BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of a Proposed Rulemaking To Implement Initiative Measure No. 937	))))))	Docket No. UE-061895 COMMENTS OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

I. INTRODUCTION

1 The Industrial Customers of Northwest Utilities ("ICNU") submits these comments in response to the Washington Utilities and Transportation Commission's ("WUTC" or the "Commission") CR-102 and Notice of Opportunity to File Written Comments issued on August 23, 2007. ICNU generally supports the Commission's proposed rules and appreciates the opportunity to participate in the formulation of these rules. The proposed rules adequately address the Commission's concern of adopting only those rules necessary for the implementation of Initiative 937 ("I-937") at this time. ICNU urges the Commission, however, to adopt the following changes in the final rules:

1. Allow investor-owned utilities ("IOUs") to count towards their annual renewable energy targets Renewable Energy Credits ("RECs") *acquired* in a subsequent year;

2. Clarify that issues related to cost-recovery cannot be raised in proceedings to determine whether a utility is in compliance under *proposed* WAC § 480-109-040;

3. Remove the reference to "power cost only type rate proceedings" under *proposed* WAC § 480-109-050.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

II. BACKGROUND

2 On November 7, 2006, voters in the State of Washington passed I-937, which implements a Renewable Portfolio Standard for Washington state "qualifying utilities."[1/] I-937 is codified at RCW § 19.285. Parties to this Docket already have submitted three rounds of written comments at the request of the Commission, and participated in multiple workshops to discuss various issues regarding this rulemaking proceeding. After consideration of the parties' comments, the Commission issued a CR-102 on August 23, 2007, and requested additional comments regarding the proposed rules.

III. COMMENTS

A. The Statutory Language Does Not Require Utilities to Acquire RECs Produced in a Subsequent Year by January 1 of the Target Year

3 In Staff's June 15, 2007 draft rules, Staff proposed to allow utilities to use RECs acquired and produced in a subsequent year to comply with the annual renewable resource targets. ICNU and the IOUs supported the draft rules in this respect.[2/] In Comments submitted by the Northwest Energy Coalition, the Northwest Energy Efficiency Council, and the Renewable Northwest Project (collectively, the "Sponsors"), however, the Sponsors argued that the plain language of I-937 precludes utilities from using RECs that are not acquired in the target year.[3/] Staff apparently agreed with the

---

1/ A "qualifying utility" is defined as a consumer- or investor-owned electric utility that serves at least 25,000 customers.

2/ ICNU Comments at 2-3 (July 9, 2007); PacifiCorp Comments at 12-13 (July 9, 2007); Avista Comments at 5-6 (July 9, 2007); PSE Comments at 4-5 (July 9, 2007).

3/ Sponsors Comments at 2-4 (July 9, 2007).

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Sponsors' interpretation due to the change in rule language from the June 15, 2007 draft to the current proposed rules.

4 The Commission is not constrained to such a reading. The differing interpretations of the statutory language presented by the stakeholders and Staff show that the language of I-937 is ambiguous at best; reasonable minds disagree as to the meaning of the statute.[4/] Moreover, because I-937 is a statute within the Commission's field of expertise, the Commission is afforded substantial deference in the interpretation of an ambiguous statute as long as it reflects a plausible construction.[5/]

5 Further, the Sponsors argue that arguments regarding the burden on ratepayers and the difficulty of compliance are not relevant in statutory interpretation.[6/] In interpreting the meaning of a statute, however, it is the reviewing court's duty to reach an interpretation that is workable and will not produce strained results.[7/] In addition, the court favors an interpretation "consistent with the spirit and purpose of the enactment over a literal reading . . . ."[8/] Whether a utility is actually able to comply with the requirements of I-937, and the effect on the ones who will ultimately bear the cost burden, are directly relevant to such an inquiry.

6 Allowing utilities to use RECs acquired and produced in a subsequent year is a plausible interpretation of the statutory language and furthers the goals of I-937 and

---

4/ See, e.g., Lane v. Dep't of Labor and Indus., 21 Wn.2d 420, 423 (1944) (statute is ambiguous where "reasonable minds are uncertain or disagree as to its meaning").

5/ See Arco Prods. Co. v. WUTC, 125 Wn.2d 805, 810-11 (1995); Nationscapital Mortgage Corp. v. Dep't of Financial Institutions, 133 Wn. App. 723, 737 (2006).

6/ Sponsors Comments at 5 (July 9, 2007).

7/ Nationscapital Mortgage Corp., 133 Wn. App. at 737.

8/ Id.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

the Commission's duty to regulate in the public interest. The goal of I-937 is to foster the development of renewable resources, not to create such strict, unworkable standards that will be impossible to meet.[9/] Penalties for non-compliance are placed in a special account from which ratepayers will see no benefit.[10/] Utilities will be forced to either pay these penalties and seek recovery of penalties in rates, or overcomply regardless of whether it is cost-effective to do so. Such a result is inconsistent with I-937's policy of "stabiliz[ing] electricity prices for Washington residents" and the public interest, as renewable energy developers will be the only ones that see any benefit.

B. The Commission's Rules Should Make Clear That Cost Recovery Issues Cannot Be Raised during Compliance Proceedings

7 In comments submitted on July 9, 2007, both ICNU and Public Counsel urged the Commission to make clear that issues of cost recovery cannot be raised in compliance proceedings under *proposed* WAC § 480-109-040(2).[11/] ICNU proposed a simple statement added to *proposed* WAC § 480-109-040(2) to clarify that compliance proceedings are limited to just that; determining compliance, i.e., whether a utility has met the conservation and renewable energy targets to the megawatt hour and any alternative compliance arguments.[12/] ICNU again urges the Commission to adopt this simple amendment to protect the rights of ratepayers.

9/ See PacifiCorp Comments at 13 (July 9, 2007).
10/ RCW § 19.285.060(5).
11/ ICNU Comments at 3-4; Public Counsel Comments at 8.
12/ ICNU Comments at 4.

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

C. Penalties Are Not Power Costs and Should Not be Eligible for Recovery in a Power Cost Only Type Rate Proceeding

8 ICNU is opposed to the possibility of allowing utilities to recover penalties in rates. If the Commission leaves this possibility open, however, ICNU objects to allowing utilities the ability to do so in a power cost only type rate proceeding. In comments submitted August 1, 2007, PSE argued that penalties properly fall within the ambit of a power cost only type rate proceeding because penalties are power costs. PSE Comments at 2.[13/] Staff agrees with PSE.[14/] Both Staff and PSE and incorrect; penalties are penalties and have no place in a limited proceeding such as PSE's power cost only rate case ("PCORC").

9 PSE's PCORC is intended to "true up the Power Cost Rate to all power costs identified in the Power Cost Rate . . . [and] to add new resources to the Power Cost Rate."[15/] For example, in PSE's latest PCORC, PSE filed to update its power costs to reflect the acquisition of a gas-fired combined cycle power plant.[16/] Penalties, however, are unrelated to any cost included in the Power Cost Rate or new resource. Penalties under I-937 are assessed because a utility *failed to acquire* a resource. Unlike power

---

[13/] The last deadline for submitting comments was July 9, 2007. PSE's comments submitted August 1, 2007, were not authorized by any Commission notice. There is no authority allowing a party to submit reply comments in a rulemaking proceeding when not requested by the Commission. In addition, the due process rights of other parties were prejudiced because PSE's August 1, 2007 Comments were not submitted pursuant to Commission notice. ICNU does not believe the Commission should consider PSE's August 1, 2007 Comments. Because the Commission retained the language regarding a power cost only type rate proceeding in *proposed* WAC § 480-109-050, however, the Commission may have given merit to PSE's unauthorized Comments.

[14/] Docket No. UE-061895, Summary of Written Comments at 5 (Sep. 20, 2007).

[15/] Re PSE, Docket Nos. UE-011570 and UG-011571, Twelfth Supp. Order at ¶ 26 (June 20, 2002).

[16/] Re PSE, Docket No. UE-070565, Order No. 7 at ¶ 2 (Aug. 2, 2007).

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

costs, penalties do not provide any service to ratepayers, and only represent a utility's failure to comply with the law.

10 Further, whether a utility is able to recover penalties in a power cost only type rate proceeding should be governed by the scope of the mechanism itself, not the Commission's rules. As Public Counsel pointed out in its Comments, PSE's latest PCORC has resulted in an agreement to reexamine the scope of the PCORC.[17/] Depending on the outcome of the final rules, a utility may advocate for the inclusion of penalties in any docket regarding the adoption of a power cost only type rate case. But the Commission should not automatically give the utilities the right to seek the recovery of penalties in such a proceeding, as it may violate the terms of any power cost only type rate proceeding, such as PSE's PCORC. Accordingly, the Commission should remove any reference to the ability of a utility to recover penalties in a power cost only type rate proceeding in *proposed* WAC § 480-109-050(4). In any case, ICNU continues to believe that the better outcome is to prevent any recovery of penalties from ratepayers.

IV. CONCLUSION

11 ICNU appreciates the opportunity to participate in this rulemaking docket and urges the Commission to adopt the foregoing changes.

[17/] Public Counsel Comments at 7 (July 9, 2007).

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Dated this 26th day of September, 2007.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Allen Chan
Melinda J. Davison
Allen C. Chan
333 S.W. Taylor, Suite 400
Portland, OR 97204
(503) 241-7242 telephone
(503) 241-8160 facsimile
mail@dvclaw.com
Of Attorneys for Industrial Customers of
Northwest Utilities