BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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| WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,<br><br>Complainant,<br><br>v.<br><br>PUGET SOUND ENERGY, INC.<br><br>Respondent. | NO. UE-100177<br><br>PUGET SOUND ENERGY, INC.'S REPLY TO THE RESPONSES OF COMMISSION STAFF, NW ENERGY COALITION, PUBLIC COUNSEL, AND THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES |

## I. INTRODUCTION

*1.* Puget Sound Energy, Inc. ("PSE" or "the Company"), by and through undersigned counsel, hereby submits its Reply to the Responses of Commission Staff, NW Energy Coalition ("NWEC"), Public Counsel, and the Industrial Customers of Northwest Utilities ("ICNU").

*2.* The Commission should grant PSE's Motion for Summary Determination on all legal issues set forth therein[1] and should deny the motions for summary determination filed by other parties. The evidence on file in this docket demonstrates that there are no genuine issues of material fact; summary determination is therefore appropriate. In opposing PSE's biennial report and motion for summary determination, the parties are undertaking a collateral attack on the plain language of Chapter 19.285 RCW and its implementing regulations by attempting to impose additional substantive and procedural requirements beyond those set forth in the law and adopted by the Commission. The Commission must abide by the rules it has adopted. To do otherwise would violate fundamental principles of due process. If the regulations require additional clarification, revision or expansion, this can be remedied in a future rulemaking. The

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[1] *See* PSE's Mot. for Summ. Determination p. 5–6. PSE disagrees with Commission Staff's accusation that PSE "phrased and organized" the issues in a" misleading manner." Commission Staff Response ¶ 22. PSE's motion identifies the specific legal obligations and requests that the Commission (1) rule as a matter of law that PSE has met these obligations, and (2) clarify the scope of the obligations imposed by certain of these requirements.

Commission should not, however, read out the plain language of the statute and regulations, and impose additional requirements on PSE, without notice, and in dereliction of the current law and regulations.

## II. ARGUMENT

### A. The Commission Should Reject Other Parties' Attempts to Impose Additional Substantive and Procedural Requirements that Are Not Contained in the Commission's Implementing Regulations

*3.* The Energy Independence Act, Chapter 19.285 RCW (the "Act") sets forth an ambitious, broadly-stated mandate requiring qualifying utilities to "pursue all available conservation that is cost-effective, reliable, and feasible."[2] To facilitate this objective, the Act requires each utility every two years to "identify its achievable cost-effective conservation potential" for the next ten-year period "using methodologies consistent with those used by" the Northwest Power and Conservation Council ("Conservation Council" or "the Council") and to establish a binding biennial conservation acquisition target consistent with its ten-year projection.[3] Nowhere, however, does the Act define available, cost-effective, achievable, feasible, reliable conservation or specify how methodologies are to be "consistent" with those used by the Conservation Council.

*4.* Rather, the Act vests the Washington Utilities and Transportation Commission with the authority and responsibility to ensure the proper implementation and enforcement of the Act for investor-owned utilities ("IOUs").[4] Exercising this authority, the Commission in 2007 promulgated regulations "to establish rules that electric utilities will use to comply with the requirements of the [Act]."[5] These rules set forth the requirements that utilities must meet to

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[2] RCW 19.285.040(1).
[3] RCW 19.285.040(1)(a)–(b).
[4] *See* RCW 19.285.080.
[5] WAC 480-109-001. *See In re 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 No. UE-061895, Order Adopting Rules Permanently (Nov. 30, 2007).

comply with the Act. Period. There are no additional unwritten requirements or standards – to impose such additional obligations now would violate principles of due process.[6]

*5.* Nonetheless, other parties posit numerous additional substantive and procedural requirements that go beyond the requirements set forth in the Commission's regulations. Seeking to impose their own interpretations of the Act and how it should be implemented, these parties—including most notably Commission Staff—have read the language of the Act and implementing regulations so expansively as to read out the plain language of the Commission's regulations. The Commission should reject these attacks on its properly promulgated rules. If parties believe that the Commission's regulations are in need of revision to reflect additional desired requirements, parties are free to petition for a rulemaking. They should not, however, accuse PSE of violating unwritten rules.

### 1. The Act and implementing regulations allow utilities to rely upon the Conservation Council's utility target calculator in projecting long-term conservation potential and setting biennial targets

*6.* In its response to PSE's Motion for Summary Determination, Commission Staff asserts that a utility cannot base its ten-year conservation potential on its pro rata share of the Conservation Council's current power plan targets using the Council's utility target calculator,[7] notwithstanding that WAC 480-109-010(1)(b)(ii) specifically allows a utility to base its ten-year conservation potential on "[t]he 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." Contrary to Commission Staff's anomalous interpretation of the regulation, WAC 480-109-010(1)(b)(ii) plainly permits utilities to use the target calculator to derive their ten-year conservation potential. The Conservation Council's Fifth Plan Calculator, while not purporting to formally assign *binding* individual utility targets pursuant to the Act, is expressly designed "to provide utilities with a simple means to compute 'their share' of the . . . 5th Plan's regional

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[6] *See Silverstreak, Inc. v. Wash. Dep't of Labor and Indus.*, 159 Wn.2d 868, 889, 154 P.3d 891 (2007) (prohibiting agency from retroactively applying new, broader interpretation of regulation); PSE's Mot. for Summ. Determination ¶ 29 & n.45.

[7] Commission Staff Response ¶ 31.

conservation target," calculating a "Target Based on Utility Share of Total Regional Retail Sales by Sector."[8] Thus, the calculator produces a 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"[9]—i.e., one of the two authorized bases for projecting long-term conservation potential under the Commission's regulations.

*7.* According to Commission Staff, however, investor-owned utilities are *prohibited* from simply using the Conservation Council's target calculator because the calculator is "not part of the Council's power plan[]" and is "not a methodology that the Council uses for conservation planning."[10] This flies in the face of the parties' expectations[11] and the Conservation Council's own understanding of its calculator.[12] It is also entirely inconsistent with the Department of Commerce's rules allowing consumer-owned utilities ("COUs") to use the Conservation Council's Fifth Plan Target Calculator.[13] Commission Staff's reference to language in the draft Sixth Power Plan in which the Conservation Council explains that using the target calculator is only an "option"[14] does not somehow establish Commission Staff's contrary conclusion that utilities may *not* use the target calculator.[15] Commission Staff's invocation of the principles of public power preference under the Bonneville Project Act and the Northwest Power Act to

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[8] Conservation Council 5th Plan Target Calculator, available at http://www.nwcouncil.org/energy/UtilityTargetCalc_v1_7.xls (last visited Apr. 27, 2010).
[9] WAC 480-109-010(b)(ii).
[10] Commission Staff Response ¶ 31.
[11] *See, e.g.,* Docket No. UE-100177, *et. al.*, Comments of the Washington Department of Ecology, Climate Policy (March 5, 2010) ("The methods available to develop these [conservation] targets include a calculator developed by the Northwest Power and Conservation Council that identifies cost-effective conservation targets consistent with the current Power Plan or the utility's current Integrated Resource Plan.").
[12] *See* Ex. A to the Decl. of Eric E. Englert (Conservation Council power point presentation representing that "Utilities Can Just Use the Utility Target Calculator" to project conservation potential).
[13] *See* WAC 194-37-040(7); WAC 194-37-070(4).
[14] Commission Staff Response ¶ 31.
[15] The Council's decision to emphasize in the draft 6th Power Plan that the Council has no authority to interpret, apply, or implement the Act for utilities or regulators is understandable in light of arguments made by COUs during the Department of Commerce rulemaking that the Act's reference to the Council's "most recently published regional plan" could be interpreted as an unconstitutional delegation of legislative authority. *See* Concise Explanatory Statement, Chapter 194-37 WAC (Energy Independence Act, RCW 19.285), p. 2, *available at* http://www.commerce.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0&ItemID=5775&MId=863&wversion=Staging (last visited Apr. 27, 2010).

justify its assertion that COUs can rely on the utility target calculator while IOUs cannot[16] is similarly off base. Unlike this federal legislation, under which BPA is statutorily *required* to give preference to COUs,[17] the Act applies equally to IOUs and COUs, with the sole exception being the recognition in RCW 19.285.080 that COUs are not subject to the Commission's jurisdiction.[18]

8. Moreover, the Act does not require utilities to project their long-term conservation potential using "part of the Conservation Council's power plan" or "a methodology that the Conservation Council uses for conservation planning."[19] Instead, the Act directs utilities to use methodologies "consistent with" those used by the Conservation Council.[20] Relying on the Conservation Council's utility target calculator to derive a pro rata share of the Conservation Council's current power plan is consistent with the Conservation Council's methodologies because the utility target calculator itself uses methodologies consistent with the Conservation Council's power plan.[21]

9. While a slide in a PowerPoint presentation delivered by the Conservation Council's staff may not bind the Commission,[22] the Commission's own regulations do. The "interpretation" pressed by Commission Staff would read WAC 480-109-010(1)(b)(ii) right out of the implementing regulations. The Commission should reject this collateral attack on its regulations and rule as a matter of law that a utility may use the Conservation Council's utility target

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[16] *See* Commission Staff Response ¶ 34.
[17] 16 U.S.C. §§ 832c(a), 839c(a).
[18] *See* RCW 19.285.080; *see also* Docket No. UE-061895, Comments of the NW Energy Coalition (NWEC), Northwest Energy Efficiency Council (NEEC) & the Renewable Northwest Project (RNP), p. 16 & n.26 (July 9, 2007) ("The intent is clear that private and public utilities across the state should be consistent in their conservation analyses."). Commission Staff does not explain why it believes IOUs and COUs are not "similarly situated" in a respect that would justify applying substantively different standards of compliance. *See* Commission Staff Response ¶ 34. While the Declaration of Deborah Reynolds alludes to the fact that some small COUs may not have an IRP, it should be noted that RCW 19.280 applies to both IOUs and COUs and requires all large COUs that are not full requirements customers of BPA to submit a detailed IRP to the Department of Commerce every two years. *See* RCW 19.280.020(5), .030, .050. The Department's regulations implementing the Act, however, do not limit the availability of the calculator to small COUs that are exempt from IRP requirements. *See* WAC 194-37-070(4).
[19] Commission Staff Response ¶ 31.
[20] RCW 19.285.040(1)(a).
[21] *See* WAC 194-37-040(7) ("The conservation calculator will use methodologies consistent with the most recently published *Power Plan*.").
[22] Commission Staff Response ¶ 33.

calculator to derive its projected ten-year conservation potential pursuant to WAC 480-109-010(1)(b)(ii). To the extent Commission Staff disagrees with the manner in which the Commission has interpreted and chosen to implement the Act, Commission Staff may petition for a rulemaking to revise the regulations.

**2. The Act and implementing regulations do not require utilities to base their projection of long-term conservation potential on the source resulting in the highest conservation projection**

*10.* NWEC urges the Commission to require PSE to select the higher of the two possible projections of ten-year achievable, cost-effective, feasible, reliable conservation potential under RCW 19.285.040(1)(a) and WAC 480-109-010(1).[23] Public Counsel makes a similar argument.[24] These arguments are not persuasive. As discussed in PSE's Motion for Summary Determination, this restriction on a utility's decision whether to use its most recent IRP or the Conservation Council's plan as the basis of its ten-year conservation projection is nowhere to be found in the Commission's regulations. To read in such a requirement now, when the Commission could have easily included language to this effect but did not, would violate principles of statutory construction.[25]

**3. There are no additional steps or analyses required if a utility elects to use the Conservation Council's utility target calculator**

*11.* NWEC and Public Council's arguments that a utility must base its ten-year projection on the source that results in the highest level of projected conservation stem from a fundamental misconception of how available, cost-effective, achievable, feasible, reliable conservation is to be projected. This misconception is similarly reflected in the arguments that, once a utility has chosen to use the Conservation Council's plan as the source for its ten-year projection, the utility must undertake additional analysis to confirm whether or not the plan-based projection does, in fact, accurately reflect "all available cost-effective conservation."[26]

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[23] NW Energy Coalition's Response ("NWEC Response") ¶ 9.
[24] Public Counsel Response ¶ 21.
[25] PSE's Mot. for Summ. Determination ¶¶ 21–29.
[26] NWEC Response ¶ 9; *see* Public Counsel Response ¶ 21; Commission Staff Response ¶ 37; ICNU Response ¶ 7.

*12.* As noted above, the Act does not define available, cost-effective, achievable, feasible, reliable conservation or specify how it is to be projected, leaving it instead to the Commission to determine how an IOU should project its ten-year potential for such conservation consistent with the Council's methodology. NWEC's recitation of dictionary definitions for the terms "all" and "available" does nothing to shed light on this issue.[27] Nor does Public Counsel's characterization of this language as "clear and unequivocal."[28]

**a. The Commission rules define the means by which a utility can project its ten-year potential for achievable, cost-effective, reliable and feasible conservation**

*13.* In promulgating rules to implement the objectives of the Act, the Commission applied its expertise and reasoned decision-making in choosing to define a utility's projected long-term achievable, cost-effective, feasible, reliable conservation as the output of either of two equally acceptable sources: the utility's most recent IRP or its pro rata share of the Conservation Council's current power plan targets.[29] Thus, whatever output is properly derived from either of these sources is, *by definition*, the utility's projected long-term achievable, feasible, cost-effective and reliable conservation. The Commission's interpretation of the Act is entitled to deference under bedrock principles of administrative law. Where a utility correctly uses the Conservation Council's utility target calculator to derive its pro rata share of the Council's power plan targets, this ends the inquiry—there is no further derivation or identification of whether "all available cost-effective conservation"[30] has been reflected in the projection.[31]

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[27] NWEC Response ¶ 8.
[28] Public Counsel Response ¶¶ 5, 9.
[29] *See* WAC 480109-010(1); PSE's Mot. for Summ. Determination ¶¶ 20–28.
[30] NWEC Response ¶ 9.
[31] PSE's Mot. for Summ. Determination ¶ 26. Public Counsel suggests that PSE's projection fails to satisfy the requirement that a projection "be derived from" one of the two authorized sources because PSE relied on numbers obtained through the use of the Council's calculator. Public Counsel Response ¶ 19. A common definition of "derive" is "to obtain or receive from a source." The American Heritage Dictionary, 2nd ed. at p. 384 (1976). PSE properly derived its long-term conservation potential by obtaining its pro rata share of regional power plan targets from the Council's Fifth Plan Calculator.

*14.* Public Counsel expresses disbelief that the Commission would reserve for itself only the "ministerial" role of ascertaining whether the calculator number had been properly filed.[32] In so doing, Public Counsel loses sight of the purpose behind the January 31 report: to set minimum binding conservation targets, with which failure to comply may subject a utility to penalties. The Commission is reviewing only whether PSE's *projection* of long-term potential for such conservation and establishment of an acquisition target consistent with this projection comply with the requirements of the Act and implementing regulations.[33] Thus, Public Counsel's protestations that the Act requires utilities to *pursue* all available, cost-effective, reliable and feasible conservation and that the Commission rules cannot relieve any utility of this obligation are beside the point. Public Counsel has identified no statutory or regulatory requirement that PSE failed to meet.

**b. Other parties confuse the IRP process with the process of projecting long-term conservation potential and setting consistent binding conservation targets pursuant to the Act and implementing rules**

*15.* Moreover, Public Counsel and other parties have confused the process of integrating assessments of commercially-available conservation into a lowest cost mix of potential resources for the purpose of *recommending an integrated resource plan* pursuant to WAC 480-100-283 with the process of projecting long-term achievable, cost-effective, feasible, reliable conservation potential for the purpose of *setting a binding conservation target* pursuant to WAC 480-109-010.[34] Given that the achievability and feasibility of cost-effective and reliable conservation opportunities can only be conclusively determined on a retrospective basis, it was entirely reasonable for the Commission to allow utilities to decide which of two equally

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[32] Public Counsel Response ¶ 20. As discussed in more detail below, the Commission's role is necessarily more expansive where the IRP is the basis of the ten-year conservation potential pursuant to WAC 480-109-010(3)(c). In that case, the Commission must consider "the technologies, data collection, processes, procedures and assumptions the utility used to develop these figures." WAC 480-109-010(3)(c).

[33] The Act itself recognizes that there is a difference between *projecting* potential conservation and identifying a minimum *target,* and then actually *pursuing* conservation opportunities as they arise. Otherwise, the Act would not have allowed the Commission to provide positive incentives for IOUs to pursue conservation in excess of the previously established targets. *See* RCW 19.285.060(4) ("The commission . . . may consider providing positive incentives for an investor-owned utility to exceed the targets established in RCW 19.285.040.").

[34] *See* PSE Response ¶ 4 n.4. PSE hereby incorporates by reference the arguments set forth in its response.

acceptable sources—the utility's IRP or the utility's pro rata share of regional power plan targets—to use when projecting long-term conservation potential to set binding conservation targets under the Act.

*16.* Thus, to the extent that Public Counsel argues that a utility's IRP produces a better projection of long-term achievable, cost-effective, feasible, reliable conservation potential for the purposes of setting binding targets under the Act, and that a utility is therefore required to base its long-term projection on its IRP rather than its pro rata share of regional power plan targets,[35] Public Council ignores the plain language of WAC 480-109-010(1)(b)(ii). As explained above and in PSE's Motion for Summary Determination,[36] this provision explicitly authorizes the use of the Conservation Council's power plan targets as an alternative to the utility's IRP in projecting long-term conservation potential and establishing biennial targets. The Commission cannot disregard the plain language of its regulations as Public Counsel suggests.[37]

**c. The numerous additional steps and analyses described by other parties are not required by the Act or implementing rules**

*17.* Under Washington State Supreme Court precedent, it is improper to "add to or subtract from the clear language of a statute, rule, or regulation . . . unless the addition or subtraction of language is imperatively required to make the statute rational."[38] The Commission's rules describe in plain and unambiguous terms the specific steps that a utility must take to demonstrate that it has properly projected its long-term conservation potential and established a consistent

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[35] *See* Public Counsel Response ¶ 10; Docket No. UE-100177, Comments of Public Counsel ¶ 17–18 (March 5, 2010). Public Counsel's March 5 comments, which present numerous legal arguments, were improperly incorporated by reference into the "factual" Second Declaration of Stefanie Johnson. *See* Second Decl. of Stefanie Johnson ¶ 3. PSE will not be responding to legal arguments contained in Public Counsel's March 5 comments, but which were not argued by Public Counsel in its response to PSE's summary determination motion.

[36] PSE's Mot. for Summ. Determination ¶¶ 20–25.

[37] The Commission should also note that nowhere in the Act is there any reference to the possibility, let alone the requirement, that utilities use their IRP to project long-term conservation potential. The Act focuses exclusively on the requirement that utilities use "methodologies consistent with those used by" the Conservation Council in its most recently-published power plan. RCW 19.285.040(1)(a).

[38] *State v. Cannon*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002).

biennial target.[39] Conspicuously absent from these rules, where a utility selects the Council's plan as the basis for its projection of long-term conservation potential, are any requirements to:

- Provide information including detailed program descriptions; measures, incentives, and eligibility requirements; detailed program budgets; evaluation plans; annual and quarterly progress reports; and cost-recovery tariffs;[40]
- Provide unspecified evidence that the utility is pursuing "all achievable cost-effective conservation";[41]
- Demonstrate that the utility has "considered" specific conservation resources;[42]
- Explain the basis for choosing the Council's plan instead of the utility's IRP to project long-term conservation potential;[43]
- Explain any differences between the utility's conservation metrics established using the Council's utility target calculator and the utility's estimated projections of future conservation established during the utility's IRP or in its conservation program filing;[44]
- Provide unspecified evidence "proving" that conservation metrics based on the Council's plan are accurate;[45] or

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[39] *See* WAC 480-109-010(3). For a utility that selects the Council's plan as the basis of its projection of long-term conservation potential, the rules state that the utility must file a report on or before January 31 (1) identifying the utility's ten-year conservation potential and biennial target; (2) outlining the extent of public and commission staff participation in the development of these conservation metrics; (3) identifying whether the conservation council's plan or the utility's IRP was the source of the ten-year conservation potential; and (4) clearly stating how the utility prorated its ten-year conservation potential to create its biennial target. *Id.*
[40] *See* Docket No. UE-100177, et. al., Staff Comments Evaluating Elec. Util. Conservation Reports Under the Energy Independence Act, RCW 19.285, p. 3 (March 5, 2010) ("Initial Staff Comments").
[41] *See* Commission Staff Response ¶ 37.
[42] *See id.* ¶ 30.
[43] *See* Public Counsel Response ¶ 10.
[44] *See id.* ¶ 10.
[45] *See id.* ¶ 37.

- Provide information regarding cost-effectiveness standards and the cost-effectiveness of projected conservation.[46]

*18.* In contrast, where a utility selects its most recent IRP as the basis of its long-term projection, the Commission's rules state that the utility is required in its January 31 report to demonstrate *how* it developed its conservation metrics by including descriptions of:

- the technologies used to develop the figures;
- the data collection used to develop the figures;
- the processes, procedures and assumptions the utility used to develop the figures; and
- any changes in assumptions or methodologies used in the utility's IRP or the Council's plan.[47]

Under the principle of *expressio unius est exclusio alterius*, the expression of one thing in a statute or regulation indicates intentional exclusion of another.[48] Given the Commission's decision to promulgate these additional informational requirements for utilities that base their projected long-term conservation potential on their IRP, and the Commission's obvious omission of any such informational requirements for utilities that base their long-term conservation projection on their pro rata share of regional power plan targets, it would be arbitrary and

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[46] *See* Initial Staff Comments at p. 3; Public Counsel Response ¶ 10. Public Counsel suggests that the Commission should compare the theoretical cost per aMW of the conservation metrics filed by PSE on January 29, 2010 to the cost per aMW under the Energy Efficiency Services tariff. *See id.* Because the Commission was investigating PSE's conservation programs and related expenditures at the time PSE filed its conservation metrics, and the Commission did not complete its investigation until well after this filing (on March 25, 2010), such a comparison is inappropriate.

[47] WAC 480-109-010(3)(c). The response of ICNU inaccurately depicts PSE's position when it states "PSE is incorrect, however, in asserting that 'there are no additional steps required if a utility elects to use' the Council's plan or its own IRP." ICNU Response at ¶ 5. *See also id.* ¶ 7 ("The Commission should reject PSE's notion that its decision to rely upon its IRP or the Council's plan cannot be reviewed to ascertain whether it accurately or reasonably forecasts the appropriate amount of . . . conservation . . . ."). As stated above, it is PSE's position, based on the language of the rules, that there are no additional steps required if a utility elects to use the *Conservation Council's plan*; however, use of the IRP requires a utility to undertake the additional analysis set forth in WAC 480-109-010(1)(b)(i) and (3)(c). Thus, the Commission may review the technology, data collection, processes, procedures and assumptions used to develop the figures when the IRP is the source of the ten-year conservation potential and, or when a utility makes "changes in assumptions or methodologies used in the utility's most recent IRP or the conservation council's power plan." WAC 480-109-010(3)(c).

[48] *See State v. Delgado*, 148 Wn.2d 723, 728–29, 63 P.3d 792 (2003).

capricious and contrary to the plain language of the regulations to reject PSE's report because it failed to provide such additional information.[49]

### 4. The ad-hoc "reality checks" and other purported "tests" that other parties allege PSE's conservation metrics must satisfy have no basis in any statutory or regulatory requirement

*19.* In addition to suggesting that PSE was required to file the extra information discussed above, other parties attack PSE's conservation metrics on the basis that the metrics do not pass various "tests" that the parties themselves have created. NWEC, for example, asserts that the Commission must reject PSE's filing because "[t]he proposed conservation target does not demonstrate an increase in energy conservation compared with preceding years."[50] NWEC divines this purported requirement from the Act's precatory purpose provision, which declares as a matter of policy that increasing energy conservation will promote a variety of societal goods.[51] However, neither this provision nor the Commission's regulations *require* utilities to increase the amount of conservation achieved each year over historically achieved amounts. Indeed, both the Commission's regulations and the Conservation Council's draft Sixth Power Plan specifically recognize that the amount of achievable conservation may in some years be smaller than in other years.[52]

*20.* Similarly, contrary to the implications of NWEC and Public Council,[53] a utility's conservation metrics based on the Conservation Council's plan are not suspect simply because they do not match up with the utility's conservation program or IRP. By providing utilities with two options to choose from in projecting long-term conservation potential, the Commission implicitly recognized that there may be some circumstances in which disparities between the

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[49] Although, as ICNU notes in paragraph 5 of its response, the Act allows the Commission to use "its standard practice for review and approval" of conservation targets, this provision does not allow the Commission to disregard the plain meaning of the rules it propounded. *See* PSE's Mot. for Summ. Determination ¶ 29.
[50] NWEC Response ¶¶ 5, 29.
[51] *Id.* ¶ 5 (quoting RCW 19.285.020).
[52] *See* WAC 480-109-007(14) (defining "pro rata" to allow utilities flexibility to meet realistic conservation implementation schedules); Commission Staff Response, Attach. A at 4–23 (draft 6th Power Plan excerpt) (acknowledging that conservation potential may ramp up *or* down).
[53] NWEC Response ¶ 8; Public Counsel Response ¶ 10.

numbers resulting from those sources would lead the utility to choose one source over the other. There is no requirement to explain such decision-making because, under the Commission's regulations, either source of information is equally acceptable. Not only is there no requirement in the Act or implementing regulations that conservation metrics filed under the Act be comparable to conservation estimates developed as a part of the utility's IRP or conservation program, such a requirement would ignore the obvious differences in purpose and consequences of these separate processes.[54]

*21.* Finally, Commission Staff's suggestion that the Commission's decision allowing PSE to adjust its rates to support acquisition of conservation resources at a level greater than its biennial target is an "appropriate circumstance" for the Commission to require PSE to use consistent information for its rate adjustment and biennial conservation target[55] is unfounded. At the time PSE filed its conservation metrics, it was not at all clear whether the Commission would approve the rate adjustment or how long the Commission's investigation into PSE's conservation program would continue. For the Commission to require PSE to adjust its biennial target upward on account of events occurring subsequent to the filing of the target is unfair and inappropriate. The Commission should encourage utilities to seek conservation above and beyond the minimum target levels of achievable conservation set pursuant to the Act.[56]

### B. PSE's Further Development of Its Projected Ten-Year Conservation Potential after December 31 Was Consistent with Statutory and Regulatory Requirements and Was Reasonable In Light of Changing Circumstances

*22.* As set forth in PSE's motion,[57] there is nothing in the Act or implementing regulations that prohibits a utility from further developing or finalizing its ten-year conservation potential in the thirty-day time period after projecting its ten-year potential and before filing its report. Nor

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[54] PSE Response ¶ 19.
[55] Commission Staff Response ¶ 35.
[56] *See* RCW 19.285.060(4) (enabling the Commission to consider providing positive incentives for IOUs to exceed conservation targets).
[57] PSE's Mot. for Summ. Determination ¶ 37.

has any party identified such a restriction. PSE does not argue, as NWEC suggests,[58] that PSE was entitled to alter its conservation assessment at *any* time and for *any* reason during January. Rather, PSE asks the Commission to rule as a matter of law that, under the circumstances of this case, PSE was permitted to adjust its anticipated projection of long-term conservation potential between December 31 and January 29 by choosing to use metrics derived from the Council's current power plan targets pursuant to WAC 480-109010(1)(b)(ii) rather than metrics derived from PSE's most recent IRP pursuant to WAC 480-109010(1)(b)(i), *where both authorized sources were used to identify PSE's long-term conservation potential prior to January 1.*

### 1. PSE did not "substantially change" its ten-year conservation potential between December 31, 2009 and January 29, 2010

*23.* In arguing that PSE "substantially changed" its projection of ten-year conservation potential between December 31 and January 29, Commission Staff[59] and NWEC[60] both start from the false premise that PSE's December 31 correspondence to stakeholders identified PSE's ten-year conservation potential using only PSE's IRP as the basis for the projection. It is indisputable, however, that the December 31 e-mail included conservation metrics derived from both PSE's IRP *and* the Conservation Council's current power plan targets.[61] As described in PSE's Response, there is nothing in the Act or implementing regulations to suggest that a utility may not identify its ten-year conservation potential using both of the authorized sources prior to January 1 and then finalize its decision regarding which source to use for purposes of establishing its biennial target prior to submitting the January 31 report.

*24.* The fact that PSE, as part of the public participation process, shared with stakeholders its plans to use the 2009 IRP as the basis for its conservation metrics does not mean that PSE was then precluded from further considering these plans in light of rapidly changing circumstances and uncertainty regarding the viability of the IRP-based metrics. This is particularly so

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[58] NWEC Response ¶ 15.
[59] Commission Staff Response ¶ 25.
[60] NWEC Response ¶ 18–19.
[61] PSE Response ¶ 15; App. G to the Decl. of Stefanie Johnson.

inasmuch as all parties were well aware that PSE was entitled to use its pro rata share of the Council's current power plan as the basis for its conservation metrics. These metrics could be independently calculated at any time using the Council's publicly-available utility target calculator, and sample calculations were provided to stakeholders during the public participation process.[62]

*25.* Commission Staff incorrectly suggests that, to the extent that PSE's December 31, 2009 e-mail represented to stakeholders that PSE intended to use its 2009 IRP as the basis for its conservation metrics (notwithstanding PSE's simultaneous identification of metrics based on the Council's calculator), PSE is somehow bound to such a representation because Commission Staff unilaterally filed this e-mail as documentation of PSE's compliance with the January 1 deadline.[63] As discussed below in section II.D.3, however, PSE was not required to provide such documentation; nor was the December 31st e-mail intended to be taken as a binding statement of intent. Given that the Commission's regulations do not require a utility to file documentation proving that it complied with the January 1 deadline, it would be inappropriate for the Commission to treat PSE's informal correspondence with stakeholders as such.

*26.* More to the point, PSE's December 31 e-mail also identified its ten-year conservation potential using the Conservation Council's Fifth Power Plan. PSE is not bound to base its ten-year conservation potential on the IRP any more than it is bound to base its ten-year conservation potential on the Fifth Power Plan, given that it used both sources in its December 31 e-mail.

### 2. PSE's further development of its ten-year conservation potential was reasonable in light of changing circumstances.

*27.* Having identified its long-term conservation potential using both authorized sources prior to January 1, PSE was entitled to make the ultimate decision regarding which source to use after this date and before filing the January 31 report. PSE's decision to use the Conservation Council's calculator rather than the IRP-based conservation metrics was reasonable and

[62] *See* PSE Response ¶¶ 4–10.
[63] *See* Commission Staff Response ¶ 23 (inaccurately characterizing this email as "[t]he December 31, 2009 projection that PSE used to document its compliance with the deadline").

appropriate in light of changing circumstances. As described in PSE's motion, the decision to use the Council's calculator was based on four key drivers, which have come into sharp focus since December 2009: (1) uncertainty about approval of the Company's 2010–2011 projected level of conservation program expenditures; (2) uncertainty about customer tolerance for upward pressure on rates due to higher conservation program expenditures; (3) uncertainty about the Company's ability to recover lost margins from conservation; and (4) uncertainty about the treatment of penalties for failing to achieve the conservation targets.[64]

*28.* Public Counsel disparages these considerations as irrelevant to the process of projecting long-term conservation potential and setting a binding biennial conservation acquisition target.[65] To the contrary, these considerations are both relevant and important. As discussed above, the Act and implementing regulations allow utilities to use either of two authorized sources when projecting their ten-year potential for available, cost-effective, achievable, feasible, reliable conservation. In choosing between these two equally acceptable ways of projecting long-term conservation potential, it was reasonable and appropriate for PSE to consider the significant uncertainty regarding the viability of the IRP-based metrics due to the four drivers referenced above and, accordingly, to rely on the more conservative projection.[66]

### C. PSE's Biennial Target Is Consistent with Its Identification of Ten-Year Conservation Potential

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[64] PSE's Mot. for Summ. Determination ¶¶ 14–16; Decl. of E. Englert ¶¶ 17–20. Commission Staff suggests that evidence of additional analysis supporting a utility's decision to further develop its projection of long-term conservation potential after the January 1 deadline is required. *See* Commission Staff Response ¶ 26. No such requirements are present in the Act or implementing rules. Regardless, PSE's additional analysis in this case consisted of additional consideration of the two sources that it identified for its ten-year conservation potential in light of the implications of changing circumstances related to the four key drivers.

[65] Public Counsel Response ¶¶ 11–18.

[66] Public Counsel suggests that the uncertainty surrounding approval of the Company's 2010–2011 projected level of conservation program expenditures and the uncertainty about customer tolerance for upward pressure on rates must not have been significant because PSE continued to pursue the conservation rider and additional funds in order to pursue the IRP-based conservation targets. Public Counsel Response ¶¶ 12–13. In light of the stated goals of the Act, it is ironic that Public Counsel would simultaneously criticize PSE for selecting a more conservative binding conservation target due to increasing uncertainty regarding PSE's projected conservation potential while nonetheless continuing to pursue more ambitious conservation goals. Pursuing conservation above and beyond the minimum conservation targets that are established under the Act should be lauded, not discouraged. *See* RCW 19.285.060(4).

*29.* PSE's January 29 report identified a biennial target of 42.2 aMW and a ten-year projected conservation potential of 213.7 aMW. Both numbers were calculated using the Conservation Council's Fifth Plan Calculator. Because no one can dispute that these numbers are consistent, NWEC instead claims that PSE's biennial target of 42.2 aMW biennial target is inconsistent with an earlier, unfiled IRP-based projection of 427.9 aMW, which PSE had informally communicated to stakeholders that it anticipated using as of December 31, 2009.[67] In so arguing, NWEC continues to ignore that (1) PSE's December 31 e-mail *also* identified a ten-year conservation potential of 219.4 aMW based on PSE's share of the Council's current power plan,[68] and (2) no statutory or regulatory requirement precluded PSE from adjusting its anticipated 10-year projection in light of changing circumstances under the particular circumstances of this case.[69] NWEC's comparison of the plan-derived 42.2 aMW biennial target to the IRP-derived ten-year projection is inapposite.

## D. Other Threshold Issues

### 1. Public and Commission Staff participation was sufficient as a matter of law

*30.* The Commission should rule as a matter of law that the numerous opportunities PSE provided for Staff and public participation in the process of determining PSE's conservation metrics satisfied the public participation requirement of WAC 480-109-010(3)(a). This public participation included opportunities to provide input regarding both the conservation numbers derived from PSE's 2009 IRP and the numbers derived from the Council's Fifth Plan Calculator, as well as the opportunity to comment on and discuss PSE's ultimate decision to use the plan-based metrics rather than the IRP-based metrics.[70] The Commission's regulations do not require more.

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[67] NWEC Response ¶ 15.
[68] PSE Response ¶ 15; App. G to the Decl. of Stefanie Johnson.
[69] PSE's Mot. for Summ. Determination ¶¶ 36–37.
[70] PSE Response ¶¶ 4–10, 13; Decl. of E. Englert ¶¶ 4–15; Supp. Decl. of E. Englert ¶ 10; Report at 3; App. H & App. I to the Decl. of Stefanie Johnson.

*31.* Misreading PSE's position, Public Counsel denounces in accusatory terms what it mistakenly believes is an attempt by PSE to describe the public participation process in a "misleading and disingenuous" manner to intentionally support the "manifestly false" conclusion that the January 29 metrics were "developed" during the public process described in the declaration.[71] To the contrary, PSE has not asserted that the specific numbers in the January 29 report were "developed" during the public participation process. Indeed, as discussed in PSE's Response, Public Counsel's focus on the "development" of these numbers is entirely misplaced, given that the "development" of a utility's pro rata share of the Council's power plan is essentially built into the target calculator.[72] In describing the multi-year public participation process, the declarations of Eric Englert demonstrate that stakeholders were involved throughout the target-setting process—both in the initial stages when PSE anticipated using its 2009 IRP as the basis for its conservation metrics, and during the later stage when PSE ultimately opted to use the Conservation Council's plan as the basis for the metrics.[73] As described in more detail in PSE's Response, this evidence further demonstrates that, even as the parties discussed the use of PSE's 2009 IRP as the likely source of PSE's metrics, all parties were well aware that PSE could alternatively choose to use the target calculator as the basis for PSE's conservation metrics and were aware of the manner in which it calculated utilities' pro rata shares.[74] Accordingly, Public Counsel's assertion that there was "no connection" between the public process and the goals ultimately filed by PSE is inaccurate.

### 2. The Conservation Council's Fifth Power Plan was the current plan when PSE filed its report.

*32.* The plain language of the Act leads to the inescapable conclusion that PSE's conservation metrics were properly based on the Conservation Council's Fifth Power Plan rather than the unpublished, unadopted, draft Sixth Power Plan. RCW 19.285.040(1)(a) unequivocally states

[71] Public Counsel Response ¶ 34.
[72] PSE Response ¶ 10.
[73] *See* Decl. of E. Englert ¶¶ 4–15 & Ex. A; Supp. Decl. of E. Englert ¶ 10 & Ex. B.
[74] PSE Response ¶¶ 4–10.

that in projecting long-term conservation potential, utilities are to use "methodologies consistent with those used by the . . . [C]ouncil in its *most recently published* regional power plan" (emphasis added). Public Counsel attempts to deflect the plain meaning of this language by suggesting that the draft Sixth Power Plan—which Public Counsel itself admits has not been "literally" or "formally published to date"[75]—should nonetheless be considered "published" within the meaning of the Act because the draft plan has been made publicly available.[76] While creative, this argument fails a "reality check": even on the Conservation Council's own website, the draft Sixth Power Plan is prominently labeled "Sixth Power Plan (Pre-Publication)."[77]

*33.* Commission Staff's arguments are similarly misplaced. Commission Staff suggests that an e-mail sent by a Conservation Council staff member to a group of stakeholders on September 3, 2009 established the draft Sixth Power Plan calculator as the source of the Council's "current power plan targets" within the meaning of WAC 480-109-010(1)(b)(ii) because the staff member referred to that version of the draft Sixth Power Plan calculator as the "current version."[78] Whether or not the target calculator attached to that e-mail was the "current version" of the draft Sixth Power Plan calculator, however, is not relevant to the issue of which calculator—the Fifth Plan or Sixth Plan calculator—PSE was allowed to use when projecting long-term conservation potential. Where, as here, the statute refers specifically to the "most recently published plan," and the corresponding implementing rule expressly authorizes utilities to calculate their pro rata share based on the conservation targets in the Council's "current power plan," it is untenable to assert that PSE was required by law to initially project or subsequently update its long-term conservation potential based on the Conservation Council's unpublished, unadopted, draft Sixth Power Plan. The Commission should interpret the Act and implementing regulations consistently with the Department of Commerce and rule as a matter of law that PSE's use of the Fifth Plan calculator was appropriate.

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[75] Public Counsel Response ¶ 23.
[76] *Id.* ¶¶ 23–24.
[77] *See* http://www.nwcouncil.org/energy/powerplan/6/default.htm (last visited Apr. 27, 2010).
[78] *See* Commission Staff Response ¶ 32.

### 3. The Commission's rules do not require the ten-year conservation potential to be filed prior to the January 31 report

*34.* Although a utility must project its ten-year conservation potential prior to January 1, the Act and implementing regulations do not require a utility to file this projection prior to January 31.[79] Public Counsel's argument that Commission Staff's filing of PSE's December 31 informal correspondence to stakeholders was somehow required by the Act because there "must be some means for the Commission to determine if PSE has met the requirements"[80] is misplaced. PSE has numerous requirements imposed on it by statute and regulation that do not require a filing or formal notice to the Commission. Commission Staff has the ability to audit PSE and to propound informal data requests if there is a question as to whether PSE projected its ten-year conservation potential prior to January 1. An affirmative notification or filing of the ten-year conservation potential by the utility prior to January 1 is not required by the rules or statute. In contrast, such public notice and filing *is* required by the Act and implementing rules by January 31.[81]

### 4. The Commission's regulations do not establish specific limits on the breadth of the range that a utility may use as a biennial target

*35.* The Commission should rule that, under the Act and implementing regulations, the breadth of the range that a utility may use as a biennial target is not limited in such a way as to preclude PSE from establishing a biennial target ranging from the prorated share of PSE's conservation potential identified by use of the Fifth Plan calculator and the prorated conservation identified through PSE's 2009 IRP. This target range is reasonable given that (1) the Act and implementing regulations allow a utility to project its ten-year conservation potential using one of two equally acceptable sources—its IRP or the Council's current plan, and (2) the utility's two-year conservation target is created by prorating either the utility's ten-year IRP-derived conservation potential or the utility's plan-derived ten-year conservation potential, depending on

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[79] *See* RCW 19.285.040(1); WAC 480-109-010.
[80] Public Counsel Response ¶ 25.
[81] RCW 19.285.040(1)(b); WAC 480-109-010.

which source the utility selected.[82] In other words, because either the prorated share of the utility's IRP-derived conservation potential or the prorated share of a plan-derived conservation potential may stand alone as a point target, using these two pro-rated shares to create a range as a biennial target is similarly appropriate. The Commission should reject Commission Staff's contrary assertion that a target range is not appropriate "[i]f the bottom of the range is less than 'all,' or the range is more than achievable."[83] Taken to its logical conclusion, Commission Staff's position would preclude a utility from ever being able to establish a biennial target in the form of a range rather than a point, because only a single point target could satisfy this test.

### E. Penalties Are Triggered Only if Conservation Falls Below the Lower End of An Approved Biennial Conservation Target Range

*36.* No party disputes PSE's position that penalties are triggered under the Act only if a utility fails to achieve conservation at or above the lower end of an approved biennial target range. Yet, the Act and rules are silent on the issue of when a penalty would be triggered in the event the utility uses a target range. As ICNU and NWEC both state, clarification by the Commission on this issue would be helpful.[84] By ruling as a matter of law on this issue, the Commission will provide utilities regulatory certainty regarding the application of administrative penalties and head off needless controversy in the future.

## III. CONCLUSION

*37.* If the Commission wishes to adopt additional procedural or substantive requirements to implement the Act it is authorized to do so; however, the Commission cannot reject PSE's properly-established conservation metrics on the basis that PSE has not complied with previously unannounced, unwritten standards. Accordingly, PSE respectfully requests that the Commission grant PSE's Motion for Summary Determination on all issues raised therein.

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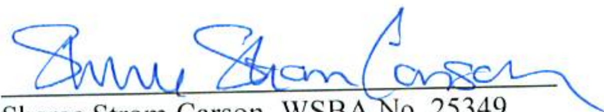
[82] *See* WAC 480-109-010(3)(b) (directing utilities to clearly state in their reports "how the utility prorated this ten-year projection to create its two year conservation target").
[83] Commission Staff Response ¶ 3.
[84] NWEC Response ¶ 23; ICNU Response ¶ 10.

DATED: April 28, 2010.

**PERKINS COIE LLP**

By 

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