

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKET UE-100177

COMMISSION STAFF RESPONSE
TO PUGET SOUND ENERGY'S
MOTION FOR SUMMARY
DETERMINATION

1 Puget Sound Energy's Motion for Summary Determination should be denied. Puget Sound Energy ("PSE") has not demonstrated that the "Report Identifying PSE's Ten-Year Achievable Conservation Potential and Biennial Conservation Target" that PSE filed on January 29, 2010 complies with Chapter 19.285 RCW and Chapter 480-109 WAC.

I. STATEMENT OF ADDITIONAL FACTS

2 Puget Sound Energy omits some key background facts in its motion. Washington Utilities and Transportation Commission Staff ("Commission Staff" or "UTC Staff") provide those facts here.

A. Washington's Initiative 937

3 Washington voters approved Initiative 937 in the 2006 general election. Now codified in Chapter 19.285 of the Revised Code of Washington, it imposes procedural and substantive requirements on electric utilities with 25,000 or more customers,¹ such as Puget

¹ Under RCW 19.285.030(16), a "qualifying utility" subject to the requirements of Chapter 19.285 RCW is an electric utility "that serves more than twenty-five thousand customers in the state of Washington." It is undisputed that Puget Sound Energy is a "qualifying utility."

Sound Energy. Among other things, such utilities must set and meet certain targets for energy conservation, and pay penalties if they do not meet them.

4 RCW 19.285.040(1) governs conservation targets. Under RCW 19.285.040(1)(a) and (b), utilities are required to do the following:

- (1) Each qualifying utility shall pursue all available conservation that is cost-effective, reliable, and feasible.
 - (a) By January 1, 2010, using methodologies consistent with those used by the Pacific Northwest electric power and conservation planning council in its most recently published regional power plan, each qualifying utility shall identify its achievable cost-effective conservation potential through 2019. At least every two years thereafter, the qualifying utility shall review and update this assessment for the subsequent ten-year period.
 - (b) Beginning January 2010, each qualifying utility shall establish and make publicly available a biennial acquisition target for cost-effective conservation consistent with its identification of achievable opportunities in (a) of this subsection, and meet that target during the subsequent two-year period. At a minimum, each biennial target must be no lower than the qualifying utility's pro-rata share for that two-year period of its cost-effective conservation potential for the subsequent ten-year period.

Under RCW 19.285.040(1)(e), the UTC has authority to review and approve investor-owned utility conservation targets.

5 RCW 19.285.080(1) authorizes the UTC to “adopt rules to ensure the proper implementation and enforcement of this chapter as it applies to investor-owned utilities.” RCW 19.285.080(2) directs the Washington Department of Commerce (“Commerce”) to adopt rules concerning “documentation to ensure the proper implementation of this chapter” as it applies to consumer-owned utilities. Both agencies have adopted rules implementing Chapter 19.285 RCW.²

² The UTC adopted its rules in Docket UE-061895, *In the Matter of Adopting Rules to Implement the Energy* STAFF RESPONSE TO PSE MOTION FOR SUMMARY DETERMINATION - 2

6 The UTC adopted WAC 480-109-010 to implement RCW 19.285.0401(1), and
Commerce adopted WAC 194-37-070.

**B. The Conservation Council’s Power Plan and its Relationship to RCW
19.285.040(1)**

7 RCW 19.285.040(1)(a) says that utilities must “us[e] methodologies consistent with
those used by the Pacific Northwest electric power and conservation planning council in its
most recently published regional power plan” when they set conservation targets. The
“Pacific Northwest electric power and conservation planning council” (“Conservation
Council”) is a regional multistate agency established under a compact between the States of
Washington, Oregon, Idaho, and Montana.³ Congress ratified the compact as part of the
Pacific Northwest Electric Power Planning and Conservation Act of 1980 (“Northwest
Power Act”).⁴ The Northwest Power Act directs the Conservation Council to prepare and
adopt “a regional conservation and electric power plan” for the Pacific Northwest region
south of Canada.⁵ The plan must give first priority to conservation, and must include a 20-
year forecast of power resources that can be met through conservation.⁶ The Conservation
Council is required to review the plan “not less frequently than every five years.”⁷

8 The Conservation Council adopted its First Northwest Power Plan in 1983.⁸ In 2006,
when Washington voters passed Initiative 937, the Conservation Council’s Fifth Northwest

Independence Act, General Order R-546. The rule adoption order is published in issue 08-1 of the Washington State Register as WSR 07-24-012. The UTC rules are codified at Chapter 480-109 of the Washington Administrative Code. The rules that the Department of Commerce adopted are codified at Chapter 194-37 of the Washington Administrative Code.

³ See 16 U.S.C. § 839b(a); Ch. 43.52A RCW. See generally *Seattle Master Builders Ass’n v. Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986).

⁴ The Northwest Power Act is codified at 16 U.S.C. §§ 839 – 839h.

⁵ 16 U.S.C. § 839b(d)(1); see 16 U.S.C. § 839a(14) (definition of “regional”).

⁶ 16 U.S.C. §§ 839b(e)(1), 839b(e)(3)(D).

⁷ 16 U.S.C. § 839b(d)(1).

⁸ See *Seattle Master Builders*, 786 F.2d at 1366-70 (rejecting challenge to portion of 1983 plan that established model energy conservation standards for new residential construction).

Power Plan was in place, having been adopted in December 2004.⁹ According to the Conservation Council’s web site, the Council began developing its Sixth Power Plan in late 2007.¹⁰

9 The Conservation Council chartered a Conservation Resources Advisory Committee (CRAC) to provide advice related to conservation elements of the Sixth Power Plan as they were developed.¹¹ During a CRAC meeting on June 19, 2009, Conservation Council staff distributed a draft of language for inclusion in the Sixth Power Plan that described its implications for Washington’s Initiative 937.¹² Conservation Council staff convened a follow-up meeting on July 2, 2009, to consider a revised draft.¹³ Representatives from Puget Sound Energy and UTC Staff participated in both meetings, and UTC Staff commented on the draft.¹⁴

10 On September 3, 2009, UTC Staff hosted a workshop where Conservation Council staff made a presentation about the methodology the Council uses to assess conservation resource potential. The presentation described a multi-step process with detailed analysis. Several PSE representatives attended.¹⁵ A few days later, Conservation Council staff e-mailed to those who had attended, including PSE staff, an interactive spreadsheet that Conservation Council staff said was a “conservation target calculator based on the draft 6th Plan,” adding “Please consider this the ‘current version’ until we issue an update.”¹⁶

11 The Conservation Council issued a draft of the Sixth Power Plan for public comment

⁹ 70 Fed. Reg. 12757 (March 15, 2005) (notice of adoption of Fifth Power Plan).

¹⁰ <http://www.nwcouncil.org/library/2007/2007-22.htm>.

¹¹ See 16 U.S.C. § 839b(c)(11). The CRAC charter is available online at <http://www.nwcouncil.org/energy/crac/craccharter.pdf>.

¹² Declaration of Deborah Reynolds (“Reynolds Decl.”) ¶ 5 & Ex. A.

¹³ Reynolds Decl. ¶ 7.

¹⁴ Reynolds Decl. ¶¶ 5—7.

¹⁵ Declaration of Eric E. Englert in Support of PSE’s Motion for Summary Determination (“Englert Decl.”) ¶ 7 & Ex. A; Reynolds Decl. ¶ 8.

¹⁶ Reynolds Decl. ¶ 9 & Ex. B.

in September 2009.¹⁷ After holding public hearings, as required by 16 U.S.C. § 839b(d)(1), the Conservation Council adopted the Sixth Northwest Power Plan on February 10, 2010.¹⁸ The Sixth Plan has not yet been formally published.¹⁹

12 Chapter 4 of the Sixth Northwest Power Plan addresses “Conservation Supply Assumptions” and describes the Conservation Council’s methodology for assessing conservation potential.²⁰ The section about Washington’s Initiative 937, which the CRAC had reviewed in mid-2009, appears at pages 4-22 and 4-23 (Attachment A hereto). It provides, in part, as follows:

[T]he [Conservation] Council has no authority to interpret or apply or implement I-937 for the utilities and regulators in the State of Washington. But because of the intersection between the two mandates—the state’s utilities are to engage in conservation planning “using methodologies consistent with” the conservation planning methodology used by the Council—it is helpful to understand some of the issues raised by the two planning processes.

There is some misunderstanding that I-937 requires Washington utilities to meet some pro-rata share of the conservation targets in the Power Plan. In fact, I-937 does not require the state’s utilities to adopt or meet conservation targets set forth in the Council’s plan nor does the plan identify any particular utility’s “share” of regional conservation targets. However, I-937 does require utilities to develop their own plan using methods “consistent with” the methodology used in the Council’s plan, leaving the utilities discretion to adapt the planning methods to their particular circumstances. To assist Washington consumer-owned utilities in this effort, the Washington Department of Commerce (Commerce),^[21] with the assistance of Council staff and others, adopted rules in 2008 that outline the methodology that the Council uses in its conservation planning.²² Although one sub-section of these rules allows utilities to adopt a share of the Council’s regional targets,²³ this is an option, not a requirement. The Washington Utilities and Transportation Commission (UTC) also adopted rules to guide the investor-

¹⁷ <http://www.nwcouncil.org/library/releases/2009/0903.htm>.

¹⁸ <http://www.nwcouncil.org/library/releases/2010/0210.htm>; see Englert Decl. ¶ 16.

¹⁹ The Sixth Northwest Power Plan “Pre-Publication Version 2/10/10” and most of its appendices are available at <http://www.nwcouncil.org/energy/powerplan/6/default.htm>.

²⁰ http://www.nwcouncil.org/energy/powerplan/6/final/Ch4_021010.pdf.

^[21] Formerly the Washington Department of Community Trade and Economic Development (CTED).

²² WAC 194-37-070(6)(a).

²³ WAC 194-37-070(4)(a).

owned utilities.²⁴ These rules are not as prescriptive and, per the law, integrate I-937 requirements into ongoing regulatory practice.

Concern has also been expressed about the fact that utilities will need to produce their first I-937 conservation plans at the precise moment the Council is making the transition from the Fifth to the Sixth regional power plan. On this issue we should point out that the Council's methodology is essentially the same in the Sixth and Fifth power plans and is clearly described in Chapter 4 of this draft. The conservation targets are higher in the Sixth Plan because of changes in prices, technology, and other factors, not because of a change in methodology.

(Footnote in original renumbered; footnotes containing WAC citations added.)

13 Posted on the Conservation Council's web site are two interactive spreadsheets that will calculate each Pacific Northwest utility's "share" of the Council's total regional conservation goals under the Fifth and Sixth Power Plans, based on retail sales.²⁵ As described in the language quoted above, however, the Council's plan does not identify any particular utility's "share" of the regional targets. Thus, neither of the spreadsheets, or "Target Calculators," is itself part of any Power Plan, nor is either of them a "methodology" that the Conservation Council uses for conservation planning.

C. Puget Sound Energy's Actions Under RCW 19.285.040(1) and WAC 480-109-010

14 RCW 19.285.040(1)(a) sets a deadline of January 1, 2010 for utilities to identify their achievable cost-effective conservation potential through 2019. WAC 480-109-010(1) describes how investor-owned utilities can do that:

- (1) By January 1, 2010, and every two years thereafter, each utility must project its cumulative ten-year conservation potential.
 - (a) This projection need only consider conservation resources that are cost-effective, reliable and feasible.
 - (b) This projection must be derived from and reasonably consistent with one of two sources:

²⁴ WAC 480-109-010.

²⁵ <http://www.nwcouncil.org/energy/powerplan/6/supplycurves/I937/default.htm>.

- (i) The utility’s most recent IRP, including any information learned in its subsequent resource acquisition process, or the utility must document the reasons for any differences. When developing this projection, utilities must use methodologies that are consistent with those used by the conservation council in its most recent regional power plan. A utility may, with full documentation on the rationale for any modification, alter the conservation council’s methodologies to better fit the attributes and characteristics of its service territory.²⁶
- (ii) The utility’s proportionate share, developed as a percentage of its retail sales, of the conservation council’s current power plan targets for the state of Washington.

15 RCW 19.285.040(1)(b) requires utilities, beginning January 2010, to establish “a biennial acquisition target for cost-effective conservation consistent with” its ten-year conservation potential identified under RCW 19.285.040(1)(a). Under WAC 480-109-010(2)(a), the “biennial conservation target must identify all achievable conservation opportunities.” WAC 480-109-010(3) sets a deadline of January 31, 2010 for each utility to “file with the commission a report identifying its ten-year achievable conservation potential and its biennial conservation target.” Relying on its standard practice, the Commission will review the report and determine “whether to approve, approve with conditions, or reject the utility’s ten-year achievable conservation potential and biennial conservation target.”²⁷

16 As described in the Declaration of Stefanie Johnson,²⁸ between April 2008 and December 2009, Puget Sound Energy involved Commission Staff, PSE’s Conservation

²⁶ Under WAC 480-109-007(11), “‘IRP’ means the filing made every two years by an electric utility in accordance with WAC 480-100-238, Integrated resource planning.” See Ch. 19.280 RCW (Electric Utility Resource Plans).

²⁷ WAC 480-109-010(4); see RCW 19.285.040(1)(e).

²⁸ Ms. Johnson’s declaration was filed with Public Counsel’s Motion for Summary Determination. See also Englert Decl. ¶¶ 4-6, 8-11.

Resource Advisory Group,²⁹ and PSE's Integrated Resource Plan Advisory Group³⁰ in the development of its ten-year conservation potential as part of PSE's integrated resource planning process. During that period, PSE represented that its ten-year conservation potential would be derived from its integrated resource plan ("IRP"), as contemplated by WAC 480-109-010(1)(b)(i). For example, PSE represented in a filing in Docket UE-091859 that its electric conservation programs identified through the integrated resource planning process were "consistent with the biennial conservation target range that the company will file" under Chapter 480-109 WAC.³¹

17 In December 2009, Commission Staff reminded PSE about the January 1, 2010 deadline by which utilities were to have identified their ten-year conservation potential under RCW 19.285.040(1)(a) and WAC 480-109-010(1). Staff recommended that, as a way to document compliance, PSE could send an e-mail to its conservation advisory board, with a copy to the UTC Records Center.³² On December 31, 2009, PSE sent to Commission Staff and others an e-mail regarding "WAC 480-109 Compliance." The e-mail said it contained "PSE's projected cumulative ten-year conservation potential and biennial conservation target range" derived from "PSE's resource portfolio model for the 2009 IRP." The e-mail added, "By contrast, PSE's share of the Power Council's 5th regional plan would be" lower.³³ UTC Staff opened Docket UE-091986 and filed the PSE materials under that docket number.³⁴

²⁹ See UTC Docket UE-011570, Twelfth Supplemental Order (June 20, 2002) (approving settlement agreement establishing PSE's Conservation Resource Advisory Group).

³⁰ See WAC 480-100-238(5) (public participation in integrated resource planning).

³¹ UTC Docket EU-091859, letter from Tom DeBoer to David Danner (Nov. 30, 2009), available at <http://www.utc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/07ec68f4c0e86d658825767f0065b3b3!OpenDocument>. See Englert Decl. ¶ 10.

³² Reynolds Decl. ¶ 10 & Ex. C; Englert Decl. ¶ 12.

³³ Declaration of Stefanie Johnson ("Johnson Decl.") ¶ 13 & Attach. G; NW Energy Coalition's Mot. Summ. Determination Ex. A; see Englert Decl. ¶ 12.

³⁴ Englert Decl. ¶ 12; Reynolds Decl. ¶ 11; see

18 There is no evidence that Puget Sound Energy did anything else to document its compliance with the deadline of RCW 19.285.040(1)(a).

19 On January 29, 2010, PSE filed a “Report Identifying PSE’s Ten-Year Achievable Conservation Potential and Biennial Conservation Target” under WAC 480-109-010(3). The ten-year achievable conservation potential and biennial conservation target identified in the report were substantially lower than those identified in the PSE documents that were filed in Docket UE-091986 on December 31, 2009. Citing WAC 480-109-010(1)(b)(ii), PSE explained that it had copied the January 29 numbers from the Fifth Power Plan Target Calculator posted on the Conservation Council’s web site.³⁵

20 In accordance with WAC 480-109-010(4), PSE’s report came before the Commission at its regularly scheduled meeting on March 11, 2010. The Commission determined that PSE had not provided enough information to determine whether the ten-year achievable conservation potential and biennial target contained in the report should be approved, and set the matter for hearing, in accordance with UTC standard practice.³⁶

21 On March 25, 2010, in Docket UE-100382, the Commission approved revisions to PSE’s Electricity Conservation Service Rider tariff.³⁷ In support of the revision, PSE represented that its 2010-2011 target of 71.0 aMW for acquiring conservation resources was a number “significantly greater than the 2010 target level filed in Docket No. UE-100177 of 20.33 aMW (42.22 aMW for the 2-year period 2010-2011).”³⁸

<http://www.utc.wa.gov/rms2.nsf/vw2005OpenDocket/859DCF80A5B1A712882576A2005CC235>.

³⁵ PSE’s January 29 filing in this Docket is available at

<http://www.utc.wa.gov/rms2.nsf/vw2005OpenDocket/AEEB685B91672D42882576BB00043AC7>.

³⁶ UTC Docket UE-100177 Order 01 (March 11, 2010), available at

<http://www.utc.wa.gov/rms2.nsf/vw2005OpenDocket/2924BA8F8A4B7AFE882576E30071BC6E>. See RCW 19.285.040(1)(e) (“commission may rely on its standard practice for review and approval of investor-owned utility conservation targets”).

³⁷ UTC Docket UE-100382 Order 01 (March 25, 2010), available at

<http://www.utc.wa.gov/rms2.nsf/vw2005OpenDocket/8F730C2BEE633446882576F1006D5BBE>.

³⁸ UTC Docket UE-100382, letter from Tom DeBoer to David Danner (March 4, 2010), available at STAFF RESPONSE TO PSE MOTION FOR SUMMARY DETERMINATION - 9

II. STATEMENT OF ISSUES

22 The overarching issue to be decided on this motion is whether the “Report Identifying PSE’s Ten-Year Achievable Conservation Potential and Biennial Conservation Target” that Puget Sound Energy filed on January 29, 2010 complies with Chapter 480-109 WAC and Chapter 19.285 RCW. Puget Sound Energy has presented that issue as ten separate issues. Though Commission Staff believe PSE has phrased and organized the issues in a misleading manner, Staff respond to all of them as presented.

III. EVIDENCE RELIED UPON

23 Commission Staff rely on the documents and evidence on file in this docket and in Dockets UE-091859, UE-091986, and UE-100382, on the Declaration of Deborah Reynolds and its attached exhibits filed herewith, and on the Conservation Council’s Sixth Northwest Power Plan. The Commission may take official notice of the Sixth Power Plan under WAC 480-07-495 and Washington Evidence Rule 201.

IV. ARGUMENT

A. Summary Determination Standard

24 Commission Staff agree with Puget Sound Energy’s description of the summary determination standard. Here, there is no genuine issue as to any material fact, and PSE’s motion should be denied as a matter of law.

B. Puget Sound Energy’s Substantial Revision of its Ten-Year Conservation Potential After the January 1, 2010 Deadline Does Not Comply With RCW 19.285.040(1) or WAC 480-109-010 and Cannot Support a Biennial Conservation Target.³⁹

25 Under RCW 19.285.040(1) and WAC 480-109-010(1), the deadline for investor-owned utilities to project their ten-year conservation potential was January 1, 2010. WAC 480-109-010(1)(b) permits utilities to derive their projection from one of two sources, either (i) the utility’s most recent Integrated Resource Plan (IRP) or (ii) the utility’s proportionate share of the Conservation Council’s current conservation targets. The December 31, 2009 projection that PSE used to document its compliance with the deadline was derived from its most recent IRP, updated with new information, per WAC 480-109-010(1)(b)(i).⁴⁰ After the deadline, PSE abandoned that approach and switched the source for its ten-year projection. The substantially lower number that PSE filed with the UTC on January 29, 2010 was copied from the Fifth Plan Conservation Target Calculator posted on the Conservation Council’s web site, purportedly per WAC 480-109-010(b)(ii).⁴¹

26 Puget Sound Energy describes its post-deadline decision to switch from its IRP to the Conservation Council’s Fifth Plan Target Calculator as “further refinements” based on “additional analysis.”⁴² No evidence supports those statements. The approach PSE took in its January 29 filing was completely different from the approach it took in December 2009, not a “refinement.” There is no evidence that PSE did any “analysis” for its January 29 numbers. PSE simply copied them from the Conservation Council’s web site.

³⁹ This section addresses Issues 4 and 5 of PSE’s “Ten-Year Conservation Potential” issues, and Issue 1 of PSE’s “Biennial Conservation Target” issues. With respect to Issue 5, Commission Staff also agree with the argument in NW Energy Coalition’s Motion for Summary Determination.

⁴⁰ Johnson Decl. ¶ 13 & Attach. G; NW Energy Coalition’s Mot. Summ. Determination Ex. A. PSE’s December 31, 2009 projection was filed in Docket UE-091986 and is available at <http://www.utc.wa.gov/rms2.nsf/vw2005OpenDocket/859DCF80A5B1A712882576A2005CC235>.

⁴¹ PSE’s January 29 filing in this Docket is available at <http://www.utc.wa.gov/rms2.nsf/vw2005OpenDocket/AEEB685B91672D42882576BB00043AC7>.

⁴² Puget Sound Energy, Inc.’s Mot. Summ. Determination ¶¶ 12, 37, 51.

27 Puget Sound Energy says it was free to abandon its pre-January 1 approach and switch to a new one after the deadline because, under WAC 480-109-010(3), it did not have to file anything with the UTC until January 31. The UTC is charged with determining compliance with the *statute*, however.⁴³ WAC 480-109-010 is designed to implement the statute, not to give utilities loopholes to avoid statutory deadlines.⁴⁴ Being based on a completely new approach adopted after the January 1 deadline, the ten-year conservation potential PSE filed on January 29 is untimely and complies neither with RCW 19.285.040(1)(a) nor WAC 480-109-010(1).

28 Under RCW 19.285.040(1)(b), a utility’s biennial conservation target must be “consistent with” the ten-year conservation potential it identified by January 1, 2010. The biennial target that Puget Sound Energy filed on January 29 was not consistent with or based on the ten-year conservation potential PSE identified on December 31, 2009. Instead, it was a “subset” of the ten-year number that PSE copied from the Conservation Council web site in January 2010, after the deadline.⁴⁵ Because the ten-year number does not comply with the statute, neither does the “subset” that PSE used for its January 29 biennial conservation target.

C. In Copying Numbers From the Fifth Plan Target Calculator on the Conservation Council’s Web Site, Puget Sound Energy Failed to Comply With RCW 19.285.040(1) and WAC 480-107-010.⁴⁶

29 According to the report that PSE filed on January 29, PSE prepared its ten-year conservation potential by copying numbers from the Conservation Council’s 5th Plan

⁴³ RCW 19.285.060(6).

⁴⁴ RCW 19.285.080(1). An administrative agency such as the UTC 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); *State v. Hodgson*, 60 Wn. App. 12, 16, 802 P.2d 129, 131 (1990).

⁴⁵ Puget Sound Energy, Inc.’s Mot. Summ. Determination ¶ 41.

⁴⁶ This section addresses Issues 1 and 3 of PSE’s “Ten-Year Conservation Potential” issues, and Issue 1 of PSE’s “Biennial Conservation Target” issues.

Conservation Target Calculator on the Council’s web site.⁴⁷ Even if PSE had done that before January 1, PSE would not have complied with WAC 480-109-010(1).

30 WAC 480-109-010(1)(a) says utilities must “*consider* conservation resources that are cost-effective, reliable and feasible” in projecting their ten-year conservation potential.⁴⁸ To “consider” something means to think about it with careful reflection.⁴⁹ There is no evidence that PSE considered any conservation resources. All that PSE did was to copy a number from a web site without further analysis.

31 Puget Sound Energy says it could do that because the statute requires utilities to use “methodologies consistent with those used by”⁵⁰ the Conservation Council, and the Fifth Plan Target Calculator is “the Conservation Council’s plan.”⁵¹ That is incorrect. As described above in Paragraphs 12 and 13, the Conservation Council’s Target Calculators are not part of the Council’s power plans, and they are not a methodology that the Council uses for conservation planning. For purposes of Washington law, the Target Calculators can be a starting point that utilities may use to consider “all available conservation that is cost-effective, reliable, and feasible” in the context of each utility’s unique circumstances.⁵² But, as emphasized in the Target Calculator spreadsheet that PSE submitted with its January 29 report:

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

⁴⁷ Puget Sound Energy, Inc.’s Mot. Summ. Determination ¶ 50. PSE’s January 29 report is available online at <http://www.utc.wa.gov/rms2.nsf/vw2005OpenDocket/AEEB685B91672D42882576BB00043AC7>.

⁴⁸ WAC 480-109-010(1)(a) (emphasis added).

⁴⁹ Webster’s Third New International Dictionary 483 (1968).

⁵⁰ RCW 19.285.040(1)(a).

⁵¹ Puget Sound Energy, Inc.’s Mot. Summ. Determination ¶¶ 25, 50, 51; *see id.* ¶¶ 26, 28, 30, 37, 43, 47.

⁵² RCW 19.285.040(1); *see* WAC 480-109-010(1)(a).

planning until such time as a utility completes its own integrated resource plan or other similar process.⁵³

(Emphasis in original.)

32 Puget Sound Energy says that, because the presentation that Conservation Council staff gave at the September 2009 UTC workshop contained a slide that says “Utilities Can Just Use the Utility Target Calculator,” with a link to the Fifth Plan Calculator, PSE can satisfy the requirements of RCW 19.285.040(1) and WAC 480-109-010 by using the Fifth Plan Calculator.⁵⁴ As described above, however, Conservation Council staff provided what they called the “current version” of the Sixth Plan Calculator to PSE a few days after the workshop.⁵⁵ Under WAC 480-109-010(1)(b)(ii), if utilities use the Conservation Council’s targets as the starting point for projecting their cumulative ten-year conservation potential, they must use its “current” targets. As of December 2009, the Sixth Plan Conservation Council Calculator incorporated the most “current” targets.

33 Moreover, the Conservation Council is not responsible for interpreting or enforcing Washington State law. The Washington Utilities and Transportation Commission, not the Conservation Council, is the entity charged with interpreting and enforcing Chapter 19.285 RCW as it applies to investor-owned utilities.⁵⁶ A slide in a PowerPoint presentation delivered by Conservation Council staff does not bind the Commission.

34 PSE correctly observes that Department of Commerce rules permit consumer-owned utilities to use the Fifth Power Plan Target Calculator on the Conservation Council’s web site as one option for documenting compliance with RCW 19.285.040(1).⁵⁷ The Commerce

⁵³ See Attachment A to PSE’s January 29 report. See also Englert Decl. Attach. A Slide 67 (“Account for territory-specific factors” in conservation measure applicability).

⁵⁴ Puget Sound Energy, Inc.’s Mot. Summ. Determination ¶ 7, Englert Decl. ¶ 7.

⁵⁵ Reynolds Decl. ¶ 9 & Ex. B.

⁵⁶ RCW 19.285.060(6).

⁵⁷ WAC 194-37-070(3), (4); WAC 194-37-040(7).

rules do not apply to investor-owned utilities such as PSE, however. Consumer-owned utilities are not similarly-situated to investor-owned utilities.⁵⁸ The Commerce rules that guide consumer-owned utilities' compliance with Chapter 19.285 RCW are not at issue here.

35 In any event, under WAC 480-109-004(2) the Commission “retains its authority to impose additional or different requirements on any utility in appropriate circumstances.” On March 25, 2010, the Commission permitted PSE to adjust its electric rates to support the acquisition of conservation resources at a level “significantly greater than the 2010 target level filed in Docket No. UE-100177.”⁵⁹ This is an appropriate circumstance for the Commission to require PSE to use consistent information for its rate adjustment and for its biennial conservation targets under WAC 480-109-010.

D. Puget Sound Energy Must Show Its Work.⁶⁰

36 RCW 19.285.040(1) imposes procedural and substantive requirements on utilities. Under RCW 19.285.060(6), the Commission is responsible for determining whether investor-owned utilities are in compliance with all of those requirements, both procedural and substantive.⁶¹ The Commission cannot do that without adequate information.

37 Puget Sound Energy argues that, under WAC 480-109-010(3), it need only file some numbers with the Commission without explaining why PSE picked them. According to

⁵⁸ See Reynolds Decl. ¶ 8. Under 16 U.S.C. § 832c(a) and 16 U.S.C. § 839c(a), for example, the Bonneville Power Administration is required to give preference and priority to public bodies and cooperatives when selling electricity. See generally *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009 (9th Cir. 2007).

⁵⁹ UTC Docket UE-100382, letter from Tom DeBoer to David Danner at 2 (March 4, 2010), available at <http://www.utc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/57b0f7e372644f9e882576e800766222!OpenDocument>.

⁶⁰ This section addresses Issue 2 in PSE's “Ten-Year Conservation Potential” issues and Issue 2 in PSE's “Other Report Requirements” issues.

⁶¹ RCW 19.285.060(6) provides: “For a qualifying utility that is an investor-owned utility, the commission shall determine compliance with the provisions of this chapter and assess penalties for noncompliance as provided in subsection (1) of this section.”

PSE, the report required by WAC 480-109-010(3) is merely a procedural filing. But the Commission must determine whether PSE’s conservation targets comply with the *substantive* requirements of RCW 19.285.040(1), and those of WAC 480-109-010(1) and (2). The Commission cannot tell whether PSE’s conservation targets comply with the statute without understanding how PSE’s numbers “identify its achievable cost-effective conservation potential” and “achievable opportunities,” and show that PSE is “pursu[ing] all available conservation that is cost-effective, reliable, and feasible.”⁶² The Commission cannot tell whether PSE’s conservation targets comply with the rules without understanding how PSE’s numbers “consider conservation resources that are cost-effective, reliable and feasible” and “identify all achievable conservation opportunities.”⁶³ Only if Puget Sound Energy shows its work can the Commission can perform its statutory duties under RCW 19.285.060(6).

38 In its motion, Puget Sound Energy explains that uncertainty about the future prompted it to pick the numbers it did.⁶⁴ None of that is in the report that PSE filed on January 29, however. Nor does it demonstrate how PSE’s numbers “identify all achievable conservation opportunities.”⁶⁵ Commission Staff need data, not excuses.

E. WAC 480-109-010 Limits the Range that May Be Used in Setting a Biennial Conservation Target.⁶⁶

39 Puget Sound Energy correctly notes that, under WAC 480-109-010(2)(c), a utility’s “biennial conservation target may be a range rather than a point target.” Puget Sound Energy is incorrect in saying that there is no limit on the breadth of that range, however. According to the rule, any biennial conservation target that Puget Sound Energy establishes

⁶² RCW 19.285.040(1).

⁶³ WAC 480-109-010(1), (2).

⁶⁴ Englert Decl. ¶¶ 17-20.

⁶⁵ WAC 480-109-010(2)(a).

⁶⁶ This section addresses Issue 2 of Puget Sound Energy’s “Biennial Conservation Target” issues.

“must identify all achievable conservation opportunities.”⁶⁷ If the bottom of the range is less than “all,” or if the top of the range is more than “achievable,” the range does not comply with the rule. A biennial conservation target range from 0 to 1000 aMW would not be acceptable.

F. Penalties Are Not Before the Commission⁶⁸

40 Puget Sound Energy asks the Commission to rule that penalties under RCW 19.285.060(1) are triggered only if a utility’s conservation falls below the lower end of an approved biennial conservation range. Penalties are not before the Commission at this time, and the deadline for utilities to demonstrate achievement of biennial conservation targets will not arrive until June 2012.⁶⁹ PSE is merely asking for an advisory opinion, which is not appropriate in this proceeding.⁷⁰

41 Puget Sound Energy has other mechanisms for getting more certainty about how the Commission may address penalties. Options include a petition for rule making under RCW 34.05.330 and WAC 480-07-240, or a petition for an interpretive or policy statement under RCW 34.05.230 and WAC 480-07-920. PSE is free to pursue those options at this time.

G. In Developing the Conservation Targets that it Filed on January 29, Puget Sound Energy did not Allow for Adequate Staff and Public Participation.⁷¹

42 As described above, Puget Sound Energy did not comply with the January 1, 2010 deadline of RCW 19.285.040(1)(a) when it developed the ten-year conservation potential that PSE filed on January 29. Its filing is defective for that reason alone. Should this tribunal determine otherwise, it should nonetheless rule that PSE did not allow for adequate

⁶⁷ WAC 480-109-010(2)(a); *see* RCW 19.285.040(1)(b).

⁶⁸ This section addresses Issue 3 of Puget Sound Energy’s “Biennial Conservation Target” issues.

⁶⁹ RCW 19.285.070(1).

⁷⁰ *See* RCW 34.05.240(1)(b) (petition for agency declaratory order must show “that a declaratory order will not be merely an advisory opinion”).

⁷¹ This section addresses Issue 1 in Puget Sound Energy’s “Other Report Requirements” issues.

public participation in the development of the ten-year conservation potential and biennial conservation target that PSE filed on January 29.

43 Commission Staff agree with the arguments in Public Counsel's Motion for Summary Determination on the public participation issue and adopt them herein.

V. CONCLUSION

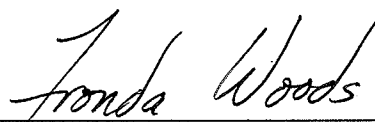
44 Puget Sound Energy developed its January 29, 2010 ten-year conservation potential after the statutory deadline of January 1 and based its biennial conservation target on that untimely number. The undisputed facts demonstrate that the ten-year conservation potential and biennial conservation target that Puget Sound Energy identified in its January 29, 2010 report are defective as a matter of law under RCW 19.285.040(1) and WAC 480-109-010. Puget Sound Energy's motion for summary determination should, therefore, be denied.

45 Puget Sound Energy can cure its noncompliance by filing a new ten-year conservation potential and 2010-2011 biennial conservation target that are consistent with the ten-year conservation potential it identified on December 31, 2009.

DATED this 19th day of April, 2010.

Respectfully submitted,

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ATTACHMENT A

to Commission Staff Response to
Puget Sound Energy's Motion for Summary Determination

Northwest Power and Conservation Council
Sixth Northwest Power Plan
Pages 4-22 through 4-23

Implications for the State of Washington's I-937 Requirements

Initiative 937 (I-937) in the State of Washington, approved by the voters in 2006, obligates seventeen utilities that serve 88 percent of the retail load in that state to “pursue all available conservation that is cost-effective, reliable, and feasible.” By January 2010, each utility to which the law applies must develop a conservation plan that identifies its “achievable cost-effective potential” for the next ten years, “using methodologies consistent with those used by the Pacific Northwest electric power and conservation planning council in its most recently published regional power plan.” Every succeeding two years, the utility must review and update its assessment of conservation potential for the subsequent ten-year period.

I-937 is a matter of state law, and does not alter or obligate the Council in its conservation and power planning under the Northwest Power Act. Similarly, the Council has no authority to interpret or apply or implement I-937 for the utilities and regulators in the State of Washington. But because of the intersection between the two mandates -- the state’s utilities are to engage in conservation planning “using methodologies consistent with” the conservation planning methodology used by the Council – it is helpful to understand some of the issues raised by the two planning processes.

There is some misunderstanding that I-937 requires Washington utilities to meet some pro-rata share of the conservation targets in the Power Plan. In fact, I-937 does not require the state’s utilities to adopt or meet conservation targets set forth in the Council’s plan nor does the plan identify any particular utility’s “share” of regional conservation targets. However, I-937 does require utilities to develop their own plan using methods “consistent with” the methodology used in the Council’s plan, leaving the utilities discretion to adapt the planning methods to their particular circumstances. To assist Washington consumer-owned utilities in this effort, the Washington Department of Commerce (Commerce),⁷ with the assistance of the Council staff and others, adopted rules in 2008 that outline the methodology that the Council uses in its conservation planning. Although one sub-section of these rules allows utilities to adopt a share of the Council’s regional targets, this is an option, not a requirement. The Washington Utilities and Transportation Commission (UTC) also adopted rules to guide the investor-owned utilities. These rules are not as prescriptive and, per the law, integrate I-937 requirements into ongoing regulatory practice.

Concern has also been expressed about the fact that utilities will need to produce their first I-937 conservation plans at the precise moment the Council is making the transition from the Fifth to the Sixth Regional Power Plan. On this issue we should point out that the Council’s methodology is essentially the same in the Sixth and Fifth power plans and is clearly described in Chapter 4 of this draft. The conservation targets are higher in the Sixth Plan because of changes in prices, technology, and other factors, not because of a change in methodology.

The Council’s plan describes the analytical methods used to identify cost-effective achievable conservation and provides a menu of possible cost-effective measures for the utilities to consider. Neither I-937 nor the Council’s plan requires utilities to choose any of the plan’s particular measures in particular amounts. The utilities may make that judgment based on their own loads

⁷ Formerly the Washington Department of Community Trade and Economic Development (CTED)

(composition, amounts, and growth rates) and their own determination of avoided cost and the measures available to them.

There are two issues—“ramping” and “penetration rates”—that may present potential inconsistencies between I-937 and the Council’s conservation methodology. An important element in the Council’s methodology is the principle that it takes time to develop certain conservation measures to their full potential, while other measures are available right away. Consequently, conservation potential ramps up and on occasion ramps down. The Council uses its ramp rate assumptions along with other information and the results of its regional portfolio model to establish five-year cumulative conservation targets for the region. The end result is that achievable conservation potential under the Council’s planning assumptions will not be evenly available across each year in the period. I-937 separately instructs the utilities to identify not just cost-effective potential over the ten-year life of the utility’s conservation plan for I-937, but also to identify and meet biennial conservation acquisition targets that must be “no lower than the qualifying utility’s pro rata share for that two-year period of its cost-effective potential for the subsequent ten-year period.” Having to acquire 20 percent of any ten-year target in any two-year period under I-937 may produce different two-year targets than would result using ramp rates consistent with the Council’s methodology. Commerce rules do not address what is meant by “pro-rata share,” but the UTC rules state that “‘pro rata’ means the calculation used to establish a minimum level for a conservation target based on a utility’s projected ten year conservation potential.” Because the provisions of I-937 are a matter of state law, this issue is not one that the Council can resolve in its plan.

A related but distinct issue concerns conservation measure “penetration” rates. Part of the Council’s methodology is to estimate the extent of total penetration of a conservation measure in the area of study over the total period analyzed. The Commerce rules address this issue, calling on utility conservation plans to “[i]nclude estimates of the achievable customer conservation penetration rates for retrofit measures and for lost-opportunity (long-lived) measures.” Because, as with “ramp rates,” I-937 requires a ten-year plan while the Council produces a twenty-year plan, the rules needed to harmonize the potential difference between penetration rates over ten years versus penetration rates over twenty years. As a result, the Commerce rules then go on to describe the Council’s 20-year and 10-year penetration rates (from the Fifth Plan, although they do not differ in the Sixth Plan), “for use when a utility assesses its” conservation potential. The UTC rules are silent on penetration rates.

One final point to consider is the treatment of savings achieved through building codes and other standards. The Council’s conservation methodology calculates the conservation potential for measures that might, at some point, be covered by building codes or energy codes, and then assumes that the savings will be accomplished over time by either utility programs or codes. If codes are adopted that ensure the capture of the potential savings, then those savings are “counted” against the regional target. The rules adopted by Commerce for I-937 do not appear to be inconsistent with this approach while the UTC rules do not address this issue specifically.