[Service Date November 30, 2007]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Adopting Rules To Implement the Energy Independence Act RCW 19.285 WAC 480-109 Relating to Electric Companies Acquisition of Minimum Quantities of Conservation and Renewable Energy	))))))))))))	DOCKET UE-061895 GENERAL ORDER R-546 ORDER ADOPTING RULES PERMANENTLY

1 **STATUTORY OR OTHER AUTHORITY:** The Washington Utilities and Transportation Commission (Commission) takes this action under Notice WSR #07-17-154, filed with the Code Reviser on August 21, 2007. The Commission brings this proceeding pursuant to RCW 80.01.040, RCW 80.04.160, and RCW 19.285.

2 **STATEMENT OF COMPLIANCE:** This proceeding complies with the Administrative Procedure Act (RCW 34.05), the State Register Act (RCW 34.08), the State Environmental Policy Act of 1971 (RCW 43.21C), and the Regulatory Fairness Act (RCW 19.85).

3 **DATE OF ADOPTION:** The Commission adopts these rules on the date this Order is entered.

4 **CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE:** RCW 34.05.325(6) requires the Commission to prepare and publish a concise explanatory statement about an adopted rule. The statement must identify the Commission's reasons for adopting the rule, describe the differences between the version of the proposed rule published in the register and the rule adopted (other than editing changes), summarize the comments received regarding the proposed rule changes, and state the Commission's responses to the comments reflecting the Commission's consideration of them.

Filed with the Code Reviser's Office
November 27, 2007, 10:39 a.m.
WSR 07-24-012

5 To avoid unnecessary duplication in the record of this docket, the Commission designates the discussion in this Order as its concise explanatory statement, supplemented where not inconsistent by the staff memoranda preceding the filing of the CR-102 proposal and the adoption hearing. Together, these documents provide a complete but concise explanation of the agency actions and its reasons for taking those actions.

6 **REFERENCE TO AFFECTED RULES**: This Order adopts the following sections of the Washington Administrative Code:

Adopt WAC 480-109-001 Purpose and scope
Adopt WAC 480-109-002 Application of rules
Adopt WAC 480-109-003 Exemptions from rules in chapter 480-109 WAC
Adopt WAC 480-109-004 Additional requirements
Adopt WAC 480-109-006 Severability
Adopt WAC 480-109-007 Definitions
Adopt WAC 480-109-010 Conservation resources
Adopt WAC 480-109-020 Renewable resources
Adopt WAC 480-109-030 Alternatives to the renewable resource requirement
Adopt WAC 480-109-040 Annual reporting requirements
Adopt WAC 480-109-050 Administrative penalties

7 **PREPROPOSAL STATEMENT OF INQUIRY AND ACTIONS THEREUNDER:** The Commission filed a Preproposal Statement of Inquiry (CR-101) on January 24, 2007, at WSR #07-03-171.

8 The statement advised interested persons that the Commission was considering entering a rulemaking to implement the requirements of the Energy Independence Act (Act). The Commission provided notice of this CR-101 to everyone on the Commission's list of persons requesting such information pursuant to RCW 34.05.320(3). The Commission also provided notice to registered electric companies, persons that received notices in the Commission's previous Least Cost Plan Rulemaking (Docket UE-030311), persons that received notices in the Request for Proposal rulemaking (Docket UE-030423), persons interested in agency rulemakings (rule list A), persons interested in electric rulemakings (rule list E), as well as to attorneys representing these persons and companies.

9 As part of the CR-101 notice, the Commission invited public comment on issues related to conservation targets and performance, renewable resource targets and exceptions, penalties for noncompliance, and reporting requirements. The Commission received ten comments in response to this notice. Following receipt and review of these comments, interested persons were notified the Commission would hold a workshop to consider an initial set of draft rules suggested by Commission staff. The workshop notice emphasized that the draft rules were a starting point for discussion of possible rules to implement the Act. The notice stated that the draft rules "may be far from final, both in terms of content and organization." In addition to the draft rules, the Commission attached to its notice a summary of comments received.

10 Following the workshop, the Commission provided a second opportunity for public comment on the draft rules. However, just prior to the due date for these comments, Puget Sound Energy (PSE), Avista Corporation (Avista) and PacifiCorp informed the Commission that they were attempting to develop a consensus recommendation with other interested persons on rule language. To facilitate this effort the Commission granted the companies' request for a delay in the time to file comments for nearly one month. No consensus recommendation was achieved. The Commission received comments on the draft rules from seven interested persons.

11 Based on this second round of comments, the Commission staff substantially revised the draft rules and a third notice requesting comment was issued. Immediately following this notice, the Commission hosted an informal gathering of interested persons to explain and discuss the Commission's approach and motivations in crafting the revised draft rules. Seven interested persons commented on the revised draft rules.

12 **NOTICE OF PROPOSED RULEMAKING:** After reviewing the third round of public comments the Commission further revised the draft rules and filed a notice of Proposed Rulemaking (CR-102) on August 21, 2007, at WSR #07-17-154. The Commission scheduled this matter for oral comment and adoption under Notice WSR #07-17-154 at 1:30 p.m., Wednesday, October 24, 2007, in the Commission's Hearing Room, Second Floor, Richard Hemstad Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. The notice provided interested persons a fourth opportunity to submit written comments to the Commission.

13 **WRITTEN COMMENTS:** The Commission received written comments from Avista, PacifiCorp, Renewable Northwest Project (RNP), Public Counsel, Northwest

Energy Efficiency Council (EEC), Northwest Energy Coalition (NWEC), Industrial Customers of Northwest Utilities (ICNU), and PSE.

14 Considering the written comments, Commission staff recommended two changes to the proposed rules in preparation for the October 24, 2007, adoption hearing. First, Staff recommended replacing the term "portfolio" with the term "system" in WAC 480-109-030(1). This change makes clear that the utility must measure the difference in total system costs considering the eligible renewable resource and the non-eligible resource to determine whether the utility meets the four percent of annual retail revenue requirement alternative compliance mechanism available in RCW 19.285.050(1)(a). Second, an inadvertently omitted time period ("After December 7, 2006") specified in the Act was added to the rules at WAC 480-109-030(3)(b). The RNP submitted comments that led to these recommended changes.

15 **RULEMAKING HEARING:** The Commission considered the proposed rules for adoption with staff's recommended changes at a rulemaking hearing on Wednesday, October 24, 2007, before Chairman Mark H. Sidran, Commissioner Patrick J. Oshie, and Commissioner Philip B. Jones. The Commission heard oral comments from Nicolas Garcia, representing Commission staff, Brent Gale representing PacifiCorp, Larry Labolle representing Avista, Nancy Hirsch representing the Northwest Energy Efficiency Council and NW Energy Coalition, Ann Gravatt representing the RNP, and Tom DeBoer representing PSE.

16 **ORAL COMMENTS:** Brent Gale representing PacifiCorp stated that the most important outcome of the rulemaking was clear direction to utilities about what they must do to comply with the Act. Mr. Gale said that in certain areas PacifiCorp remained unsure of it compliance requirements, referring specifically to the use of forecasts versus actual numbers for demand and production. Mr. Gale also stated concern that the rule, as written, may inadvertently prevent the use of owned qualifying renewable generation to comply with the rules. Finally, Mr. Gale requested that following the issuance of these rules, the Commission hold a workshop to further refine how utilities will comply with the Act.

17 Nancy Hirsch of the NW Energy Coalition focused her comments on the conservation provisions of the rulemaking. Ms. Hirsch asserted that the rules provide utilities flexibility in this area beyond what is allowed by the Act. Specifically, Ms. Hirsch objected to the definition of "pro rata" in the rules, asserting that the term should mean equal portions. Ms. Hirsh also objected to the use of a range rather than a single number to establish each utility's conservation target. Ms. Hirsch stated that if

there is to be a range it should be bounded to within five to ten percent around a point estimate. Ms. Hirsch also asserted that language in the rule dealing with cogeneration was too broad and that the Act limited the use of cogeneration in place of conservation to situations where the electricity produced is used directly by the owner of the co-generation facility.

18 Ann Gravatt representing RNP generally supported the rules as written. Ms. Gravatt requested that the Commission take up in a subsequent rulemaking the issue of compliance auditing to confirm that utilities actually received the claimed renewable emission credits or megawatt-hours from their own qualifying renewable generating facilities. Ms. Gravatt also reiterated a previously articulated concern that the "retail revenue requirement" should be based on revenue needed in the compliance year rather than the most recently approved general rate case, as provided in the rules.

19 Larry Labolle representing Avista and Tom DeBoer representing PSE both indicated that even with the proposed rules areas of uncertainty remain regarding compliance with the Act. Mr. Labolle suggested an additional rulemaking may be needed.

20 **RECOMMENDED CHANGES TO THE PROPOSED RULES THAT ARE ACCEPTED:** In addition to accepting the two previously discussed changes to the proposed rules, the Commission also accepts three changes suggested at the adoption hearing or in prior written comments. First, Mr. Gale's concern that, as proposed, the rules may inadvertently prevent the use of utility-owned qualifying renewable generation is well taken. The rules we adopt by this Order more closely follow the wording of the Act and make clear that utilities may use their own qualifying renewable resources to meet the renewable generation mandate.

21 Second, Ms. Hirsch correctly pointed out that the Act limited the use of co-generation in place of conservation to situations where the electricity produced is used directly by the owner of the co-generation facility. We modify the rule language to be consistent with this restriction.

22 Finally, in its comments to the proposed rules, Avista suggested that the definition of "renewable resource" under proposed WAC 480-109-007(18)(i) should be clarified to state that eligible renewable electricity produced by biomass should be based on the portion of the fuel supply that is made up of eligible biomass fuels. We agree and have revised the proposed rule accordingly.

23 **RECOMMENDED CHANGES TO THE PROPOSED RULES THAT ARE REJECTED:** The Commission's responsibility in this matter is to develop rules that "ensure the proper implementation and enforcement of [the Act] as it applies to investor owned utilities." *RCW 19.285.080(1).* Most sections of the Act are specific and provide the Commission little discretion in determining the optimal implementation path. As a result, other than the five revisions discussed above, the Commission rejects all other suggested changes to the rules, as discussed below.

24 RNP comments that the definition of "annual retail revenue requirement" in WAC 480-109-007(1) is not consistent with the law because it does not take into account increases in costs from year to year. The Commission uses the phrase "annual retail revenue requirement" as a term of art in various contexts. The term, and its use by the Commission, are understood by the regulated utilities. We reject RNP's suggestion because we do not wish to define this term in this rule given its established use in other contexts.

25 The EEC, NWEC and RNP comment that the term "pro rata," as used in WAC 480-109-007(14), deviates from the dictionary definition of pro rata. They request that the rule reflect conservation goals of equal portions for every biennial period. We find the proposed definition for pro rata appropriate considering statutory requirements. The term, as defined, allows utilities flexibility to meet realistic conservation implementation schedules.

26 PSE and PacifiCorp express concerns that conservation targets established in one biennial period will be retroactively revised for the same period using new conservation assumptions. PSE suggests adding a definition for "gross electric savings" to avoid the potential that the assumptions used to determine electric savings may be retroactively adjusted. PacifiCorp seeks clarity that new best available information will not be retroactively applied to prior targets. The rules we adopt identify a range for potential conservation and resulting targets. This mitigates potential variations between projected electricity savings and the achieved electricity savings and thus addresses the companies' concerns.

27 PSE and PacifiCorp suggest adding a definition for the phrase "real-time basis without shaping, storage or integration services." They state the lack of a definition leaves utilities facing uncertainty when they acquire resources. We acknowledge the uncertainty, but find there is no industry standard definition for the term "real-time". Statutory time constraints governing the calendar for this rulemaking do not allow sufficient time for a full analysis concerning whether and, if so, how the Commission

should define the term as used in the quoted phrase. The Commission may consider establishing a definition in this context in a later rule making.

28 Public Counsel, NWEC and the EEC suggest the language in WAC 480-109-010(2)(c) be modified to set biennial conservation targets as a point rather than as a range. Both claim the bottom of the range will become the "de facto point target." Public Counsel further states the Commission will need a point target "so that utilities are aware of when administrative penalties could be assessed." We note that the Act does not limit a utility's conservation potential or conservation target to a single number and that a conservation range allows flexibility to realistically match the target to the implementation schedule. Moreover, 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.

29 Public Counsel recommends that utilities be required to use stakeholder advisory panels to develop their projected ten-year conservation potential. We agree that stakeholders should be involved in the process and WAC 480-109-010(3)(a) makes this point. The jurisdictional utilities currently have public processes and stakeholder groups involved in the development of conservation programs and we expect that to continue.

30 Avista recommends that WAC 480-109-010(4)(c), concerning comments and Commission review of a utility's ten-year achievable conservation potential or its biennial conservation target, include March 31 as the date by which the Commission will make a determination of the utility's conservation targets. The Commission always endeavors to complete its deliberations in an expeditious manner. Because adjudicative processes vary significantly in terms of complexity and must ensure adequate time for due process to all participants in every proceeding, the Commission should retain its discretion concerning the date by which it will complete its review of conservation targets. Accordingly, the proposed deadline is not included in the rules.

31 PacifiCorp requests that the Commission remove WAC 480-109-020. We reject this proposal. The rule language provides important context and detail needed to implement the Act in terms of its requirements for utilities to meet annual targets for renewables, as discussed below.

32 WAC 480-109-020(1), which proposes that utilities meet annual targets for using renewable resources and acquiring renewable energy credits (RECs), generated

comments from ICNU, PSE, PacifiCorp, and Avista. ICNU suggests a more permissive interpretation of the statutory language. PSE claims the draft rules are inconsistent with the language and spirit of the statute. PacifiCorp questions the reference to a single day in relation to the annual target. Avista suggests that the Commission should follow language from rules drafted by the Department of Community, Trade and Economic Development (CTED). We find the language in RCW 19.285.040(2) does not allow us to alter the compliance date or the date by which utilities must acquire the rights to future RECs. We disagree with an interpretation of the Act that allows compliance by the conclusion of a target year rather than by January 1 of a calendar year.

33 RNP, PSE and PacifiCorp comment on WAC 480-109-020(2). The utilities desire to use generation from owned renewable resources in prior or subsequent years to meet their renewable target. RNP states only renewable energy credits from prior or subsequent years may be used to meet the target and company-generated megawatt-hours must be converted to RECs prior to counting them towards compliance. The statute requires, and the rules provide, that by January 1, 2012, a utility must demonstrate that three percent of its average load for 2010 and 2011 was either produced by renewable resources during 2011, and/or RECs acquired by January 1, 2012. The rule provision that RECs may represent megawatt-hours generated in 2010, 2011, or 2012 is consistent with the statute.

34 Avista, PSE, and PacifiCorp all note that WAC 480-109-020(3) requires utilities to meet a renewable energy target based on the average of two years of megawatt-hour loads that ends the day before the target must be met. The rule follows the language of RCW 19.285.040(2)(a) and (c). By January 1 of a given year, the utility must meet a given percentage of its "annual load based on the average of the utility's load for the previous two years." Therefore, by January 1, 2012 a utility must have acquired RECs or used during 2011 sufficient eligible renewable resources to have met three percent of the average of its load in 2010 and 2011. WAC 480-109-020(2) allows for the use of RECs acquired prior to January 1, although the renewable generation backing the REC may be produced in the prior or subsequent year. This degree of flexibility allows the utilities to meet a target that may not be known until after January 1.

35 PSE argues for greater definition of the costs that may be included in the term "incremental costs of eligible renewable resources" in WAC 480-109-030(1), which addresses alternatives to the renewable resource requirement. The proposed rule mirrors language in RCW 19.285.050(1)(a) and (b). The Commission has the

authority to conduct fact-based adjudications to test compliance if a utility follows this alternative approach.

36 The EEC and NWEC suggest WAC 480-109-040(1)(a), which addresses annual reporting requirements, should be restricted to "energy consumption avoided at that site by the cogeneration facility owner." We find that the statute does not limit the use of the electrical output of a co-generation facility only to that facility's site.

37 RNP requests that WAC 480-109-040(1)(c) should allow interested persons the right to adjudication any time a utility relies on an alternative compliance mechanism. We reject this suggestion. Interested persons will have an opportunity to comment on whether a utility has made a sufficient demonstration that its alternative compliance mechanism meets the requirements set forth in WAC 480-109-030. The Commission will consider such comments and determine on a case-by-case basis if adjudication is warranted.

38 RNP and PacifiCorp seek clarification on the reporting requirements in WAC 480-109-040(1)(d). The rule is sufficiently clear that in the first report submitted on June 1, 2012, a utility must demonstrate that it complied with the requirements of WAC 480-109-020 and describe its progress towards meeting the January 1, 2013, renewable target.

39 PSE asks that WAC 480-109-040(4) not require utilities to provide a copy of current and historical reports to any person on request, suggesting that posting such reports on a company website is sufficient. We find it is reasonable to require the utilities to provide a copy of the reports to the public on request. This may be the only way some interested individuals can access and review the reports. If this requirement becomes a burden to a utility, the utility may petition the Commission for an exemption.

40 PSE requests flexibility in the methods identified in WAC 480-109-040(5) to notify customers. The rule language allows for alternative methods and does not require revision.

41 Avista, RNP, and PacifiCorp commented on WAC 480-109-040. Avista requests clarity on how utilities should report underperformance of renewable resources or contracted-for RECs. RNP also comments on potential underperformance of generating resources or RECs. PacifiCorp requests clarity on when the Commission will assess compliance for any given year. The report due in June of each year will

state how the utility met the requirements of WAC 480-109-020 for the prior calendar year and its progress in meeting those requirements in the current year. The Act establishes specific targets, reports, and timelines. The Act does not establish an auditing regime. The concerns expressed by these commenters are speculative and may or may not be experienced in practice. The earliest these issues will become relevant is in the year 2012. Absent further statutory directive or demonstration of a real and serious problem, it is not necessary to address these issues at this time.

42 ICNU requests clarity that the Commission's determination of compliance for an annual report filed under WAC 480-109-040 does not constitute authorization for cost recovery by the utility. We find RCW 19.285.050 and .080(2) adequately address this subject, such that there is no need to clarify this issue in rule.

43 ICNU, Public Counsel, EEC, NWEC, RNP and PSE all comment on the recoverability of administrative penalties in WAC 480-109-050(4). The Commission will address the recovery of penalties on a case-by-case basis. The prudence of a utility's choice to pay a penalty rather than acquire renewable resources or conservation will be decided through a fact-based inquiry. PSE also asks about the possibility of mitigating penalties for missing conservation targets in cases of force majeure. Any utility may present a force majeure argument in the context of a conservation compliance report and the Commission will decide then whether that argument is allowed under the Act and adequate under the given set of circumstances.

44 PSE states the Act provides for possible incentives to exceed targets, but the rules are silent on this issue. We find there is no need to elaborate on this issue in rules. RCW 19.285.060(4) allows for Commission consideration of positive incentives that exceed targets. Any utility may propose incentives and the Commission will consider them on a case-by-case basis.

45 PSE notes that RCW 19.285.050(2) entitles investor-owned utilities to recover all prudently incurred costs associated with compliance with the Act, but that the draft rules do not address this section. The statute simply reiterates the Commission's longstanding practice concerning cost recovery of any investment. No rule language is necessary.

46 PSE requests that the Commission establish rules concerning "conservation credits" by or before June 30, 2009. We reject this request because the Act neither defines nor refers to conservation credits.

47 Finally, we note that implementation of the Act will be informed by time and experience. While various participants in this rulemaking identified certain regulatory ambiguities and possible obstacles to the efficient compliance and enforcement of the Act's provisions, our responsibility is to implement the law as written. If the legislature finds in the future that there are issues that should be addressed by statutory amendment, the Commission will respond, if necessary, with amended rules.

48 **COMMISSION ACTION:** After considering all of the information in the rulemaking record as discussed in this order and as documented at the Commission, the Commission finds and concludes that it should adopt the rules as proposed in the CR-102 at WSR # 07-17-154 with the changes described below.

49 **CHANGES FROM PROPOSAL:** The Commission adopts the proposal with the following changes from the text noticed at WSR # 07-17-154:

- The term "portfolio" is replaced by the term "system" along with minor conforming changes in WAC 480-109-030(1). This change makes clear that the utility must measure the difference in total system costs considering the eligible renewable resource and the non-eligible resource to determine whether it meets the four percent of annual retail revenue requirement alternative compliance mechanism authorized by RCW 19.285.050(1)(a).

- The word "use" is added and the word "acquire" is moved in WAC 480-109-020(1)(a), (b), and (c). This language more closely follows the wording of the Act and makes clear that utilities may use their own qualifying renewable resources to meet the renewable generation mandate.

- The time period, "after December 7, 2006," is added to WAC 480-109-030(3)(b). This date is specified in the Act, but was inadvertently omitted from the proposed rules.

- The phrase "owned and used by a retail electric customer" is added to WAC 480-109-040(1)(a). This addition better aligns the language of the rule to the requirements in the Act.

- The following phrase is added to the definition of "renewable resource" in WAC 480-109-007(18)(i): "Eligible renewable resources produced by biomass

facilities should be based on the portion of the fuel supply that is made up of eligible biomass fuels."

50 **STATEMENT OF ACTION; STATEMENT OF EFFECTIVE DATE:** After reviewing the entire record, the Commission determines that WAC 480-109-001, WAC 480-109-002, WAC 480-109-003, WAC 480-109-004, WAC 480-109-006, WAC 480-109-007, WAC 180-109-010, WAC 480-109-020, WAC 480-109-030, WAC 480-109-040, and WAC 480-109-050 should be adopted to read as set forth in Appendix A, as rules of the Washington Utilities and Transportation Commission, to take effect pursuant to RCW 34.05.380(2) on the thirty-first day after filing with the Code Reviser.

ORDER

51 **THE COMMISSION ORDERS:**

52 The Commission adopts WAC 480-109-001, WAC 480-109-002, WAC 480-109-003, WAC 480-109-004, WAC 480-109-006, WAC 480-09-007, WAC 480-109-010, WAC 480-109-020, WAC 480-109-030, WAC 480-109-040, and WAC 480-109-050 to read as set forth in Appendix A, as rules of the Washington Utilities and Transportation Commission, to take effect on the thirty-first day after the date of filing with the Code Reviser pursuant to RCW 34.05.380(2).

53 This Order and the rules set out below, after being recorded in the register of the Washington Utilities and Transportation Commission, shall be forwarded to the Code Reviser for filing pursuant to RCW 80.01 and RCW 34.05 and WAC 1-21.

DATED at Olympia, Washington, November 26, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

Note: The following is added at Code Reviser request for statistical purposes:

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, amended 0, repealed 0; Federal Rules or Standards: New 0, amended 0, repealed 0; or Recently Enacted State Statutes: New 11, amended 0, repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, amended 0, repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, amended 0, repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, amended 0, repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, amended 0, repealed 0; Pilot Rule Making: New 0, amended 0, repealed 0; or Other Alternative Rule Making: New 0, amended 0, repealed 0.