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September 26, 2007

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.: Comment Letter for CR 102 Rules

Dear Ms. Washburn:

In response to the August 21, 2007 CR-102 Proposed Rule Making and Notice of Opportunity to Submit Written Comments on Proposed Rules, Puget Sound Energy, Inc. ("PSE or the Company") provides the following written comments on the August 21, 2007 Draft Rules ("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 August 21, 2007 Draft Rules.

WAC 480-109-007 Definitions

(10) PSE disagrees with Draft Rules that omit the definition of "gross electricity savings" from WAC 480-109-007 and remove the phrase from WAC 480-109-040(1)(a). The referenced language is included in PSE's proposed revisions to the Draft Rules. 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.

This is consistent with the manner in which PSE and its Conservation Resource Advisory Group ("CRAG") have been operating for the past several years. Pursuant to the conservation

stipulation in PSE's 2001 general rate case,[1] PSE often relies on "deemed" savings from the Regional Technical Forum ("RTC"), a group which establishes the savings to be used as the basis for BPA funding of specified conservation measures. The RTF periodically changes its savings calculations as new information becomes available. PSE's CRAG has agreed that any new data on energy savings developed after PSE has started a new two-year program cycle will not be applied retroactively to measure the savings achieved during that period, but will instead be applied to the next two-year cycle. For example, in 2005 the RTF's average savings for compact fluorescent light bulbs went from approximately 60 kWh per bulb to 30 kWh per bulb. PSE had already set targets, planned programs, and started implementing programs based on the old numbers—after the entire process had been vetted through the CRAG. PSE used the 60 kWh to measure the total savings from its 2004-2005 program and applied the 30 kWh standard to the 2006-2007 program.

It should go without saying that the same assumptions that underlie the establishment of the target should also be used to measure compliance with the target. The manner in which "actual savings" are calculated should be the same as the manner in which expected savings from the target are calculated. The conservation target should not be a moving target. Utilities, customers and regulators should understand what the expected savings assumptions are when the target is set and those same assumptions should form the foundation for calculation of actual gross savings.

(17) As stated in earlier comments, the phrase "real-time basis without shaping, storage, or integration services" as used in the Draft Rules (WAC 480-109-007(9)(a)(ii)) and RCW 19.285.030(10)(a) needs to be defined. We understand that the Commission proposes to address this in a later rulemaking; however, postponing the issue leaves utilities facing the specter of uncertainty if they acquire a resource that needs to use the real time provision. Moreover, 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").

PSE's proposed revisions to the Draft Rules include a definition that is consistent with the industry definition. Our best understanding of the industry practice is that "real time" includes 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

[1] *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).

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.

If the Commission rejects PSE's proposed definition and waits to define "real time", the Commission should not disallow any utility's investment in a resource that needs to use the real time provision and that is acquired before the Commission defines "real time." Or, at a minimum, utilities should be permitted to seek preapproval of such resources, in order to establish whether the resources meet the "real time" requirement.

WAC 480-109-020 Renewable resources.

This section of the Draft Rules is inconsistent with the language and spirit of the Act because it requires a utility to have met the renewable resource target on January 1 of the target year, rather than allowing a utility to use the full statutory three-year time period to meet its target. PSE's proposed revisions to the Draft Rules are consistent with the Act because they recognize that the target years are calendar years, and they allow RECs produced during the target year, the preceding year and the subsequent year to be used in meeting the target, regardless of whether these RECs were generated by company-owned renewable resources or third-party-owned renewable resources.

(1) Calendar Year Targets: The Draft Rules are Inconsistent with the Act

RCW 19.285.040(2)(a) divides the renewable target period into three subsets: (i) the time period from January 1, 2012 through December 31, 2015 in which a three percent annual target must be met; (ii) the time period from January 1, 2016 through December 31, 2019 in which a nine percent annual target must be met; and (iii) the time period from 2020 and continuing each year thereafter in which a fifteen percent annual target must be met. In the language of the Act, the January 1 and December 31 dates are used to circumscribe the three periods of time that correspond to the three target levels. They should not be read as setting the date on which compliance with the target must be attained, given that the Act allows a utility to use RECs generated over a three-year period to demonstrate compliance. RCW 19.285.040(2)(e).

The Draft Rules focus on the January 1, dates, and require the percentage target to be met by that date. The Draft Rules ignore the subsequent references to December 31 in the Act. The December 31 dates are significant because they make clear that the target is an annual, calendar year target, which is consistent with other sections of the Act. *See* RCW 19.285.030(20)

(defining a year as a calendar year); RCW 19.285.040(2)(e) (describing compliance with the targets for any given *year*).

PSE's proposed revisions to the Draft Rules give meaning and effect to the January 1 and December 31 dates contained in the Act and make clear that the target is a calendar year target—not a target that must be met by the first day of the target period.

(2) Use of RECs:

RCW 19.285.040(2)(e) permits a utility to meet the renewable targets with RECs produced during the target year, the year preceding the target year, or the year subsequent to the target year:

> The requirements of this section may be met for any given year with renewable energy credits produced during that year, the preceding year, or the subsequent year. Each renewable energy credit may be used only once to meet the requirements of this section.

WAC 480-109-020(2) of the Draft Rules is inconsistent with the Act because it limits a utility's ability to use RECs produced during the target year or the subsequent year to meet the renewable energy requirements for the target year:

> Renewable energy credits produced during the target year, the preceding year or the subsequent year may be used to comply with this annual renewable resource requirement *provided that they were acquired by January 1 of the target year.*

(Emphasis added).

An administrative rule cannot take away a right granted by a statute, nor can an agency amend a statute by regulation. *See, e.g., Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 227, 858 P.2d 232 (1993); *H&H Partnership v. State*, 115 Wn. App. 164, 170, 62 P.3d 510(2003). The Act gives a utility flexibility to meet annual targets with RECs produced over a three year period. The Draft Rules take away this right and effectively blot out the language of the Act. Instead of a three-year period, under the Draft Rules a utility must have acquired all RECs by January 1 of the target year.

Further, in WAC 480-109-020(2), the Draft Rules artificially distinguish between RECs generated by a renewable generating asset owned by a utility and RECs generated by a renewable generating asset owned by a third-party that are purchased by a utility.[2] The Act

[2] *See* Summary of Written Comments Draft Rules, Energy Independence Act – UE-061895 (September 20, 2007) (hereafter "Summary of Comments")("[B]ecause 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 hear to meet the January 1, compliance date.

makes no such distinction. Under the plain language of the Act a REC is defined as a "tradable certificate of proof of at least one megawatt-hour of an eligible renewable resource . . . ." RCW 19.285.030(17). Thus, a REC can be generated by an eligible renewable resource owned by a utility, or it can be produced by an eligible renewable resource owned by a third-party and sold to a utility. In either case, the RECs can be used to meet the renewable target, so long as they are produced during the target year, the year preceding the target year, or the year subsequent to the target year. There is no basis in the Act for distinguishing between RECs produced by utility-owned renewable resources and RECs produced by third-party-owned renewable resources. There is no basis in the Act to allow a utility to count all RECs produced over a three-year period if they were produced by company-owned renewable resources, but to allow the utility to count only those RECs produced in the year preceding the target year if the RECs are owned by a third party and purchased by the utility. PSE's proposed revisions to the Draft Rules remove this inconsistency.

If there is a distinction to be made between RECs produced by utility-owned resources and RECs produced by third-parties, it would make sense to give a utility *more* flexibility over the use of RECs produced by a third-party, so that a utility could buy such RECs during the target year and subsequent year to fill in the gaps when utility-owned renewable resources do not produce the expected RECs (i.e., during a low wind year). The Draft Rules have turned this reasoning on its head and give the utility no flexibility to purchase RECs during the target year or subsequent year to make up for low output by a utility-owned renewable resource.

(3) Load

The requirement in the Draft Rules that a utility have sufficient RECs by January 1, 2012 to meet three percent of its load is also inconsistent with the Act because the utility will not know its load on January 1 of the target year, and thus will not be able to quantify three percent (or nine percent, or fifteen percent) of its load by January 1 of the target year. The Draft Rules incorporate the statutory language defining load in the context of the renewable resources target: "In meeting the annual targets of this subsection, a utility must calculate its annual load based on the average of the utility's load for the previous two years." WAC 480-109-020(3); *see* RCW 19.285.040(20(c). Thus, under the language of the Draft Rules, on January 1, 2012 a utility will be required to demonstrate that three percent of its load is met by RECs from renewable resources, but the utility will not know the load on which the three percent requirement is based until after the date for complying with the target has passed. Requiring a utility to meet a standard that cannot be ascertained or measured violates due process, is unreasonable, and will not be enforced. *See e.g.,* Greco v. Parsons 105 Wn.2d 669, 673 717 P.2d 1368 (1986)(holding ordinance unreasonable and unenforceable that failed to provide adequate time constraints for

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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.")(emphasis added).

required action). There is no way a utility can plan to meet its target of three percent of load before it can calculate its load.

In contrast, if the target year is treated as a calendar year and a utility is allowed to use RECs produced during the target year, the preceding year and the subsequent year to meet its three percent target, then there is no longer an inconsistency with the Act's and Draft Rules' method of calculating load for purposes of the renewable target. For the target year 2012, the load will be the average load for 2010 and 2011. The utility will be able to calculate this load figure in early to mid 2012, and will be able to use the remainder of the target year and the subsequent year to acquire RECs to meet three percent of its load.[3]

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

PSE disagrees with the decision not to include detail in the Draft Rules regarding the costs that may be included in the incremental cost calculation.[4] The purpose of the administrative rules is to provide clarity. Utilities should not be required to engage in a guessing-game as to whether or not they have met the four percent cap alternative.

PSE continues to propose express language stating 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.

WAC 480-109-040 Annual reporting requirements.

(1)(a) Report on Conservation Target

As discussed above, PSE's proposed revisions to the Draft Rules include language consistent with the Act regarding the "expected" electricity savings and clarify that the electricity savings being measured is "gross" electricity savings, which will not be retroactively adjusted based on new assumptions that arise after the expected electricity savings from the conservation target has been set.

(1)(a) Inclusion of Cogeneration Facilities

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[3] If the Commission accepts the position in the Draft Rules that all RECs must be acquired by January 1 of the target year, then utilities should use the average of the two previously completed years to establish their load for the target year. In other words, for a January 1, 2012 target, the load should be determined based on the average load for the years 2009 and 2010, since the load for 2011 will not be known by January 1, 2012.

[4] *See* Summary of Comments ("The proposed rules do not detail what costs may be included in the incremental cost calculation.").

PSE interprets the law and the Draft Rules to allow electricity savings from third-party-owned cogeneration facilities to count toward the conservation target, as long as the cogeneration project is located at a customer site and is used to meet that customer's energy needs, as well as meeting the other eligibility requirements. This is consistent with WAC 480-019-040(1)(a) which allows the utility to count electricity savings from cogeneration facilities operating within the utility's service area towards to the utility's conservation target during the biennium when the cogeneration facility commences operation. This is also consistent with the language of the Act. The Act permits a utility to count cogeneration owned and used by a retail electric customer to meet its own needs. The Act does not preclude a utility from counting cogeneration that is owned by a third-party but used by a customer to meet that customer's own needs.

(1)(a) Clarification of Reporting Requirement for Conservation

PSE's proposed revisions to the Draft Rules include language expressly stating the date by which a utility must report on its compliance with biennial conservation targets. This, along with a parallel provision for renewable resources discussed below, provide additional clarity and certainty regarding the compliance period, annual reporting, and issuance of administrative penalties.

(1)(b) Reporting on Progress Towards Meeting Renewable Target

Because the full report on Target Year 2012 performance will not be known until the completion of the subsequent year (2013), it will be the June 2014 report that will provide a complete analysis of the utility's performance in 2012.[5] PSE's proposed revisions to the Draft Rules make clear that a utility must demonstrate compliance with the renewables target beginning with the June 2014 report. As discussed in detail above, a utility has the right to rely on RECs produced during the target year, the year preceding the target year, and the year subsequent to the target year, either from utility-owned renewable resources or renewable resources that the utility acquires from third parties. No penalty can be assessed until a utility has had the full benefit of RECs produced during the target year, the preceding year, and the subsequent year. *See* RCW 19.285.040(2)(e).

(4) Copies of Annual Progress Reports

PSE's proposed revisions to WAC 480-109-040(4) delete the language that requires a utility to provide copies of all current and historical reports to any person on request. This goes beyond the requirements set forth in the Act that require a utility to make its annual progress reports

[5] The Summary of Comments states that the June 2013 report is the first report to address renewables. While the 2013 report may address a utility's progress toward meeting the renewable target, a full report on compliance cannot be made until 2014, for the reasons set forth above.

available to its customers. RCW 19.285.070(3). PSE is willing to make current and historical reports available on its website, which provides for adequate public access.

(5) Customer Notification

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.

(4) Recovery of Penalties in Rates

PSE proposes adding language 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.

(5) Mitigation of penalties for failure to meet biennial target

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)(h)(i) and WAC 480-109-030(2) 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(d), (e) 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. Despite this directive, the only cost recovery issue that is currently addressed in the Draft Rules is the recovery of administrative penalties.

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. RCW 19.285.050 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 Strom Carson

cc: Nicolas Garcia