

September 26, 2007

**VIA ELECTRONIC FILING**

Ms. Carole J. Washburn  
Executive Secretary  
Washington Utilities and 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 on CR-102**

Dear Ms. Washburn:

In response to the Washington Utilities and Transportation Commission's ("Commission") August 23, 2007 Notice of Opportunity to Submit Written Comments on Proposed Rules ("August 23 Notice") PacifiCorp, dba Pacific Power ("PacifiCorp" or "Company"), respectfully submits the following comments on the Commission's proposed rules to implement the Energy Independence Act, RCW 19.285 (the "Act").

The Company has been an active participant throughout this proceeding. PacifiCorp participated in workshops at the Commission on March 26, 2007 and June 26, 2007. On May 18, 2007, PacifiCorp, Avista and Puget Sound Energy (the "Utilities") filed joint comments and proposed revisions to specific rule language to the first set of draft rules. On July 9, 2007, PacifiCorp individually submitted comments on, and proposed revisions to, the second discussion draft of the rules.

On August 21, 2007, the Commission filed a Notice of Proposed Rulemaking ("CR-102") with the proposed rules ("Proposed Rules"). The Company appreciates the opportunity to provide further comments in this rulemaking on the Proposed Rules. Throughout multiple rounds of comments and participation in discussions with parties and the Commission rulemaking team, the Company has sought to clarify the items it believes are critical to enable compliance with the conservation and renewable energy targets in the Act. While PacifiCorp supports certain changes reflected in the Proposed Rules as discussed below, it believes that significant uncertainty remains, the outcome of which will have an impact on how compliance is achieved, whether or not compliance is achieved, and the level of costs associated with compliance.

While PacifiCorp appreciates the Commission's issuance on September 20, 2007 of a summary of the parties' comments and explanation of the changes ("Summary"), much uncertainty regarding interpretation and enforcement remains.

Clarity regarding the Commission's intent and interpretation of the Proposed Rules and the criteria necessary to comply is critical as utilities are currently planning and acquiring resources toward achieving the proposed targets. As drafted, the Proposed Rules have significant policy implications and leave many aspects of compliance unclear. PacifiCorp respectfully requests that the Commission either amend the Proposed Rules to provide clarity or provide a thorough explanation of its rules in the rule adoption order as requested below. Additionally, future Commissions will benefit from an explanation and understanding of the Commission's intent at the time the rules were adopted recognizing that the decisions made by this Commission will not bind future Commissions.

#### **WAC 480-109-020 Renewable Energy Targets**

The Proposed Rules allow for a utility to comply with the renewable energy requirements by either supplying a percentage of its load with renewable energy and/or renewable energy credits ("RECs") as listed in WAC 480-109-020(1)(a-c) or by meeting an alternative listed in WAC 480-109-030. WAC 480-109-020(1)(a-c) states:

- (a) By January 1 of each year beginning in 2012 and continuing through 2015, each utility must acquire sufficient eligible renewable resources, equivalent renewable energy credits, or a combination of both to supply at least three percent of its load for the remainder of each year;
- (b) By January 1 of each year beginning in 2016 and continuing through 2019, each utility must acquire sufficient eligible renewable resources, equivalent renewable energy credits, or a combination of both to supply at least nine percent of its load for the remainder of each year; and
- (c) By January 1 of each year beginning in 2020 and continuing each year thereafter, each utility must acquire sufficient eligible renewable resources, equivalent renewable energy credits, or a combination of both to supply at least fifteen percent of its load for the remainder of each year.

PacifiCorp interprets this language to mean that the Commission has adopted the statutory interpretation put forth by the renewable developers, i.e. that by January 1, 2012 a utility must have acquired contractual or actual ownership of eligible renewable resources or RECs, or a combination of both to supply at least three percent of its load through December 31, 2012.

By adopting this interpretation, there are several policy implications and points to clarify. PacifiCorp respectfully requests that the Commission provide clarification with regard to the renewable energy targets outlined in the Act in the areas discussed below.

1. Compliance Period: As PacifiCorp has discussed in previous comments in this rulemaking, the reference in all three subsections above to a single day in time, January 1, in relation to an “annual” target is at odds with the definition of “load” and “year” as defined in the Act. 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. The Summary seems to imply that the Commission intends to assess a utility’s compliance with the 2012 renewable target by using the June 1, 2013 annual report. The September 12, 2007 version of the Community, Trade and Economic Development (“CTED”) Department’s proposed rules (“September 12<sup>th</sup> Rules”) for compliance with the Act defines the compliance period differently than the Commission. Section WAC 194-37-110(2)(a)(i) of CTED’s proposed rules states that a utility that meets the renewable energy requirements in RCW 19.285.040 shall include in its June 1 report of each year beginning in 2014 the following:

“Demonstration that it acquired in the target year: (a) megawatt-hours of eligible renewable resources by December 31 of the target year; (b) renewable energy credits from the target year, the year prior or the year subsequent to the target year; or (c) any combination of (a) and (b), in amounts sufficient to meet the percent of load target for the calendar year two years prior.”

PacifiCorp respectfully requests that the Commission confirm that its interpretation of the same Act effectively shortens the period by one year for which an investor-owned utility may demonstrate compliance compared to a publicly-owned utility, by requiring an investor-owned utility to have acquired resources to satisfy its target by January 1 of the target year rather than through December 31 of the target year (e.g. by January 1, 2012 versus by December 31, 2012). PacifiCorp respectfully requests that the Commission provide its reasoning behind the divergence and the policy implications of two state agencies interpreting the same law inconsistently.

The Summary states that “because utilities must have all the RECs or MWhs needed for 2012 on the first day of that year, utilities will have to take steps in the preceding year to meet the January 1, compliance date. The one exception is if a utility relies on MWhs from its own renewable generating assets that are expected to be produced in the current or following year.” RCW 19.285.040(2)(a) however, makes no distinction between when a utility must demonstrate it has acquired sufficient eligible renewable resources or when a utility must demonstrate it has acquired RECs to satisfy the renewable target by January 1. PacifiCorp respectfully requests that the Commission explain why it believes that a utility will not have to take steps in the preceding

year to meet the January 1 compliance date if it is relying on MWhs from its own generating resources expected to be produced in the current year or following year.

2. Load Years: To calculate the renewable energy targets a utility must calculate its annual load based on the “average of the utility’s load for the previous two years.” Given that it appears that the Commission has adopted the position of the renewable developers, PacifiCorp interprets this to mean that the load percentage requirement for the January 1, 2012 target should be based on the calendar years 2010 and 2011. PacifiCorp has explained previously in its comments that it will not know actual load for the calendar year 2011 until at least sixty days after the end of the calendar year. This policy implies that the Commission is encouraging a utility to over comply with the estimated target to ensure it is not penalized for insufficient eligible resources to meet the unknown and unknowable target. PacifiCorp respectfully requests that the Commission either confirm that the intent is for a utility to over comply when the target is unknown and unknowable or clarify how it reconciles the fact that the utility will not know its target by the time it is expected to comply. In addition, please clarify whether the Commission believes it has the flexibility to waive a penalty if there is a forecast error outside a reasonable range.

3. Removal of WAC 480-109-020: PacifiCorp suggests that the Commission consider removal of the entirety of WAC 480-109-020. Since the language contained in proposed WAC 480-109-020 essentially mirrors the language in RCW 19.285(2)(a), the statutory provision governing the renewable energy targets, removal of WAC 480-109-020 will not alter the substance of the Proposed Rules. The Commission will still be able to rely on the statutory provisions for governing the establishment of and compliance with the renewable energy targets.

4. Assessment of Penalties: Pursuant to proposed rule WAC 480-109-040(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.” Assuming that a utility acquires sufficient renewable energy resources and/or RECs by January 1, 2012, the actual amount of renewable energy resources and/or RECs produced during the target year or subsequent year will not be known until after December 31, 2013. The Commission response in the Summary states that “Since the June 1, 2012 report is to cover “progress in the preceding year,” or 2011, that first report need only focus on the conservation requirement. The June 1, 2013 report would be the first report to deal with both conservation and renewables.” PacifiCorp interprets the Commission’s intent of this reporting requirement to mean that the Commission will assess compliance that a utility has acquired sufficient resources to satisfy the renewable energy targets based on the June 1, 2013 report. A utility however, will not be able to demonstrate at that time that the RECs it acquired by January 1 were produced during the year subsequent to the target year. For RECs acquired for the January 1, 2012 target the actual amount produced would not be demonstrable until the June 1, 2014 report. PacifiCorp respectfully requests that the Commission clarify if it is its intent to assess compliance with a single target at two separate points in time (e.g. the June 1, 2013 report

and the June 1, 2014 report for the January 1, 2012 target) or reconcile how it will assess compliance based on the June 1, 2013 report when six months remain in the subsequent year period.

Additionally, CTED's September 12<sup>th</sup> Rules state in WAC 194-37-110(2)(a)(i) that "The utility may demonstrate that it acquired RECs in the subsequent year to make up for any performance deficiency and for under-estimates in load projections of no more than five percent." The Commission's Proposed Rules do not include specific language to this effect. In fact, if the Commission makes the penalty determination on June 1 of the year subsequent to the target year (e.g. June 1, 2013 report for the January 1, 2012 target), the Commission has effectively eviscerated this provision of the law. The Summary states that "A "grace period" appears inconsistent with the statute." PacifiCorp respectfully requests that the Commission confirm if it will allow an investor-owned utility to acquire RECs in the subsequent year to make up for any performance deficiency and for under-estimates in load projections or if not, reconcile why there is a different interpretation of the same statutory language when identical penalty provisions apply.

5. Eligible Renewable Resources: As defined in WAC 480-109-007(9)(a), one of the criteria for an eligible renewable resource for purposes of meeting the renewable energy targets is that the electricity from the eligible generation facility is "delivered into Washington state on a real-time basis without shaping, storage or integration services." PacifiCorp has advocated throughout this rulemaking the importance of clarifying what is meant by the phrase "real-time basis without shaping, storage or integration." PacifiCorp's July 9, 2007 comments provide an explanation of the considerations and restrictions this provision places on the market of eligible renewable resources. Additionally, this criterion presents potential conflicts with the North American Free Trade Agreement and the Interstate Commerce Clause of the United States Constitution. See PacifiCorp's July 9, 2007 comments. PacifiCorp respectfully requests that the Commission explain the process it will use to determine whether a resource is eligible under this provision without a definition of the phrase in the Proposed Rules. Absent clarification, utilities will be forced to rely on resources in the Pacific Northwest. Unnecessary geographic restrictions upon the renewable energy market enhance the market power of sellers within that geographically restricted market to the detriment of our customers.

#### **WAC 480-109-010 Conservation Resources**

By January 1, 2010, and every two years thereafter, PacifiCorp intends to project its cumulative ten-year conservation potential based on its Integrated Resource Plan or portion of the conservation council's most recent regional power plan. Beginning January 1, 2010, and every two years thereafter, PacifiCorp intends to establish a biennial conservation target. PacifiCorp supports the language in WAC 480-109-010(2)(c) that the biennial conservation target "may be a range rather than a point target." PacifiCorp intends to involve Commission staff and members

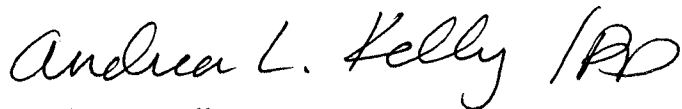
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of its Demand Side Management advisory group for input in establishing the target. PacifiCorp intends to report its conservation savings using actual program participation levels recorded in the Company tracking system. PacifiCorp has concern with the Summary response that states "Reported conservation savings should be based on the best available information." PacifiCorp respectfully requests that the Commission clarify if it intends to allow reported conservation savings to be based on consistent assumptions used in setting the conservation target or explain if it intended a different process by the reference "based on the best available information."

### **Summary**

PacifiCorp appreciates the opportunity to submit these comments. PacifiCorp respectfully requests that the Commission either adopt final rules to address the uncertainty or provide the necessary clarification on the items discussed above in the Commission's order adopting the rules. PacifiCorp also respectfully requests that the Commission reconcile the implications of its interpretations of the Act that are substantially different than the interpretations of the same statute by another state agency. The addition to the record in this proceeding to include clarification of the interpretation and intent of the Proposed Rules based on the Commission's response to the questions raised above will be important for the understanding of future Commissions and parties involved in complying with the rules today and for years to come.

Sincerely,

Handwritten signature of Andrea L. Kelly in cursive script, followed by the initials "AD".

Andrea L. Kelly  
Vice President, Regulation

cc: Nicolas Garcia  
Dick Byers