not the five year old Fifth Plan. Significantly, PSE itself used the Sixth Plan, not the Fifth, as part of the basis for developing the demand-side resource potential for its IRP.[28] The Draft Sixth Plan has been in circulation for an extended period to the industry and stakeholders, and has thus been "published" in the sense that it has been made public, although not formally published to date. The Council has now adopted the Sixth Plan. In common sense and practical terms, the Sixth Plan is and has been for some time the current plan. PSE is forced to rely on the historical accident that the Sixth Plan was not formally "published" or adopted at the time of the Compliance Report.

24. While PSE may be technically correct that Sixth Plan was not literally "current" or "published" when it made its compliance filing, this does not resolve the ultimate question in the case. The EIA does not say that mechanical use of a calculator ends the inquiry. Again, as discussed at the outset of this memorandum, under the statute and its implementing rules, the

[28] Declaration of Stefanie Johnson, April 6, 2010, Appendix B (PSE IRP Excerpt, "Comprehensive Assessment of Demand-Side Resource Potential (2010-2029)," Final Report, July 10, 2009, p. 2).

conservation. PSE has provided no evidence that the projections and targets based on the Fifth Plan calculator are an accurate statement of its identified achievable cost-effective conservation. On the contrary, there is ample evidence that proves that PSE should be and will be pursuing a much higher potential target, based on PSE's own IRP and the supporting documentation for the aggressive portfolio of conservation resources that PSE is currently pursuing.

4. The filing requirement.

PSE statement of issue:

> Whether WAC 480-109-010(1), which states that a utility must project its cumulative ten-year conservation potential by January 1, 2010 and every two years thereafter, requires a utility to file its projection by January 1.

25. Public Counsel anticipates that Staff will address this issue and defers to the Staff's briefing. Public Counsel would observe, however, that there must be some means for the Commission to determine if PSE has met the requirement in the rule and statute that the ten-year conservation potential must be identified "by January 1, 2010." In any event, there appears to be no dispute that PSE documented its compliance with the January 1, 2010, deadline by sending its ten-year projection to UTC Staff, who then filed it.

5. Further development and finalization

PSE statement of issue:

> Whether WAC 480-109-010 prohibits a utility from further developing and finalizing its projected ten-year conservation potential after it makes a projection on January 1st, and before it files its final report with the WUTC by January 31.

26. This issue statement rests on the false premise that what occurred in this case was "further development and finalization" of PSE's conservation goals. That is not an accurate description of events, as the initial Declaration of Stefanie Johnson details. As a result, the question of whether some further development, or refinement, or finalization is permitted by the

statute is irrelevant. To characterize the surprise last minute substitution of the Fifth Plan calculator results as "further development" or "finalization" fails the straight face test. The filing made on January 29 was a complete and dramatic departure from PSE's December 31 projections and from all information provided throughout the entire multi-year process of conservation goal development. No "development" occurred. The number was simply generated mechanically by PSE from the Fifth Plan Calculator. Describing this as a "refinement" of the December target defies credulity.

27. It is Public Counsel's understanding that the Northwest Energy Coalition will address this issue in more depth and Public Counsel defers to their briefing on this point.

D. PSE Threshold Issues Regarding Biennial Conservation Targets.

1. Use of the pro rata share.

PSE statement of issue:

> Whether a utility's biennial conservation target complies with WAC 480-109-010(3)(b) where the utility uses Option 2 of the Conservation Counsel's Target Calculator (target based on utility share of total regional retail sales by a sector) for the years 2010 and 2011.

28. On this issue, PSE focuses on the calculation of the biennial target as a pro rata share of the ten year potential projection. PSE puts the cart before the horse. As discussed throughout this response, the key question is whether PSE has properly identified all achievable cost-effective conservation. Once that has been determined accurately, the pro rata calculation is a relatively straightforward matter. The problem in this case is not the pro rata calculation but the fundamental validity of PSE's ten-year potential and related two-year target.

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2. Limitation of the range used as a target.

PSE statement of issue:

> Whether WAC 480-109-010 limits the range that may be used in setting a biennial conservation target.

29. PSE has not filed a range as a target in this proceeding. Accordingly, this is not an appropriate matter for a dispositive motion. PSE indicates that it is asking the Commission for an advisory opinion on whether it would be permitted to file a range with one end being IRP-based and on end Council Plan based. PSE argues that this is allowed because "there is no limit on the breadth of the range that a utility may use as a biennial target." This is both illogical and an inaccurate reading of the law. Any range must be meaningful and consistent with the EIA as a whole. Because the statute requires a projection of achievable cost-effective conservation, any point in the range must also meet that requirement, whatever its basis.

30. PSE proposal for a range with the IRP and the Council Plan at either end seeks to game the target setting process. PSE appears to issue an ultimatum to the Commission that if this filing is rejected, it will simply refile a range with the Fifth Plan as the low end. If the Commission were to reject the Fifth Plan target as non-compliant with the statute, however, that target cannot lawfully be used as the low-end of the range. All points in the range must be lawful, i.e., must reflect a projection of all achievable cost-effective conservation. PSE has already calculated such a range during its IRP process.[29]

31. The Commission's order adopting the EIA rules adds further clarification to what constitutes a proper target range. The order explained that a target range was being permitted in

[29] Comments of Public Counsel, p. 6 (Chart: PSE's Proposed Two-Year Target Range), attached to Second Declaration of Stefanie Johnson.

order to "mitigate potential variations between projected electricity savings and the achieved electricity savings."[30] The Commission also stated that "the conservation range allows flexibility to realistically match the target to the implementation schedule."[31] Neither explanatory statement provides support for PSE's reading of the rule.

3. Penalties if below range.

PSE statement of issue:

> Whether a utility is subject to penalties only if conservation falls below the lower end of an approved biennial conservation target range.

32. This issue is not appropriate for a dispositive motion. PSE did not file a target range with the Commission and has not been assessed any penalties. The request for a ruling on this issue, therefore, seeks an improper advisory opinion. The framing of the issue is somewhat curious in any event. The rules plainly state that a utility may file its target as a range. PSE does not explain why it believes penalties might accrue for achieving conservation levels within an approved lawful range.[32]

E. PSE's Other Threshold Reporting Issues.

1. Public Participation.

PSE's statement of issue:

> Whether the public participation outlined in PSE's report is sufficient to meet the requirements of WAC 480-109-010(3).

33. According to PSE, Public Counsel claims that if the filed conservation goals do "not

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[30] *In the Matter of Adopting Rules to Implement The Energy Independence Act*, Docket UE-061895, General Order R-546, Order Adopting Rules Permanently, ¶ 26.

[31] *Id.*, ¶ 28.

[32] The rule adoption order addressed concerns raised by Public Counsel and other parties about the use of a range as opposed to a point target, indicating that the Commission's authority to approve or reject goals and targets would minimize the risks from use of a range. *Id.*

conform exactly to stakeholder expectations" that the participation is inadequate. Public Counsel has made no such claim. In any event, this is hardly a case about exact conformance. Public Counsel's actual claim with respect to public participation is set forth in its Motion filed on April 6. That motion argues and provides factual support to establish that there was no connection between the public participation process and the conservation potential and target goals actually filed by PSE.

34. PSE's description of the public process in the Declaration of Eric Englert is misleading and disingenuous. PSE treats the public process as a generic series of meetings about the general topic of energy efficiency, focusing on the sequence of meeting dates while omitting reference to the actual substance of the meetings. In this way PSE intentionally uses the Englert Declaration to support the manifestly false conclusion that the final targets and projections filed on January 29, 2010, were developed during the process described in the declaration. Ms. Johnson's initial Declaration details how significantly this departs from the facts.

35. One example is illustrative. As part of the "brief chronology of extensive public participation that took place over a two-year period during the development of PSE's ten-year conservation potential and biennial conservation target," Mr. Englert's Declaration states that: "On November 30, 2009, PSE filed its conservation programs for 2010-2011 with the Commission."[33] The advice letter filed on that date with the related tariff filing, signed by

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[33] Declaration of Eric Englert, ¶ 3, ¶ 10.

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Mr. Englert for Tom DeBoer states:

> The Company and the Conservation Resource Advisory Group have met regularly to share and discuss plans for energy efficiency programs, budgets and goals for 2010 through 2011. In developing these programs, the Company and the CRAG considered the energy efficiency resource potential identified in the Company's 2009 Integrated Resource Plan, as well as individual program cost effectiveness and market conditions. This collaborative process resulted in establishing a portfolio of cost-effective, reliable, and feasible electric and natural gas conservation programs for 2010-2011. *The electric programs are consistent with the biennial conservation target range that the company will file before January 31, 2009, in compliance with WAC 480-109.*[34]

36. PSE states that "Public Counsel and Commission Staff would imply a requirement that utilities give determinative weight to stakeholder input." Public Counsel has not made that claim. Public Counsel is not aware that any CRAG or IRPAG participant has claimed the authority to direct company actions. The Commission's rules state that public participation in the development of the targets is "essential." That participation must be meaningful, however, rather than a charade. The rules make this clear by requiring that public participation must relate to "the development of the ten-year conservation potential and the two-year conservation target."[35] In this case, there was no relation between the public process and the goals filed by PSE.

37. For purposes of the summary determination standard, there is no actual factual dispute that would render summary determination on Public Counsel's motion inappropriate. The Englert Declaration is silent as to the content of the meetings that occurred, and therefore does not provide any information that conflicts with the Johnson Declaration. There is no factual

[34] PSE Advice Letter No. 2009-31, UE-091859, UG-091860, November 30, 2009, p. 2 (emphasis added).
[35] WAC 480-109-010(3)(c).

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dispute about the dates and meetings listed by the Mr. Englert. The dispute is about the conclusions to be drawn from the facts.

2. Additional Program Details.

PSE statement of issue:

> Whether a report filed pursuant to WAC 480-109-010(3) must include program detail such as: detailed program descriptions; measures, incentives and eligibility requirements; detailed program budgets; cost-effectiveness standards; projected program cost-effectiveness; evaluation plans; annual and quarterly progress reports; and cost recovery tariffs.

38. Public Counsel defers to Commission Staff argument on this issue. It is worth recalling however, that the burden of proof lies with PSE to establish that it is in compliance with the statute. If it cannot provide the Commission with sufficient information to establish that it has identified all achievable cost-effective energy efficiency, or chooses not to do so, it cannot expect to receive approval for its goals. Commission review is not a rubber stamp limited to the ministerial act of approving any filing which the company makes, no matter how unsupported.

III. CONCLUSION

39. For the foregoing reasons, Public Counsel respectfully requests that the PSE Motion for Summary Determination be denied. Public Counsel further requests that the Public Counsel, Staff and NWEC motions for summary determination be granted.

40. Dated this 19th day of April, 2010.

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