BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, INC., Respondent.	)	**Docket No. UE-100177** **NW Energy Coalition's Response to Motions for Summary Determination**

I. Introduction

1. The NW Energy Coalition ("Coalition") files this Response to Motions for Summary Determination pursuant to Order 03 in this docket.

2. Puget Sound Energy ("PSE" or "the Company"), Commission Staff, Public Counsel and the Coalition each filed a Motion for Summary Determination with the Commission on April 6, 2010. The Coalition supports the Motions filed by Staff and Public Counsel.[1] We respond here to certain issues raised by PSE and respectfully request the Commission to deny PSE's Motion.

3. We begin this Response by addressing the "letter" of I-937, *i.e.*, the statutes and rules that are relevant here. We then review the "spirit" behind the Clean Energy Act, *i.e.*, the reasons why the Coalition and other organizations pushed so hard for passage of this important citizen-based initiative. Our Response discusses why the filing that PSE made on January 29 fails to comply

[1] In particular, Public Counsel provides an extensive examination of the public process that PSE employed. This is an extremely important issue to the Coalition. As a member of PSE's CRAG and Integrated Resources Plan Advisory Group, we echo Public Counsel's concerns about the lack of process associated with the targets that PSE proposed on January 29.

with the Act both as it was drafted (i.e., the letter) and as it was intended (i.e., the spirit). We close with a brief review of certain other points that PSE makes in its Motion.

II. PSE's filing does not comply with the letter of Chapter 19.285 RCW.

4. Contrary to PSE's assertion,[2] the Report that the Company filed on January 29 does not comply with the letter of Chapter 19.285 RCW ("I-937" or the "Clean Energy Act").

A. The Report shows a decrease in energy conservation, not an increase.

5. In reviewing PSE's Report, the overriding consideration should be whether it advances the Clean Energy Act's stated purpose.[3] The Act declares, as a fundamental matter of policy, "*increasing energy conservation* and the use of appropriately sited renewable facilities builds on the strong foundation of low-cost hydroelectric generation in Washington state and will promote energy independence in the state and the Pacific Northwest region."[4] This declaration sets out the voters' intent to go beyond the status quo and stimulate a utility such as PSE to acquire greater levels of energy efficiency.

6. The conservation level that PSE proposes for 2010-2011, however, falls far short of the mark set in statute. Instead of an increase, the Report shows a significant reduction in conservation for the two-year period compared to the conservation level that PSE budgeted for 2010-2011, and further compared to the actual conservation that PSE acquired in recent years. The following table compares PSE's conservation history to the Report's assessment.[5]

[2] PSE Motion at ¶ 2.
[3] *See Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458-59, 645 P.2d 1076 (1982).
[4] RCW 19.285.020 (emphasis added).
[5] The historical information in Table 1 is derived from EES Annual Reports filed in Docket No. UE-970686. The 2010-2011 budgeted target is drawn from PSE's conservation tariff filing, Docket No. UE-091859. The 2010-2011 target that PSE proposes for I-937 compliance is drawn from the Company's Report in this docket.

Table 1: PSE's Historical and Proposed Acquisition of Energy Efficiency

2004-2005 (actual)	2006-2007 (actual)	2008-2009 (actual)	2010-2011 (budgeted)	2010-2011 (proposed for I-937 compliance)
39.34 aMW	44.4 aMW	66.4 aMW	71.0 aMW	42.2 aMW

7. In sum, PSE's I-937 conservation target should be in line with its budgeted conservation target, not decreasing to a level akin to the energy efficiency acquired in 2004-2005.

B. The Report does not show that PSE is pursuing all achievable cost-effective conservation.

8. PSE's filing does not satisfy the Clean Energy Act's mandate. RCW 19.285.040(1) requires the Company to "pursue all available conservation that is cost-effective, reliable, and feasible." This requirement is plain and unambiguous.[6] The word "all" in the statute means "the whole amount" or "as much as possible," and the word "available" means "accessible" or "obtainable."[7] Here, though, PSE proposes a 10-year conservation potential that is only 50 percent of the potential that the Company identified in its 2009 IRP, and a biennial target that is only 47-61 percent of the target range that PSE provided to the CRAG on December 31.[8] These figures are not at all consistent with the mandate that PSE acquire "all available conservation."

9. In its Motion, PSE claims that "RCW 19.285.040 does not require a utility to choose the source that results in the highest level of conservation."[9] But I-937 does not provide a choice between sources of conservation assessments. The Clean Energy Act simply requires a qualifying utility to use methodologies consistent with the Northwest Power and Conservation

[6] *See Young v. Estate of Snell*, 134 Wn.2d 267, 279, 948 P2d 1291 (1997); *State ex rel. Royal v. Board of Yakima County Comm'rs*. 123 Wn23 451,451, 869 P2d 56 (1994) (meaning of a statute must be derived from the wording of the statute itself where the statutory language is plain and unambiguous).
[7] Merriam-Webster Dictionary; *see also American Legion v. Walla Walla*, 116 Wn.23 1, 8, 802 P.2d 784 (1991) (court relies on dictionary definition for plain meaning of word).
[8] Coalition Motion at ¶¶ 5, 7.
[9] PSE Motion at ¶ 28.

Council ("Council") when assessing the utility's 10-year conservation potential.[10] WAC 480-109-010(1)(b) does provide utilities with two options for deriving their conservation potential: their most recent IRP or the Council's current power plan. A reasonable interpretation of this rule, however, particularly when considering it in conjunction with the plain language of RCW 19.285.040(1), is that a utility must select the *higher* of the two target options if that higher target in fact reflects all available cost-effective conservation (as the statute requires).[11]

10. In an attempt to bolster its position, PSE points to a slide contained in a presentation by Council staff at a Commission workshop. PSE states, "[T]he Council specifically recommends that 'Utilities can just use the utility target calculator.'"[12] But the referenced slide also provides a link to a website containing the calculator,[13] which is prefaced by the following statement:

> The purpose of this calculator is to provide utilities with a simple means to compute "their share" of the Northwest Power and Conservation Council 5th Plan's regional conservation target. This calculator is intended to provide utilities with an "approximation" of the level of conservation they should target in order to be consistent with the Council's regional goals. The Council ***does not*** formally assign individual utility targets in its planning process. *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.*[14]

Council staff thus states its desire that a utility use its share of the regional conservation assessment as a benchmark rather than a specific target unless that utility has not performed a

---

[10] RCW 19.285.040(1)(a).
[11] WAC 480-109-010 must be interpreted in a manner consistent with Chapter 19.285 RCW because an administrative agency such as the Commission cannot modify or amend a statute by regulation. *E.g.*, *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 428, 833 P.2d 375, 377 (1992). *See also Edelman v. State Ex Rel. P.D.C.*, 152 Wn.2d 584, 591, 99 P.3d 286 (2004) (stating that agencies may not promulgate rules that amend or change legislative enactments).
[12] PSE Motion at ¶ 7.
[13] PSE Motion, Declaration of Eric Englert, Exhibit A, slide 39.
[14] Introduction, Northwest Power and Conservation Council's Fifth Plan Conservation Target Calculator, www.nwcouncil.org/energy/utilitytargetcalc_v1_7.xls. (Second emphasis added.)

current, rigorous assessment for its service territory.

11. In this case, however, the IRP that PSE prepared in 2009 included such a rigorous assessment. Consequently, the 10-year conservation potential that PSE derived from its IRP and filed by January 1 should be recognized as the basis for the Company's first biennial target under I-937.

12. In sum, PSE's proposed biennial target is not sufficient to acquire all available cost-effective conservation as dictated by the statute.

C. The Report is not consistent with the 10-year conservation potential that PSE identified.

13. As we discuss in our Motion,[15] PSE notified its CRAG on December 31, 2009 that the Company had assessed its 10-year conservation potential at 427.9 aMW based on the results of its most recent IRP.[16] Using this 10-year assessment, PSE projected a biennial target range of 69.4 aMW - 90.3 aMW at the customer meter level.[17]

14. The analysis and target that PSE presented to the CRAG on December 31 are consistent with earlier Company filings, which confirm PSE's intent to use its IRP to determine I-937 compliance. For example, PSE's 2009 IRP states: "[T]he results of the electric conservation potential reported here are reflected in PSE's upcoming IRP and will *provide the basis for compliance with the requirements of WAC Chapter 480-109.*"[18] Similarly, the Company made a filing in November 2009 (regarding tariffs for energy efficiency services) in which it projects 71 aMW of energy savings during 2010-2011 -- a figure that falls within the biennial target range that PSE provided to the CRAG in December. The November filing further states:

[15] Coalition Motion at ¶¶ 5, 7.
[16] Docket No. UE-091986, "E-mail 12-31-2009," page 1.
[17] *Id*.
[18] Docket Nos. UE-080948 and UG-080949, Appendix L1, page 3 (emphasis added).

> 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*.[19]

15. On January 29, 2010, however, PSE filed the Report in this docket that purported to comply with I-937. The Report identifies a 10-year achievable conservation potential of only 1,871,908 MWh (213.7 aMW), and a biennial target of only 369,796 MWh (42.2 aMW).[20]

16. I-937 requires a qualifying utility to identify its 10-year conservation potential "by January 1, 2010" and at least every two years thereafter.[21] The law further requires the biennial target to be made publicly available beginning January 2010, "consistent with its identification of achievable opportunities in (a) of this subsection" -- in other words, with the 10-year assessment.[22] Despite this requirement, however, the target that the Company filed on January 29 cannot be reconciled with the more expansive assessment that PSE provided to its CRAG just one month earlier.

17. PSE relies on WAC 480-109-010(3) to justify the sudden and dramatic change that it to made to the assessment target. The rule states that a utility must file both its 10-year conservation potential and its associated biennial target by January 31, 2010. On this basis, PSE claims that it was entitled to alter its conservation assessment at any time and for any reason during January.[23] But the statute certainly does not contemplate a last-minute modification that, as is the case here, has the effect of cutting the slashing the conservation assessment by almost 50 percent compared to the potential that PSE identified as late as December 31 in its e-mail to the CRAG, and further represented would form the basis for the Company's I-937 compliance

[19] Docket No. UE-091859, Cover Letter, filed by PSE on November 30, 2009 (emphasis added).
[20] Docket No. UE-100177, Report 1-29-2010, page 1.
[21] RCW 19.285.040(1)(a).
[22] RCW 19.285.040(1)(b).
[23] PSE Motion at ¶¶ 36-37.

filing. As even PSE concedes, the Commission should reject expansive interpretations of the Clean Energy Act that are not supported by applicable law and the Commission's own rules.[24]

18. PSE also suggests that it provided two possible options to the CRAG in December: one based on the Company's IRP, and one based on the Council's Fifth Plan.[25] Yet this argument does not square with the e-mail that PSE sent to the CRAG on December 31. That communication focused on PSE's intent to use its IRP analysis, not the Fifth Plan analysis, as the basis for its I-937 biennial target. The e-mail's single reference to the Fifth Plan simply contrasted the Plan with PSE's then-proposed target, and did not use the Plan to justify yet another target:

> By contrast, PSE's share of the Power Council's 5th regional plan would be a cumulative ten-year potential of 219.4 aMW (2009 - 2018, the latest period in the Council's published calculator) and a 2010-11 "target" of 42.7 aMW. [26]

19. In sum, PSE's proposed biennial target is not consistent with the 10-year conservation potential identified by the Company on December 31, and therefore does not meet the statutory requirement.

II. PSE's filing does not comply with the spirit behind I-937

20. PSE claims that the Report is consistent not only with the letter of I-937, but with the spirit that underlies the initiative.[27] We vehemently disagree. From our perspective as one of the organizations that drafted I-937 and led efforts for its passage, the Clean Energy Act endeavors to shift the energy paradigm in Washington towards a clean and affordable future and away from increased reliance on fossil fuels. The objectives in passing I-937 were lofty yet achievable: reduce risk, create jobs, save money, protect consumers, stimulate rural economic development,

[24] *Id*. at ¶ 3.
[25] *Id*. at ¶ 34.
[26] Docket No. UE-091986, "E-mail 12-31-2009," page 2. We note that the Report ultimately proposes a biennial target of 369,796 MWh or 42.2 aMW.
[27] PSE Motion at ¶¶ 2, 37.

and protect the environment. But these goals will not be realized if utilities such as PSE are allowed to set and pursue meager conservation targets that are substantially less than available, cost-effective conservation.

21. The spirit behind I-937 is further captured in the 2006 Voter Guide issued by Washington Secretary of State Sam Reed.[28] The statements for Initiative Measure 937 focus on how the Initiative "will save us energy and money – through conservation and cheaper, cleaner energy." I-937 is an approach that "lets us take hold of our energy future and reduce our dependence on fossil fuels." Further, I-937 "protects consumers" and "saves money by requiring utilities to offer energy efficiency programs." There is no doubt, then, about the intent behind the initiative – an intent that would be vitiated if the Commission accepts PSE's position in this proceeding.

22. Finally, the Commission has acknowledged the critical importance of conservation as a new paradigm for the state. The recent Avista and PSE rate orders confirm that conservation now represents one of the Commission's "cornerstone missions" because "under almost all circumstances, [it represents] the least cost energy resource available to a utility and its ratepayers.[29] Under these circumstances, therefore, and because conservation has become such an important part of Washington's energy strategy, we do not believe that PSE should be allowed to undercut the Commission's cornerstone mission and the spirit behind I-937.

[28] The 2006 Voter Guide is attached to the Coalition's Response as Exhibit A. Although we believe that PSE's conservation obligations under I-937 are plain and unambiguous, we refer the Commission to the 2006 Voter Guide should it determine otherwise. *See Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 205-06 (2000): "Where the language of an initiative enactment is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation. . . . However, if there is ambiguity in the enactment, the court may examine the statements in the voters pamphlet in order to determine the voters' intent."

[29] *WUTC v. Avista Corporation, d/b/a Avista Utilities*, Docket Nos. UG-090134, UE-090135, and UG-060516, Order 10 at ¶ 289 (December 22, 2009); *WUTC v. Puget Sound Energy, Inc.*, Docket Nos. UE-090704 and UG-090705, Order 11 at ¶ 48 (April 2, 2010).

III. Other issues.

23. PSE requests clarification regarding the allowed size of a range for a biennial conservation target[30] and the application of a penalty to that range.[31] We agree that clarification on these points would be helpful.

24. During the Commission's rulemaking on I-937, the Coalition and other parties argued that the biennial conservation target should be established as a point estimate rather than a range, in order to maintain the Initiative's intent and to avoid the bottom of the range becoming the de facto point target.[32] Parties further argued that a point target would enable utilities to know when administrative penalties could be assessed.[33] The Commission responded, in part:

> WAC 480-109-010(4) provides that the Commission will approve, approve with conditions, or reject the utility's ten-year achievable conservation potential and biennial conservation target, thus minimizing the risks identified by the commenters.[34]

25. Given this statement, the Coalition posits that a proposed range should be reasonable, i.e., the lower number should be no more than 5-10 percent below the assessed cost-effective conservation, and only then should the penalty be assigned to lack of compliance with the bottom of the range.

26. If the Commission rejects PSE's proposed biennial target, the Company plans to file a revised report with a biennial target ranging from PSE's share of the Fifth Plan (42.2 aMW) to PSE's identification of cost-effective conservation in its IRP (69.4-90.3 aMW).[35] Such a broad target is farcical, and appears to be a blatant attempt to avoid any possibility of a penalty.

---

[30] PSE Motion at ¶ 43.
[31] *Id.* at ¶¶ 44-45.
[32] Docket No. UE-061895, General Order R-546, Order Adopting Rules Permanently at ¶ 28.
[33] *Id.*
[34] *Id.*
[35] PSE Motion at ¶ 43.

27. The Commission can look to other penalty mechanisms applied to PSE's conservation programs in recent years to assess a reasonable range for a target. PSE's conservation penalty mechanism in place from 2002-2006 assigned the following financial penalties for failure to achieve the annual conservation savings targets:

- Achieve savings that are 90 to 99% of the goal: $200,000 penalty applies;
- Achieve savings that are 75% to 89% of the goal: $500,000 penalty applies;
- Achieve savings that are less than 75% of the goal: $750,000 penalty applies.[36]

That mechanism was modified for 2007-2009 in conjunction with adoption of a new conservation incentive mechanism for PSE. The new mechanism included a dead-band zone of achieved savings in which no incentive or penalty was assessed from 90% to 99.9% of the baseline target.[37]

28. With I-937, the law is clear that a utility must pay a penalty for each megawatt-hour of shortfall.[38] Allowing utilities to propose a range rather than a point target provides a de facto deadband. That deadband must be appropriate.

IV. Conclusion

29. The Commission should reject PSE's Report for the following reasons:[39]

- The proposed biennial conservation target does not demonstrate an increase in energy conservation compared with preceding years;
- The proposed target does not reflect all available cost-effective conservation;
- The proposed target is not consistent with the 10-year potential identified by January 1;

[36] Docket Nos. UE-011570 and UG-011571, Exhibit F to Settlement Stipulation at ¶ 43.
[37] Docket Nos. UE-060266 and UG-060267, Order 08 at ¶ 154, adopting Staff's design for PSE's conservation incentive mechanism as detailed in the testimony of Joelle Steward.
[38] RCW 19.285.060(1).
[39] In this Response, the Coalition focuses on a subset of issues identified by PSE in its Motion. Lack of response to any particular issue does not indicate agreement with PSE's arguments or portrayal of that issue.

- The proposed target was not accompanied by a rigorous public process as required by the Commission's rules;[40] and
- The proposed target does not demonstrate a positive shift from the status quo in keeping with the spirit of I-937 – rather, it represents a dramatic step backward.

30. To sum, I-937 must be interpreted holistically.[41] The relevant provisions in the statute work together and are unambiguous: utilities must set and achieve meaningful biennial conservation targets that move beyond the status quo. As the Commission stated when adopting rules to implement I-937, "Finally, we note that implementation of the Act will be informed by time and experience."[42] This is an appropriate proceeding, then, for the Commission to ensure that I-937 is implemented in a manner that remains faithful to the law.

Dated this 19th day of April, 2010

_____

NW Energy Coalition
Danielle Dixon, Senior Policy Associate

[40] WAC 480-109-010(3)(a); *see* Public Counsel Motion at ¶¶ 3-6.
[41] *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) ("[when 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.'"). *See also Advanced Silicon Materials, LLC v. Grant County*, 156 Wn.2d 84, 89-90, 124 P.3d 294 ("The plain meaning of a statute 'is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'") (citation omitted); *Washington State Human Rights Comm'n ex rel. Spangenberg v. Cheney School Dist. No. 30*, 97 Wn. 2d 118, 641 P.2d 163 (1982) (holding that each part of a statute should be construed in connection with every other part so as to produce a harmonious whole).
[42] Docket No. UE-061895, General Order R-546, Order Adopting Rules Permanently at ¶ 47.