

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND	)	DOCKET UE-100177
TRANSPORTATION COMMISSION,)	
	)	ORDER 04
Complainant,)	
	)	ORDER GRANTING IN PART AND
	)	DENYING IN PART PSE’S MOTION
v.	)	FOR SUMMARY JUDGMENT,
	)	REJECTING PSE’S REPORT AND
	)	DIRECTING PSE TO REFILE, AND
PUGET SOUND ENERGY,	)	GRANTING STAFF’S, PUBLIC
	)	COUNSEL’S, AND NWEC’S
Respondent.	)	MOTIONS FOR SUMMARY
	)	DETERMINATION
.....)	

1 **Synopsis:** *The Commission finds that PSE’s ten-year achievable conservation potential identified in its Biennial Conservation Target Report (Report) is insufficient because (1) there was lack of public participation in the development of its potential and the biennial target in its Report and (2) there was substantial inconsistency between the projected potential PSE identified on December 31, 2009, and its biennial target contained in its Report. We reject PSE’s Report and direct the Company to re-file its Report in compliance with the Act and our rules and using the IRP-based numbers PSE originally used in projecting its potential. We also rule on various other legal issues which were the subject of motions for summary determination filed by the parties.*

2 *We direct PSE to re-file within ten days of the effective date of this order its Biennial Conservation Target Report using the conservation potential it projected based on its integrated resource plan numbers.*

INTRODUCTION

3 **NATURE OF PROCEEDING.** Docket UE-100177 involves the ten-year
achievable conservation potential and biennial conservation target report (Report)
filed by Puget Sound Energy, Inc. (PSE or the Company) with the Washington
Utilities and Transportation Commission (Commission) on January 29, 2010,
pursuant to RCW 19.285 and WAC 480-109. In the Report, PSE projects its ten-year
achievable conservation potential and biennial conservation target.

4 The Commission set the matter for hearing at its open meeting on March 11, 2010,
because the Company did not provide sufficient information to determine whether its
ten-year achievable conservation potential and biennial conservation target should be
approved.¹

5 **APPEARANCES.** Sheree Strom Carson, Perkins Coie, Bellevue, Washington,
represents PSE. Fronda Woods, Assistant Attorney General, Olympia, Washington,
represents the Commission's regulatory staff (Commission Staff or Staff).² Simon
ffitch, Senior Assistant Attorney General, Seattle, Washington, represents the Public
Counsel Section of the Washington Office of the Attorney General (Public Counsel).
Danielle Dixon, Senior Policy Associate, Seattle, Washington, represents NW Energy
Coalition (NVEC). Irion Sanger, Davison Van Cleve, P.C., Portland, Oregon,
represents Industrial Customers of Northwest Utilities (ICNU).

6 **BACKGROUND.** In 2006, Washington voters passed Initiative Measure No. 937
(Initiative 937) which "require[d] investor-owned and consumer-owned utilities with
25,000 or more customers to meet designated targets for energy conservation,

¹ See *Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc.*, Docket UE-100177, Order 01, Setting 10-Year Achievable Conservation Potential and Biennial Conservation Target Report for Hearing.

² In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. See RCW 34.05.455.

including cogeneration as defined, and use of eligible renewable energy resources ... [with u]tilities not meeting conservation and renewable energy resource targets [paying] penalties to the state, to be used for purchase of renewable energy credits or certain energy conservation purposes.”³ Titled the Energy Independence Act (the Act), Initiative 937 was codified at RCW 19.285 *et. seq.* It authorized the Commission to determine whether an investor-owned utility has complied with the provisions of the Act and impose monetary penalties for noncompliance.⁴

7 On December 21, 2006, the Commission opened a rulemaking, Docket UE-061895, to examine whether new or revised regulations were needed to govern the Commission’s implementation of the Act.⁵ Following several opportunities for public comment, the Commission adopted rules. WAC 480-109-001, *et seq.*⁶ The rules established the procedures investor-owned utilities must follow to demonstrate compliance with the Act including, *inter alia*, reporting and public participation requirements for the utilities’ acquisition of achievable cost-effective conservation.⁷

8 In projecting their ten-year achievable conservation, the Act provides that qualifying utilities must use methodologies consistent with those used by the Northwest Power and Conservation Council (Council) in its most recently published regional power plan.⁸ Congress created the Council when it enacted the Pacific Northwest Electric Power Planning and Conservation Act, Public Law 96-501.⁹ Four states, Idaho,

³ Office of the Secretary of State, Proposed Initiatives to the People - 2006, <http://www.sos.wa.gov/elections/initiatives/people.aspx?y=2006>.

⁴ RCW 19.285.060(6).

⁵ RCW 19.285.080(1) gives the Commission the authority to “adopt rules to ensure the proper implementation and enforcement of this chapter as it applies to investor-owned utilities.”

⁶ See, *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 (November 30, 2007).

⁷ *Id.*, ¶¶ 9, 16 and WAC 480-109.

⁸ RCW 19.285.040(1)(a).

⁹ 16 U.S.C §§839-839h. The Council was established “...[to] prepar[e] and [adopt] a regional conservation and electric power plan and a program to protect, mitigate, and enhance fish and

Montana, Washington, and Oregon, make up the Council, with two representatives from each state, appointed by the respective governors.¹⁰ The Council is tasked with the responsibility of formulating a 20-year electric power plan to meet the electrical needs of the Pacific Northwest at the lowest cost.¹¹ As a result, the plan gives the highest priority to cost-effective conservation, with the next highest priority given to renewable sources of energy.¹²

9 The Council adopted the first power plan in 1983 and has subsequently revised the plan five times.¹³ In December 2004, the Council adopted the Fifth Power Plan.¹⁴ The Council adopted the Sixth Power Plan on February 10, 2010, after publishing it in draft form in September 2009.¹⁵

10 **PROCEDURAL HISTORY.** On December 31, 2009, Staff filed an e-mail from PSE along with an attached file entitled “WAC 480-109 Potential Target FINAL 12-30-09” with the Commission in Docket UE-091986.¹⁶ The e-mail, which PSE had sent to Staff and other members of the Conservation Resource Advisory Group (CRAG), stated that the Company had attached its projected cumulative conservation

wildlife, and to ... achieve such purposes and facilitate cooperation among the States of Idaho, Montana, Oregon, and Washington, and with the Bonneville Power Administration...” 16 U.S.C. § 839b(a)(1)-(2).

¹⁰ 16 U.S.C. §839b (a).

¹¹ *Id.* §839b (d)-(e).

¹² *Id.* §839b (e)(1).

¹³ <http://www.nwcouncil.org/library/1983/PowerPlan.htm>.

¹⁴ <http://www.nwcouncil.org/energy/powerplan/5/Default.htm>.

¹⁵ <http://www.nwcouncil.org/library/releases/2010/0210.htm>.

¹⁶ Under the Act and our rules, the term “conservation potential” can refer to two different stated “potentials.” One is the projected ten-year conservation potential which must be *projected* by January 1, 2010. RCW 19.285.040(1)(a); WAC 480-109-010. The second is the ten-year conservation potential which must be included in the utility’s Report by January 31, 2010 that the utility files with the Commission, together with its proposed biennial target. WAC 480-109-010(3). In most cases, we would expect these two to be the same. However, in this case, they are different, and that has led to much of the dispute. In our discussion, we take care to identify which of PSE’s “potentials” we are referring to by reference to the date (January 1 or January 31) or to the type of document which memorialized the potential (the December 31 e-mail or the January 29 Report).

potential and biennial conservation target.¹⁷ PSE's ten-year conservation potential was projected to be 427.9 average megawatt (aMW) at the customer level, and its biennial target range was calculated at 69.4 aMW to 90.3 aMW at the customer meter level.¹⁸ PSE claimed that these numbers were derived from the Company's 2009 IRP plus generation facility efficiency improvements.¹⁹ PSE's only reference to the Council's (Council) Fifth Power Plan was in the statement that, "[b]y contrast, PSE's share of the Power Council's 5th regional plan would be a cumulative ten-year potential of 219.4 aMW (2009-2018, the latest period in the Council's published Target Calculator) and a 2010-2011 'target' of 42.7 aMW."²⁰

11 On January 29, 2010, PSE filed its Report which contains its ten-year achievable conservation potential, a biennial conservation target, an explanation of the participation of Staff and the public in the development of the conservation metrics, a statement indicating that PSE used the Council's Fifth Power Plan as the basis for the ten-year achievable conservation potential, and an explanation of how PSE prorated the ten-year projection to create its biennial conservation target. PSE's Report stated the Company's ten-year achievable conservation potential at 213.7 aMW and its biennial conservation target at 42.2 aMW.²¹ PSE maintained that these numbers were derived using the Council's Fifth Plan Target Calculator.²²

12 The Commission issued a Notice of Opportunity to Comment on PSE's Report Concerning Its Ten-Year Conservation Potential and Its Biennial Conservation Target and Notice of Open Meeting (Notice) on February 2, 2010. The Notice invited interested persons to submit written comments on PSE's Report by March 5, 2010, and indicated that the Commission would consider the Report at the March 11, 2010,

¹⁷ A copy of that e-mail has been provided as Exhibit A to NWEC's Motion.

¹⁸ *Id.* The Act and our rules only require qualifying utilities to identify their ten-year conservation potential by January 1, not their biennial target.

¹⁹ *Id.*

²⁰ *Id.*

²¹ PSE's Reply, ¶ 29.

²² *Id.*

open meeting. The Commission received written comments from Public Counsel, Commission Staff, NWEAC, and the State of Washington, Department of Ecology.

13 At the open meeting, the Commission discussed PSE's Report and voted to accept Staff's recommendation to set the matter for hearing based on the Company's failure to provide sufficient information to allow for the determination of whether the ten-year potential and biennial target should be approved.²³

14 On March 16, 2010, the Commission issued a Notice of Deadline to File Legal Issues List (Issues Notice). The Issues Notice requested that the parties "frame the legal issues by filing a legal issues list prior to the prehearing conference."²⁴ The Commission encouraged the parties to work together in the drafting of a single, joint issues list so as to promote the prompt resolution of the case.²⁵

15 PSE filed its Issues List on March 29, 2010, proposing that the Commission address ten threshold legal issues. Commission Staff, Public Counsel, and NWEAC filed a joint issues list consisting of variations on several of PSE's issues and objections to three of PSE's issues. ICNU did not file an issues list.

16 The Commission convened a prehearing conference in this docket at the Commission's headquarters in Olympia, Washington on April 1, 2010, before Administrative Law Judge Marguerite E. Friedlander (Judge Friedlander). At the prehearing conference, Judge Friedlander granted the unopposed petitions for intervention filed by NWEAC and ICNU.²⁶ The parties agreed that the threshold legal

²³ See, *Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc.*, Docket UE-100177, Order 01, Setting 10-Year Achievable Conservation Potential and Biennial Conservation Target Report for Hearing.

²⁴ *WUTC v. PSE*, Docket UE-100177, Notice of Prehearing Conference and Notice of Deadline to File Legal Issues List, ¶ 10.

²⁵ *Id.*, ¶ 11.

²⁶ See *Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc.*, Docket UE-100177, Order 03, Prehearing Conference Order. The Commission issued Order 02, a protective order, on April 2, 2010.

issues surrounding the Company's Report should be addressed by the filing of motions for summary determination.

- 17 On April 6, 2010, PSE, Commission Staff, Public Counsel, and NWEC filed Motions for Summary Determination. PSE's Motion for Summary Determination (PSE's Motion) requested that the Commission rule in its favor on ten threshold legal issues, including a finding that PSE's Report complies with WAC 480-109 and RCW 19.285.²⁷
- 18 Staff, Public Counsel, and NWEC, each filed their motions for summary determination on April 6, 2010.²⁸
- 19 Public Counsel's Motion for Summary Determination (Public Counsel's Motion) requests that the Commission find that the public participation afforded by PSE in development of its ten-year conservation potential and biennial targets filed on January 29, 2010, is insufficient to meet the requirements of RCW 19.285 and WAC 480-109, and consequently that the target should be disapproved.²⁹
- 20 NWEC's Motion for Summary Determination (NWEC's Motion) requests that the Commission find that the biennial target PSE filed on January 29, 2010, is inconsistent with its ten-year conservation potential identified on December 31, 2009, that the target does not meet the requirements set by the Washington Legislature and by the Commission, and that PSE should be required to file biennial targets that meet these requirements.³⁰

²⁷ PSE's Motion, ¶ 1.

²⁸ Hereafter referred to as Staff's Motion, Public Counsel's Motion, and NWEC's Motion, respectively.

²⁹ Public Counsel's Motion, ¶ 1.

³⁰ NWEC's Motion, ¶ 2.

21 On April 19, 2010, the Commission received the following filings:

- 1) PSE's Response to the Motions for Summary Determination Filed by Staff, NWECA, and Public Counsel (PSE's Response);
- 2) Commission Staff's Response to PSE's Motion for Summary Determination (Commission Staff's Response);
- 3) Public Counsel's Response to Motions for Summary Determination (Public Counsel's Response);
- 4) NWECA's Response to Motions for Summary Determination (NWECA's Response); and
- 5) ICNU's Response to PSE's Motion for Summary Determination (ICNU's Response).

22 Staff filed a Reply in Support of its Motion for Summary Determination (Commission Staff's Reply) on April 22, 2010. PSE, Public Counsel, and NWECA each filed their replies on April 28, 2010.³¹

MEMORANDUM

I. GOVERNING LAW

23 In deciding motions for summary determination, we are governed by WAC 480-07-380(2), which provides that:

A party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support (e.g., affidavits, fact stipulations, matters of which official notice may be taken), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion made under this subsection, the commission will consider the standards

³¹ Hereafter referred to as PSE's Reply, Public Counsel's Reply, and NWECA's Reply, respectively.

applicable to a motion made under CR 56 of the Washington superior court's civil rules.

24 Under our rule, we first must review the pleadings and supporting evidence to ascertain whether there is a dispute as to any question of fact material to our determination of the issues that cannot be resolved without resorting to further process, i.e., an evidentiary hearing, to develop additional evidence. Second, if there are no disputes of material fact, we must make a decision on the basis of the pleadings and supporting evidence, considering the evidence in the light most favorable to the nonmoving party³² and determine whether the moving party is entitled to judgment as a matter of law.³³ We will grant motions for summary determination only where reasonable minds "could reach but one conclusion from all the evidence."³⁴

II. ISSUES

25 PSE, Staff, and Public Counsel acknowledge that there are no genuine issues of material fact.³⁵ No other party suggested there were any such disputed issues.

26 Accordingly we find that no genuine issues of material fact exist, and thus move on to the merits of the parties' Motions.

³² *Activate, Inc., v. State, Dept. of Revenue*, 150 Wn.App. 807, 812, 209 P.3d 524 (2009), citing *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

³³ CR 56(c).

³⁴ *Activate*, 150 Wn.App. at 812, citing *Vallandigham*, 154 Wn.2d at 26.

³⁵ PSE's Reply, ¶ 2; Staff's Reply, ¶ 2; Public Counsel's Reply, ¶ 2.

1. Whether WAC 480-109-010(1) allows a utility to project its cumulative ten-year conservation potential using either (1) the most recent integrated resource plan, or (2) the utility's proportionate share of the Conservation Council's current power plan targets for the state, regardless of which source provides the higher projection.

27 In its Motion, PSE argues that the plain, unambiguous language contained within WAC 480-109-010(1) allows a utility to project its ten-year conservation potential based on either the utility's integrated resource plan (IRP) or its proportionate share of the Council's current power plan targets for the state of Washington.³⁶ Our rule provides:

(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:

(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.

³⁶ PSE's Motion, ¶¶ 21, 22. PSE states that, if the rules require any clarification, then the proper venue would be a future rulemaking proceeding. PSE's Reply, ¶ 2.

(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.³⁷

28 PSE maintains that the rule's unambiguous language needs no further interpretation. PSE cites to the Supreme Court finding that "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

29 PSE also points to WAC 480-109-010(3)(b) and (c) which address the conservation potential's reporting requirements and do not restrict a utility's choice in selecting either source.³⁹ PSE contends that the Act provides utilities with the option of using the Council's power plan in determining the utility's ten-year conservation potential.⁴⁰ In RCW 19.285.040, utilities are directed to "pursue all available conservation that is effective, reliable, and feasible" and to identify their conservation potential by January 1, 2010, "using methodologies consistent with those used by the [Council] in its most recently published regional power plan."⁴¹ The Company argues that it complied with the statute when it utilized methodologies consistent with the Council's most recently published power plan, which PSE asserts was the Fifth Power Plan at the time PSE filed its Report on January 29, 2010.⁴²

³⁷ WAC 480-109-010(1)(a) and (b)(i)-(ii).

³⁸ PSE's Reply, ¶ 17, quoting *State v. Cannon*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002).

³⁹ PSE's Motion, ¶ 22.

⁴⁰ PSE's Motion, ¶ 24.

⁴¹ *Id.*, citing to RCW 19.285.040(1)(a).

⁴² *Id.*, ¶ 25.

- 30 The Company also asserts that utilities are not required to choose the higher of the two source options.⁴³ The Commission, PSE maintains, could have included language imposing such a requirement upon the utilities, but it did not.⁴⁴ PSE cautions that the language of RCW 19.285.040(1)(e) which allows the Commission to “rely on its standard practice for review and approval of investor-owned utility conservation targets” does not constitute “a roving mandate to impose new and different requirements than what the Commission has formally adopted in rulemaking proceedings.”⁴⁵ To impose additional requirements upon the utilities beyond what is set forth in the Commission’s regulations, according to PSE, would violate the principles of due process.⁴⁶
- 31 NWEC argues that WAC 480-109-010(1)(b), which provides a utility with two options for determining its conservation potential, should be read together with RCW 19.285.040(1), which requires electric utilities to pursue all cost-effective conservation.⁴⁷ This, NWEC states, would necessitate that a utility select the source which results in a higher target.⁴⁸
- 32 PSE replies, stating that the Act does not “define cost-effective, achievable, feasible, reliable conservation or specify how methodologies are to be ‘consistent’ with those used by the Conservation Council.”⁴⁹ Further, by providing utilities with two source options from which to derive their ten-year potentials and biennial targets, PSE contends that the Commission recognized that there may be instances when the two

⁴³ *Id.*, ¶ 27.

⁴⁴ *Id.*

⁴⁵ PSE’s Motion, ¶ 29.

⁴⁶ *Id.*

⁴⁷ NWEC’s Response, ¶ 9.

⁴⁸ *Id.*

⁴⁹ PSE’s Reply, ¶ 3, citing RCW 19.285.040(1)(a)-(b).

sources will produce different results that will lead the utilities to choose one over the other.⁵⁰

33 **Decision.** PSE has framed this issue in too simple a manner. PSE cites to but one rule among many provisions that address the requirements a qualifying utility must meet under Initiative 937. After examining the entire regulatory framework, we find that while the rule does allow a utility some choice in arriving at its projection, that choice cannot be made without regard to the overall statutory requirement that utilities pursue all available conservation that is cost-effective, reliable, and feasible,⁵¹ and the major policy behind the Act to increase energy conservation⁵² These provisions of the Act provide the context for the Commission rule and significant guidance as to which source a utility should use to project its potential.

34 The issue is not which means leads to a higher or lower projection, but which one most conforms to the letter and spirit of the Act. Accordingly, given the way this issue was framed by PSE, we deny PSE's Motion on this issue.

2. Whether WAC 480-109-010(3) requires a utility to explain why it identified the source of its ten-year conservation potential as either (1) the most recent IRP or (2) the utility's proportionate share of the Conservation Council's current power plan targets for the state of Washington.

35 PSE asserts that there is no legal requirement for a utility to explain its reasoning for choosing either the methodology consistent with the Council's power plan or its own IRP as the basis for its ten-year conservation potential.⁵³ PSE acknowledges that, when a utility revises the assumptions or methodologies from its IRP or the Council's

⁵⁰ *Id.*, ¶ 20.

⁵¹ RCW 19.285.040(1).

⁵² RCW 19.285.020.

⁵³ PSE's Motion, ¶ 30.

plan, the utility must describe and support such changes.⁵⁴ However, the Commission cannot reject PSE's ten-year conservation potential as deficient for not including such a rationale.⁵⁵

36 Public Counsel notes that it is ultimately PSE who bears the burden of establishing that it is in compliance with the Act.⁵⁶

37 **Decision.** We find that WAC 480-109-010(3) does not specifically require PSE to explain in its Report its rationale for selecting one of the options over the other in developing its ten-year conservation potential. We grant PSE's Motion on this issue.

38 That being said, we note that Commission review of a utility's potential and target is not solely limited to WAC 480-109-010(3), but is also described in WAC 480-109-010(4)(a)-(c). In the instant case, the Commission has already determined, under WAC 480-109-010(4)(b), that PSE's potential and target warrant additional scrutiny and the matter is now in an adjudicative proceeding. Because PSE has the burden of proof to show that it has pursued all available conservation that is cost-effective, reliable, and feasible, PSE likely will find it necessary to provide an explanation on why it chose one means of determining its potential and target in meeting this burden of proof. Accordingly, we would expect that if the detailed explanation of why the utility chose one method over another in identifying its ten-year conservation potential is not contained in the Report, it will need to do so in any follow-on proceeding. So, it would seem prudent and certainly more efficient for all concerned for a utility to include that information in the Report.

⁵⁴ *Id.*, citing WAC 480-109-010(3)(c).

⁵⁵ *Id.*

⁵⁶ Public Counsel's Response, ¶ 22.

3. Whether the option in WAC 480-109-010(1)(a)(ii) to derive a ten-year projection from the “conservation council’s power plan” allows a utility to use the plan that is currently in effect as of the date the projection is filed with the Commission.

39 PSE contends that the Act and our rules allow the Company to use the Council’s Fifth Power Plan to establish its ten-year conservation potential since the Fifth Power Plan was in effect at the time that PSE filed its Report.⁵⁷ According to PSE, the draft Sixth Power Plan, which had not been finalized, approved, or published when the Company projected its potential or filed its Report, was not a current plan as envisioned by the Commission’s regulations.⁵⁸

40 The Company also points to the rules adopted by the Washington Department of Commerce, Trade and Economic Development (CTED) (now the Department of Commerce) to bolster its claim.⁵⁹ Those rules specifically reference the use of the Council’s Fifth Power Plan.⁶⁰

41 Commission Staff acknowledges that, as of the time of the filing of its Response, the Sixth Power Plan had not been formally published.⁶¹ Staff contends that the Council commenced the process for developing its Sixth Power Plan in late 2007.⁶² The Council, according to Staff, distributed a draft Sixth Power Plan at a June 19, 2009,

⁵⁷ PSE’s Motion, ¶ 31, citing WAC 480-109-010(1)(b) and RCW 19.285.040(1)(a).

⁵⁸ *Id.*

⁵⁹ *Id.*, ¶ 32.

⁶⁰ *Id.*, citing WAC 194-37-070(3).

⁶¹ Staff’s Response, ¶ 11. Staff notes that the Sixth Power Plan was not adopted until February 10, 2010. *Id.*

⁶² *Id.*, ¶ 8.

Conservation Resources Advisory Group (CRAG) meeting.⁶³ Staff states that the Council convened another meeting on July 2, 2009, for the consideration of a revised draft.⁶⁴ Following the September 3, 2009, Council presentation regarding the methodology it uses to assess conservation potential, Staff maintains that the Council e-mailed an interactive Target Calculator spreadsheet to presentation participants, including PSE.⁶⁵ Staff asserts that the e-mail indicated that the Target Calculator was based on the Sixth Power Plan and that it was to be considered “the ‘current version’ until we issue an update.”⁶⁶

42 Staff points out that CTED’s rules do not apply to investor-owned utilities, and that the consumer-owned utilities regulated by CTED are not similarly situated to utilities like PSE.⁶⁷

43 Public Counsel asserts that PSE had already used the Council’s Sixth Power Plan to develop its IRP in July 2009.⁶⁸ The Sixth Power Plan has been circulated and thus “published,” according to Public Counsel, for some time.⁶⁹ However, Public Counsel asserts that the bigger issue is PSE’s failure to substantiate its projections and targets.⁷⁰

44 **Decision.** RCW 19.285.040(1)(a) requires PSE to identify its ten-year conservation potential “using methodologies consistent with those used by the [Council] in its *most*

⁶³ *Id.*, ¶ 9. While Staff has identified the group as the Conservation Resources Advisory Committee, the appropriate moniker is actually the Conservation Resources Advisory Group or the CRAG.

⁶⁴ *Id.*

⁶⁵ *Id.*, ¶ 10.

⁶⁶ *Id.*, citing Declaration of Deborah Reynolds, ¶ 9 and Exhibit B.

⁶⁷ *Id.*, ¶ 34.

⁶⁸ Public Counsel’s Response, ¶ 23.

⁶⁹ *Id.*

⁷⁰ *Id.*, ¶ 24.

recently published regional power plan.”⁷¹ PSE’s projected potential was due on or before January 1, 2010. As Staff admits, the Council’s Sixth Power Plan was not adopted officially until February 10, 2010. The Sixth Power Plan could have been revised between its unofficial publication as a draft and its official adoption by the Council’s vote. As a result, we find that the Act allowed PSE to use the most recently published regional power plan, in this case, the Council’s Fifth Power Plan. We grant PSE’s Motion on this issue.

4. Whether WAC 480-109-010(1), which states that a utility must project its cumulative ten-year conservation potential by January 1, 2010, and every two years thereafter, requires a utility to file its projection by January 1.

5. Whether PSE’s December 31, 2009, e-mail constitutes PSE’s identification of its conservation potential as envisioned by RCW 19.285.040(1)(a) and WAC 480-109-010(1).⁷²

45 PSE maintains that there is no requirement that it file its ten-year conservation potential projection by January 1, only that it must identify its potential projection by that date.⁷³ PSE argues that a plain reading of the rules demonstrates that the Company is only required to file its Report, which is due on or before January 31.⁷⁴

46 Staff has moved for summary determination that the Commission can consider PSE’s December 31, 2009, e-mail when evaluating whether the Company has complied with RCW 19.285.040(1) and WAC 480-109-010. Staff maintains that RCW 19.285.060(6) compels the Commission to determine whether a utility has complied with all of the requirements of RCW Chapter 19.285.⁷⁵ RCW 19.285.040(1)(a)

⁷¹ Emphasis added.

⁷² See Staff’s Motion.

⁷³ PSE’s Motion, ¶ 33, citing WAC 480-109-010(3).

⁷⁴ *Id.*, ¶ 35.

⁷⁵ Staff’s Motion, ¶13.

requires an investor-owned utility to “identify its achievable cost-effective conservation potential through 2019” by January 1, 2010.⁷⁶ Staff argues that the Commission must have some evidence that the utility did indeed make that identification by January 1, 2010, in order to find PSE in compliance with the Act.⁷⁷

47 The Commission, according to Staff, adopted WAC 480-109-010(1) which “allows each utility to choose the mechanism [for documenting procedural compliance with the ten-year conservation potential] that will best fit its needs.”⁷⁸ Staff asserts that one option is to file a document with the Commission, so Staff opened Docket UE-091986 for that purpose using the e-mail PSE sent to CRAG and IRPAG members identifying its potential projection.⁷⁹ Staff also points out that PSE is obligated to establish its biennial target “consistent with”⁸⁰ the ten-year conservation potential it was supposed to have identified by January 1, 2010.⁸¹

48 PSE responds that it has many statutory and regulatory responsibilities that do not require the Company to make a filing with the Commission.⁸² If the Commission needed to verify that PSE had projected its potential by January 1, Staff has the ability to audit PSE and propound informal data requests.⁸³ PSE does not dispute that the Commission may consider its December 31 e-mail in determining whether the Company complied with RCW 19.285.040(1) and WAC 480-109-010.⁸⁴

⁷⁶ *Id.*, ¶ 14.

⁷⁷ *Id.*

⁷⁸ *Id.*, ¶ 6.

⁷⁹ *Id.*

⁸⁰ RCW 19.285.040(1)(b).

⁸¹ Staff’s Motion, ¶ 15, citing RCW 19.285.040(1)(a). Public Counsel predicted that Staff would address this issue and deferred to Staff’s judgment. Public Counsel did note that the Commission needs some way of determining whether PSE has met the requirement of identifying the ten-year potential by January 1. Public Counsel’s Response, ¶ 25.

⁸² PSE’s Reply, ¶ 34.

⁸³ *Id.*

⁸⁴ PSE’s Response, n 33.

49 **Decision.** PSE is correct that our rule does not specifically require the Company to file its ten-year conservation potential projection by January 1. We grant PSE's Motion on Issue 4.

50 We also grant Staff's Motion as to Issue 5. While there is no requirement that PSE file its projection, the Company's December 31 e-mail was filed with the Commission, is a matter of public record, and can be considered in order to determine whether PSE filed its Report in compliance with the Act and our rules. PSE does not dispute this.

51 Having given careful consideration to the role the projected potential plays in both the Act and our rules and employing our authority "to impose additional or different requirements on any utility in appropriate circumstances,"⁸⁵ we determine that, in the future, PSE should file, not merely "identify," its projected potential with the Commission. The Company's projected potential sets a foundation for the development of the biennial target to be filed thirty days later and requiring PSE to file its projection will work to provide clarity of public process as well as facilitate an expeditious examination of PSE's subsequent filing of its Report.

6. Whether WAC 480-109-010 prohibits a utility from further developing and finalizing its projected ten-year conservation potential after it makes a projection on January 1, and before it files its final report with the Commission by January 31.⁸⁶

52 The Company asserts that, since there is no requirement that a utility file its ten-year conservation potential projection, the utility is not prohibited from further developing

⁸⁵ WAC 480-109-004(2).

⁸⁶ Staff proposes that this issue be re-phrased as follows:

Is the fact that Puget Sound Energy substantially changed its ten-year conservation potential between December 31, 2009 and January 29, 2010 evidence that PSE has not complied with RCW 19.285.040(1)(a)?

Staff's Motion, ¶ 12.

and finalizing its projection after it has been identified, but before it has been filed as a part of the January 31 Report.⁸⁷ In this case, prior to filing its Report, PSE claims to have completed additional analysis of its projection during the month of January.⁸⁸ PSE states that it decided to use the Council's Fifth Power Plan as the source of its ten-year conservation potential after seeking additional public participation and due to various uncertainties it faced.⁸⁹ PSE claims that this "complied with the letter and spirit of the law and implementing rules."⁹⁰ According to PSE, the ability to choose between the two source options when establishing its ten-year conservation potential provides a utility with the capacity "to consider the significant uncertainty regarding the viability of the IRP-based metrics due to the four drivers ... and, accordingly, to rely on the more conservative projection."⁹¹

53 In its Motion, Staff argues that the fact that PSE substantially changed its conservation potential between December 31, 2009, and January 29, 2010, is evidence that PSE has not complied with RCW 19.285.040(1)(a). In support, Staff states that PSE's Report provided a much different ten-year conservation potential than the projection it had put forward on December 31, 2009.⁹² NWECC makes similar assertions, stating that, in its December 31, 2009, e-mail, PSE proposed a ten-year conservation potential of 427.9 aMW,⁹³ while in its January 29, 2010, Report the Company stated its ten-year conservation potential as 1,871,908 MWh (213.7

⁸⁷ PSE's Motion, ¶ 36.

⁸⁸ *Id.*, ¶ 37.

⁸⁹ *Id.*, ¶¶ 14, 37. PSE names four drivers of its decision to use the Council's Fifth Power Plan including: (1) Uncertainty about approval of PSE'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 PSE's ability to recover lost margins from conservation; and (4) Uncertainty about the treatment of penalties for failing to achieve the conservation targets. *Id.*, ¶ 14.

⁹⁰ *Id.*, ¶ 37.

⁹¹ PSE's Reply, ¶ 28.

⁹² Staff's Motion, ¶ 17.

⁹³ *Id.* See, Exhibit A to NWECC's Motion.

aMW).⁹⁴ Public Counsel and Staff argue that the December 31 projection was based on PSE's IRP and that PSE abandoned this approach completely when drafting its Report in favor of the Council's Target Calculator.⁹⁵ According to Staff, PSE has presented no evidence to indicate that this new direction was simply the "further development" of its December 31 projection.⁹⁶ Instead, Staff contends that PSE did not perform any analysis for the new numbers but only "copied them from the [Council's] web site."⁹⁷

54 Staff also points out that PSE's December 31 e-mail regarding the Company's potential contained an attachment entitled "WAC 480-109 Potential Target FINAL 12-30-09.pdf."⁹⁸ This attachment contained two graphs with "IRP" in their titles, and the e-mail itself indicated that the ten-year conservation potential and biennial target were derived from PSE's 2009 IRP.⁹⁹ The only sentence in the e-mail which relates to the Council's Fifth Power Plan summarizes what the Company's share of the Fifth Power Plan would be on a ten-year and biennial basis.¹⁰⁰ It is not reasonable, according to Staff, to infer from a single sentence in the December 31 e-mail that PSE was relying upon the Council's Target Calculator for its ten-year conservation potential.¹⁰¹

55 Staff argues that this substantial change in the Company's ten-year conservation potential demonstrates that PSE is not in compliance with RCW 19.285.040(1).¹⁰² If

⁹⁴ NWEC's Motion, ¶¶ 5, 7.

⁹⁵ Staff's Response, ¶ 25. Public Counsel's Response, ¶ 26.

⁹⁶ *Id.*, ¶ 26.

⁹⁷ *Id.*

⁹⁸ Staff's Reply, ¶ 4.

⁹⁹ *Id.*

¹⁰⁰ *Id.*, ¶ 5.

¹⁰¹ *Id.*, ¶ 6.

¹⁰² Staff's Motion, ¶ 17.

the December 31 number is correct, then the biennial target PSE identified in its Report is not “consistent with” its ten-year conservation potential pursuant to RCW 19.285.040(1)(b).¹⁰³ If the January 29 number is correct, then PSE did not meet the statutory deadline of identifying its ten-year conservation potential by January 1, 2010.¹⁰⁴

56 NWEC agrees with Staff and requests that the Commission require PSE to file a biennial target that is consistent with the Company’s ten-year conservation potential identified on December 31, 2009.¹⁰⁵ According to NWEC, PSE projected its biennial target range at between 69.4 aMW and 90.3 aMW at the customer meter level.¹⁰⁶ NWEC observes that PSE filed its conservation program tariff which set an energy savings goal of 71.0 aMW for 2010-2011, within the range detailed in PSE’s e-mail, and which the Commission allowed to become effective on January 1, 2010.¹⁰⁷ PSE’s biennial target of 42.2 aMW is not consistent with this tariff filing or other filings the Company has made with the Commission.¹⁰⁸

57 NWEC contends that the plain language within RCW Chapter 19.285 requires that the biennial target be consistent with the ten-year conservation potential, and that consistent here means “marked by harmony, regularity, or steady continuity; free from variation or contradiction.”¹⁰⁹ NWEC maintains that PSE’s biennial target is

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ NWEC’s Motion, ¶¶ 2, 10. Public Counsel indicates that it defers to NWEC’s briefing on this issue.

¹⁰⁶ *Id.* “Customer meter level energy efficiency” is simply energy efficiency that occurs behind the customer’s meter (i.e., appliance efficiencies, insulation, HVAC improvements, et cetera) or on the customer’s physical property.

¹⁰⁷ *Id.*, ¶ 6, citing *Tariff Revision Proposing a 29 percent increase over the 2008-2009 spending for the 2010-2011 Electric Conservation program budget*, Docket UE-091859.

¹⁰⁸ NWEC’s Motion, ¶ 9.

¹⁰⁹ *Id.*, ¶ 9, citing to *Merriam-Webster Dictionary* and *American Legion v. Walla Walla*, 116 Wn.2d, 1,8, 802 P.2d 784 (1991)(internal citations omitted).

neither harmonious nor consistent with its projected potential.¹¹⁰ For that matter, NWEAC comments that the biennial target is supposed to be no lower than a pro rata share of the Company's ten-year conservation potential identified on December 31, 2009.¹¹¹ PSE's biennial target of 42.2 aMW is less than 10 percent of its ten-year potential, far below the 20 percent "we would expect a utility's biennial target ... of its 10-year potential [to be]."¹¹²

58 PSE counters that the conservation metrics the Company set out in its December 31 e-mail included numbers based on both its IRP and the Council's Fifth Power Plan Target Calculator.¹¹³ The Company states that there is nothing in the Act which prevents a utility from basing its potential on both sources and then finalizing its ultimate decision prior to filing its report on January 31.¹¹⁴ According to PSE, Staff ignored the fact that the December 31 e-mail specifically includes the 219.3 aMW ten-year conservation potential based on the Council's Target Calculator.¹¹⁵ The 219.3 aMW potential is not "substantially different" from the potential of 213.7 aMW identified in the January 31 Report.¹¹⁶

59 PSE disagrees with NWEAC's contention that the Company's biennial target must be at least 20 percent of its ten-year conservation potential, and asserts that the Commission rightly rejected this argument in the rulemaking docket implementing the Act.¹¹⁷ PSE quotes the Commission in its order adopting permanent rules implementing the Act in Docket UE-061895 as defining the term "pro rata," in WAC 480-109-007(14) such that the term, "allows utilities flexibility to meet realistic

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ PSE's Response, ¶ 15.

¹¹⁴ *Id.*

¹¹⁵ *Id.*, ¶ 16.

¹¹⁶ *Id.*

¹¹⁷ *Id.*, ¶ 18.

conservation implementation schedules.”¹¹⁸ PSE states that, contrary to NWECE’s claim, there is no requirement in the Act or implementing regulations that the biennial target be consistent with PSE’s other filings and submittals such as its 2010–2011 conservation program savings target and 2009 IRP.¹¹⁹

60 The Company maintains that NWECE has failed to cite to any requirement within the Act or the Commission’s rules that the biennial target must be consistent with PSE’s IRP or other prior filings.¹²⁰ PSE also notes that Staff had opened an investigation into the Company’s conservation program description, budgets, and cost-effectiveness when PSE had identified its projected potential and was developing its biennial target.¹²¹ This investigation “was a key driver” behind PSE’s decision to use the Council’s Target Calculator instead of its own IRP in developing its biennial target.¹²²

61 Public Counsel states that Staff’s investigation into PSE’s Energy Efficiency Services tariff filing was initiated at the Commission’s December 23, 2009, open meeting, and PSE voiced no opposition to the investigation.¹²³ In fact, Public Counsel maintains that PSE’s concern for the “uncertainties” raised by Staff’s investigation did nothing to reduce the size of PSE’s conservation targets’ budget in Schedule 120 of the Company’s tariff.¹²⁴

62 NWECE argues that, contrary to PSE’s claim, the Company’s e-mail in December focused solely on PSE’s intent to base its biennial target on its IRP not the Council’s Fifth Power Plan.¹²⁵ NWECE argues that PSE’s Report fails to advance the purpose

¹¹⁸ *Id.*

¹¹⁹ *Id.*, ¶ 19.

¹²⁰ *Id.*

¹²¹ *Id.*, ¶ 20.

¹²² *Id.*

¹²³ Public Counsel’s Response, ¶ 12.

¹²⁴ *Id.*

¹²⁵ NWECE’s Response, ¶ 18.

behind the Act, which is to increase conservation.¹²⁶ Instead of increasing conservation, NWECC maintains that PSE's Report shows a deep reduction in its biennial target from the conservation level the Company documented in its IRP.¹²⁷ NWECC notes that the Report's conservation target decreases conservation to "a level akin to the energy efficiency [PSE] acquired in 2004-2005."¹²⁸

63 **Decision.** WAC 480-109-010 does not prohibit the Company from modifying its ten-year conservation potential between January 1 and January 31. We caution PSE, however, that, as articulated below, the ability to "further develop and finalize" the Company's potential is not without limits.

64 We agree with Staff and find that the Act and our rules do not contemplate a utility making radical revisions to its potential projection in this one month period. First, under RCW 19.285.040(1)(b), the utility's biennial target must be consistent with its ten-year potential projection as identified by January 1. A radical change would strain this consistency requirement.

65 Second, our rules instruct qualifying utilities that the participation of Staff and the public is essential in the development of the conservation metrics that make up the utility's Report. The utility could not radically revise its potential projection since it would need to demonstrate that it had sought the participation of Staff and the public or risk having its Report rejected.

66 Not only did PSE's biennial target completely diverge from the Company's prior potential projection, but PSE also failed to solicit the participation of Staff and the public in the development of its amended ten-year conservation potential.

67 We grant PSE's Motion in part, acknowledging that qualified utilities may modify their potential projection between the time it has been identified by January 1 and the time they have filed their Report by January 31. We see no reason why a mathematical error, for example, could not be corrected during the month if it were

¹²⁶ *Id.*, ¶ 5.

¹²⁷ *Id.*, ¶ 6.

¹²⁸ *Id.*, ¶ 7.

discovered. However, we do not contemplate utilities completely revising their potential projections to the point they are unrecognizable. Such an event would effectively render the projection on January 1 meaningless and allow a utility to circumvent the Act.

68 We find that PSE’s biennial target in its Report is inconsistent with the potential projection the Company identified, in its December 31 e-mail. Therefore, we grant Staff’s and NWECA’s Motions on this issue. A utility must still comply with the Act and our rules governing its Report even if it modifies its original potential projection. As a result, we reject PSE’s Report and find that PSE should re-file its Report in compliance with the Act and our rules within ten business days following the effective date of this order. Specifically, PSE’s Report should contain a ten-year conservation potential that is either based on its December 31 projection or based on its December 31 projection with modification. Should PSE modify this projection, it shall explain why such a modification is necessary, including any material changes in circumstances that have occurred since its December 31 filing that have affected its original projection of conservation potential. PSE must also file a new biennial target that is consistent with its potential projection identified in its December 31 e-mail.

7. Whether a utility’s biennial conservation target complies with WAC 480-109-010(3)(b) where the utility uses Option 2 of the Conservation Council’s Target Calculator for the years 2010 and 2011.

69 PSE argues that the regulatory scheme makes clear that the utility’s biennial target is derived from the utility’s ten-year conservation potential.¹²⁹ PSE contends that its biennial target is consistent with and a subset of its ten-year conservation potential.¹³⁰

70 According to PSE, the Target Calculator it used to derive its biennial target is intended “to provide utilities with a simple means to compute ‘their share’ of the ... 5th Plan’s regional conservation target.”¹³¹ Further, PSE argues that the Act requires a

¹²⁹ PSE’s Motion, ¶ 40.

¹³⁰ PSE’s Response, ¶ 14.

¹³¹ PSE’s Reply, ¶ 6, quoting the Council’s website at http://www.nwcouncil.org/energy/UtilityTargetCalc_v1_7.xls.

utility to use a methodology consistent with one used by the Council, and the Council's Target Calculator is just that since it "uses methodologies consistent with the Conservation Council's power plan."¹³²

71 Staff points out that the Council's Target Calculator is not part of the Council's Power Plan.¹³³ The Target Calculators are not, Staff asserts, a methodology used by the Council for conservation planning as required by the statutes and rules.¹³⁴ In fact, the Council prefaces the Target Calculator spreadsheet with the caveat that the Target Calculator produces results that "can be used as rough guidance for utility conservation program planning until such time as a utility completes its own integrated resource plan or other similar process."¹³⁵

72 Deborah Reynolds, Regulatory Analyst for Staff, states that the Council's Tom Eckman made a presentation to stakeholders on September 3, 2009, detailing the Council's conservation potential assessment methodology.¹³⁶ Ms. Reynolds asserts that Mr. Eckman "cautioned that none of the utilities in the room would be well-served by relying on the Target Calculator alone, but that it could be useful for consumer-owned utilities that did not have an IRP."¹³⁷

73 While the September 3, 2009, presentation contained a slide entitled "Utilities Can Just Use the Utility Target Calculator," and a link to an interactive spreadsheet on the Council's web site, Staff contends that the Council is not the arbiter of compliance

¹³² *Id.*, ¶ 8, citing to WAC 194-37-040(7) which provides that "[t]he conservation calculator will use methodologies consistent with the most recently published Power Plan."

¹³³ Staff's Response, ¶ 31.

¹³⁴ *Id.*

¹³⁵ *Id.* and *WUTC v. PSE*, Docket UE-100177, Attachment A to PSE's Report (January 29, 2010). The preface is also available on the Council's website when one selects the Target Calculator option from the following web page:
<http://www.nwcouncil.org/energy/powerplan/6/supplycurves/I937/default.htm>.

¹³⁶ Declaration of Deborah Reynolds, ¶ 8.

¹³⁷ *Id.*

with the Act, the Commission is.¹³⁸ It is the responsibility of the Commission to interpret the Act and enforce its provisions, not the Council, so a slide presentation by the Council does not bind the Commission.¹³⁹

- 74 Public Counsel acknowledges that the Commission’s rule allows a utility to choose from two sources in the development of its projection.¹⁴⁰ This does not mean, according to Public Counsel, that a third-party may perform the projection.¹⁴¹ Public Counsel argues that a utility must make “a bona fide analysis of its own conservation potential” and not “simply pick a number from a third party’s calculator.”¹⁴² Allowing PSE to merely insert numbers into the Target Calculator and do nothing more would, Public Counsel contends, reduce the Commission’s review to “ascertaining that the [C]alculator number had been filed.”¹⁴³
- 75 NWEC contends that Initiative 937 does not allow a utility to use its share of the Council’s conservation assessment when determining its biennial target.¹⁴⁴ Instead, NWEC notes that Initiative 937 requires a utility to use “methodologies consistent with those used by the [Council] in its most recently published power plan” to identify its ten-year conservation potential.¹⁴⁵ According to NWEC, the language of Initiative 937 does not permit PSE the “broad leeway it now seeks from the Commission.”¹⁴⁶

¹³⁸ Staff’s Response, ¶ 33.

¹³⁹ *Id.*

¹⁴⁰ Public Counsel’s Response, ¶ 19.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*, ¶ 20.

¹⁴⁴ NWEC’s Reply, ¶ 5.

¹⁴⁵ *Id.*, citing RCW 19.285.040(1)(a).

¹⁴⁶ *Id.*

76 **Decision.** RCW 19.285.040(1)(b) requires that PSE’s biennial target must be consistent with the Company’s projected potential, and the projected potential must be derived from methodologies consistent with those used by the Council in its most recently published power plan. The Target Calculator is not, by the Council’s own admission, part of the Council’s methodology as it relates to investor-owned utilities. Mr. Eckman, a representative of the Council, provided clear guidance stating that PSE would not be well served by relying on the Target Calculator alone, and that it was a useful tool for consumer-owned utilities that did not have an IRP. We agree. We reject PSE’s argument and deny its Motion on this issue.

8. Whether WAC 480-109-010 limits the range that may be used in setting a biennial conservation target.

77 PSE contends that, not only does the Commission’s rule allow the Company to establish a biennial target range rather than a point target, but the rule does not limit the breadth of that range.¹⁴⁷ According to PSE, if the Commission finds its Report deficient and rejects either the Company’s ten-year conservation potential or biennial target, the Company pledges to re-file its Report with a biennial target using a range instead of a point target.¹⁴⁸ The range in the re-filed Report, PSE maintains, would stretch from the prorated share of PSE’s conservation potential to the prorated conservation identified through PSE’s IRP.¹⁴⁹

78 Staff counters that the Commission’s rule mandates that PSE’s biennial conservation target “identify all achievable conservation opportunities.”¹⁵⁰ As a result, Staff claims that the bottom of PSE’s range cannot be less than “all” and the top of its range cannot be more than what is “achievable” or the target would not comply with the rule.¹⁵¹

¹⁴⁷ PSE’s Motion, ¶ 42, citing WAC 480-109-010(2)(c).

¹⁴⁸ *Id.*, ¶ 43.

¹⁴⁹ *Id.*

¹⁵⁰ Staff’s Response, ¶ 39, citing WAC 480-109-010(2)(a).

¹⁵¹ *Id.*

79 Public Counsel states that this issue is not appropriate for Commission decision since PSE has not submitted a target range.¹⁵² In addressing, PSE’s proposal that the target range consist of the Company’s IRP at one end and the Council’s Plan at the other, Public Counsel asserts that such an idea “seeks to game the target setting process.”¹⁵³ Public Counsel points out that the Commission may reject the Fifth Plan target as non-compliant, which would mean that the Fifth Plan target could not be used as the bottom of the range.¹⁵⁴

80 NWEC states that this issue needs clarification.¹⁵⁵ PSE’s proposal of setting a target range using both the Fifth Plan and its IRP, according to NWEC, “is farcical, and appears to be a blatant attempt to avoid any possibility of a penalty.”¹⁵⁶

81 ICNU maintains that the Commission’s rules allow PSE to establish its biennial conservation target in the form of a range instead of a point target.¹⁵⁷ ICNU states that penalties are only appropriate under the Act if the Company fails to meet the targets it has established under a Commission-approved plan.¹⁵⁸ That being said, ICNU argues that PSE should not be penalized if it is meeting the targets in its approved conservation plan, including the lower end of the range.¹⁵⁹

82 **Decision.** Given our decision on PSE’s ten-year conservation potential,¹⁶⁰ we doubt PSE could propose a range similar to the one it suggests in paragraph 43 of its

¹⁵² Public Counsel’s Response, ¶ 29.

¹⁵³ *Id.*, ¶ 30.

¹⁵⁴ *Id.*

¹⁵⁵ NWEC’s Response, ¶ 23.

¹⁵⁶ *Id.*, ¶ 26.

¹⁵⁷ ICNU’s Response, ¶ 10.

¹⁵⁸ *Id.*, citing RCW 19.285.060(1).

¹⁵⁹ *Id.*

¹⁶⁰ See ¶ 68 above.

Motion. Nonetheless, PSE submitted its biennial target as a point target in its Report, not in a range. Therefore, we find that this issue is not ripe for determination.

9. Whether a utility is subject to penalties only if conservation falls below the lower end of an approved biennial conservation target range.

83 PSE argues that, since a utility is permitted to set its biennial target as a range, a utility that employs this option should not be penalized “unless its conservation level falls below the lower end of the approved biennial conservation target range.”¹⁶¹ The Company states that the Commission’s rules do not address this issue.¹⁶² PSE reiterates its plan to, if required, re-file its Report utilizing a biennial target range instead of a point target, and the Company asserts that it would like the Commission to provide clarity on possible administrative penalties in advance of such a filing.¹⁶³

84 Staff and Public Counsel maintain that this issue is not before the Commission and that the deadline for PSE to prove that it has achieved its biennial targets is not until June 2012.¹⁶⁴ Thus, both argue that this issue is not appropriate in this proceeding and that PSE may pursue it in other proceedings before the Commission.¹⁶⁵

85 **Decision.** This issue, like issue 7, is not ripe for determination. PSE will not have to demonstrate compliance with its biennial target for the first time until June 1, 2012.

10. Whether the public participation outlined in PSE’s Report is sufficient to meet the requirements of WAC 480-109-010(3).

86 The Company contends that the Commission’s rule, WAC 480-109-010(3), requires that a utility outline the extent of the public participated in the utility’s Report and

¹⁶¹ PSE’s Motion, ¶ 44.

¹⁶² *Id.*, ¶ 45.

¹⁶³ *Id.*

¹⁶⁴ Staff’s Response, ¶ 40; Public Counsel’s Response, ¶ 17.

¹⁶⁵ Staff’s Response, ¶ 41; Public Counsel’s Response, ¶ 17.

that the Company did so.¹⁶⁶ PSE states that there is no prescribed process for public participation nor is there a prescribed length of time for public participation.¹⁶⁷ Even so, PSE asserts in its Motion that it filed its ten-year conservation potential and biennial conservation target timely and that it provided for public participation in the development of both.¹⁶⁸ PSE, through the declaration of Eric Englert, Manager, Regulatory Initiative & Tariffs for PSE, recounts the process by which public participation was solicited over the previous two years.¹⁶⁹

87 PSE responds to Public Counsel's Motion, which requests that the Commission find that public participation in the development of PSE's Report was insufficient, by asserting that public participation included the discussion of the Council's power plan as a source for calculating the ten-year conservation potential.¹⁷⁰ For example, PSE asserts that it participated in a meeting at the Commission's offices where the Council made a slide presentation addressing "its methodology for calculating conservation potential."¹⁷¹ Among the slides, PSE maintains, was one that suggested that the Council's Target Calculator could be used to develop a utility's potential.¹⁷² According to PSE, this public meeting also included the distribution of a sample calculation of PSE's conservation metrics using the Council's Sixth Power Plan Target Calculator.¹⁷³ The sample calculation was forwarded to stakeholders, including several representatives for Public Counsel, Staff, and NWECC, via e-mail.¹⁷⁴

¹⁶⁶ PSE's Motion, ¶¶ 46-47.

¹⁶⁷ *Id.*, ¶ 46.

¹⁶⁸ PSE's Motion, ¶ 2.

¹⁶⁹ Declaration of Eric Englert.

¹⁷⁰ PSE's Response, ¶ 4.

¹⁷¹ *Id.*, ¶ 5. PSE notes that Public Counsel did not attend this meeting. *Id.*

¹⁷² *Id.* See, Exhibit A to Englert Declaration.

¹⁷³ *Id.*, ¶ 6.

¹⁷⁴ *Id.* See, Exhibit B to Suppl. Englert Declaration.

88 PSE contends that it informed interested parties via e-mail on January 24, 2010, that it would use the results from the Council's Target Calculator to derive its ten-year potential and biennial target.¹⁷⁵ The Company's e-mail indicated that PSE had planned a meeting on January 27th to discuss the ten-year potential and biennial target.¹⁷⁶ PSE asserts that it provided a toll free telephone number which stakeholders, such as Staff and Public Counsel, could have used to call in to the meeting.¹⁷⁷ While neither of these stakeholders participated in person or via telephone, both sent comments to PSE regarding the anticipated filing which PSE states that it considered when finalizing its Report.¹⁷⁸

89 Public Counsel moves for summary determination that the public participation in development of PSE's Report was insufficient and that the biennial target in the Report be disapproved. Public Counsel asserts that the Company's public participation process was devoted solely to developing the ten-year conservation potential and the biennial target based on PSE's IRP process up to December 31, 2009.¹⁷⁹ According to Public Counsel, it was not until January 25, 2010, that PSE indicated to the IRPAG and CRAG members that the Company would be using the Council's Fifth Plan Target Calculator instead of its own IRP to develop its numbers.¹⁸⁰ PSE's Report was "all but unrecognizable" to the CRAG and IRPAG members who had been involved with the Company's potential and biennial target over the last couple of years, according to Public Counsel.¹⁸¹ Public Counsel argues that the focus of the public process was in developing numbers based on PSE's IRP, not the Council's Target Calculator.¹⁸² With regard to the Report numbers, PSE only

¹⁷⁵ Suppl. Englert Declaration, ¶ 9.

¹⁷⁶ *Id.*

¹⁷⁷ PSE's Response, ¶¶ 8, 9.

¹⁷⁸ *Id.*, ¶ 9.

¹⁷⁹ Public Counsel's Motion, ¶ 3.

¹⁸⁰ *Id.*

¹⁸¹ Comments of Public Counsel, March 5, 2010, Attachment to Second Declaration of Stefanie Johnson, ¶ 7.

¹⁸² *Id.*, ¶ 8.

held one meeting, on January 27, 2010, and that meeting was on such short notice that neither Public Counsel nor Staff could attend.¹⁸³

90 Public Counsel refers to the language in WAC 480-109-010(3) and (3)(a) which provides:

(3) On or before January 31, 2010, and every two years thereafter, each utility must file with the [C]ommission a report identifying its ten-year achievable conservation potential and its biennial conservation target.

(a) Participation by the [C]ommission [S]taff and the public in the development of the ten-year conservation potential and the two-year conservation target is essential. The report must outline the extent of public and [C]ommission [S]taff participation in the development of these conservation metrics.¹⁸⁴

91 To participate, according to Public Counsel, means “to take part in something ... or share in something ... [c]ommonly understood, the word means something more than merely being present. It connotes an active presence in which one contributes something to a common enterprise.”¹⁸⁵ Public Counsel asserts that no such participation occurred with regard to the potential and target contained within PSE’s Report.¹⁸⁶

92 Public Counsel also maintains that, with regard to the regulatory requirement of “essential” public participation, both Black’s Law Dictionary and the Supreme Court define “essential” to mean, “[i]ndispensably necessary; important in the highest degree, requisite...required for the continued existence of a thing”¹⁸⁷ and

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Public Counsel’s Motion, ¶ 3, quoting *State v. Eaton*, 82 Wash. App. 723, 734, 919 P.2d 116 (1996), citing *Webster’s Third New International Dictionary* 1646 (1969).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*, ¶ 4, quoting *Black’s Law Dictionary*, Sixth Edition, at 546.

“fundamental, basic, necessary, and indispensable.”¹⁸⁸ Public participation in a utility’s development of its target is “integral not optional.”¹⁸⁹

93 Public Counsel contends that the public participation requirement was reiterated by the Commission in its order adopting the permanent rules implementing RCW 19.285.¹⁹⁰ Specifically, Public Counsel points to the language in the Commission’s order which states that “[w]e agree that stakeholders should be involved in the process and WAC 480-109-010(3)(a) makes this point...[the utilities] currently have public processes and stakeholder groups involved in the development of conservation programs and we expect that to continue.”¹⁹¹

94 Public Counsel asserts that PSE relies upon “a few tangential references to the [Target Calculator] as a means to somehow connect PSE’s entire multi-year public participation process to the January 29 filing of conservation metrics based on the Council’s Target Calculator.”¹⁹² The Council’s slideshow presentation on September 3, 2009, does not provide any indication of PSE’s intent to use the Target Calculator to develop its ten-year conservation potential.¹⁹³ This is not, Public Counsel asserts, evidence of a public discussion on the use of the Plan, and PSE fails to mention that on six separate occasions following this meeting, PSE referenced using its IRP to develop the targets.¹⁹⁴

¹⁸⁸ *Id.*, quoting *Davis v. Microsoft Corp.*, 149 Wash.2d 521, 533, 70 P.3d 126 (2003)(defining the term “essential function” in an employment context, citing *Webster’s Third New International Dictionary of the English Language* 777 (1976) for the definition of “essential”).

¹⁸⁹ *Id.*

¹⁹⁰ Public Counsel’s Motion, ¶ 3.

¹⁹¹ *Id.*, citing to *In the Matter of Adopting Rules to Implement the Energy Independence Act*, Docket UE-061895, General Order R-546, ¶ 27 (November 30, 2007).

¹⁹² Public Counsel’s Reply, ¶ 5.

¹⁹³ *Id.*, ¶ 8.

¹⁹⁴ *Id.*

95 Public participation for the development of the biennial target based upon the Council's Fifth Plan Target Calculator was nonexistent, according to Public Counsel.¹⁹⁵ The extent of the CRAG and IRPAG meetings addressing the ten-year potential and biennial targets focused on the Company's use of its IRP targets not the Target Calculator.¹⁹⁶ Public Counsel asserts that, if the Commission finds that the public participation was insufficient for the targets derived in PSE's Report, the Commission could disapprove the biennial targets.¹⁹⁷ The Company could then either initiate a new process of public participation utilizing the Council's Fifth Plan Target Calculator or PSE could re-file its biennial targets using the IRP based projections and targets which had sufficient public participation in their development.¹⁹⁸ In its Response, Commission Staff adopts all of Public Counsel's arguments.¹⁹⁹

96 PSE states that it should come as no surprise that public participation in the development of conservation metrics derived using the Council's Target Calculator may be less intensive than public participation in the development of conservation metrics based on a utility's most recent IRP since the Council's Target Calculator has already built in most of the development process.²⁰⁰ Further, PSE asserts that participation does not include the right to dictate the end-result of a decision-making process.²⁰¹ PSE points out that even Public Counsel's interpretation of the term "participation" does not involve license to govern the end-result of a decision-making process.²⁰² PSE argues that, while the public participants may have discussed the use of the IRP as the source of the Company's metrics, "all parties were well aware that

¹⁹⁵ *Id.*, ¶ 5.

¹⁹⁶ Public Counsel's Motion, ¶ 6.

¹⁹⁷ *Id.*, ¶ 7.

¹⁹⁸ *Id.*

¹⁹⁹ Staff's Response, ¶ 43.

²⁰⁰ PSE's Response, ¶ 10.

²⁰¹ *Id.*, ¶ 12.

²⁰² *Id.*

PSE could alternatively use the target calculator as the basis for PSE's conservation metrics²⁰³

97 Public Counsel denies that adequate public participation is linked in any way to stakeholder expectations of the end-result.²⁰⁴ In fact, Public Counsel notes that none of the CRAG or IRPAG participants have claimed the authority to direct PSE's actions.²⁰⁵ Public Counsel argues that PSE's litany of meeting dates does nothing to reflect compliance with the public participation requirement.²⁰⁶

98 **Decision.** WAC 480-109-010(3)(a) indicates that the participation of Staff and the public is "essential" in the development of the Company's ten-year conservation potential and its biennial target. This provision is contained within the section of the rule addressing PSE's Report. Likewise, in our order adopting the conservation reporting rules we stated that, "[w]e agree that stakeholders should be involved in the process and WAC 480-109-010(3)(a) makes this point...[t]he jurisdictional utilities currently have public processes and stakeholder groups involved in the development of conservation programs and we expect that to continue."²⁰⁷

99 While Staff and the public appear to have had opportunities to address PSE's IRP-based numbers that PSE used to formulate its projection at the meetings PSE held over the last two years, the Company's Report was not based on those numbers and was instead based on the Council's Target Calculator. The Company tried to organize one hastily scheduled meeting with the CRAG on January 27, 2010, two days before it filed its Report with the Commission, to discuss its use of numbers derived from the Council's Target Calculator. We agree with Public Counsel that this meeting was not

²⁰³ PSE's Reply, ¶ 31.

²⁰⁴ Public Counsel's Response, ¶ 33.

²⁰⁵ *Id.*, ¶ 36.

²⁰⁶ *Id.*, ¶ 34.

²⁰⁷ *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, ¶ 29 (November 30, 2007).

sufficient to allow Staff and the public, even had they been able to attend a meeting on such short notice, to provide substantive comments on the development of PSE's numbers prior to PSE filing its Report. We find that the simple list of public participation meetings outlined in PSE's Report does not substitute for the requirement to engage in meaningful discussions on the biennial target. Quite simply, PSE's hasty attempt to call a meeting in late January provided no meaningful role for Staff and the public to participate in the development of PSE's ten-year conservation potential and biennial target. Therefore, PSE's biennial target should be disapproved. We deny PSE's Motion on this issue and grant Public Counsel's Motion. As outlined in paragraph 68, we direct PSE to re-file its Report in compliance with the Act and our rules within ten business days following the effective date of this order. Specifically, PSE's Report should contain a potential based on its December 31 projection and a biennial target that is consistent with this potential projection.

11. Whether a Report filed pursuant to WAC 480-109-010(3) must include program details such as: detailed program descriptions; measures, incentives, and eligibility requirements; detailed program budgets; cost-effectiveness standards; projected program cost-effectiveness; evaluation plans; annual and quarterly progress reports; and cost recovery tariffs.

100 According to PSE, the Commission should reject any arguments that the Company is required to take additional steps to identify its achievable cost-effective conservation potential beyond use of its IRP or the Council's most recently published plan.²⁰⁸ PSE states that the regulations do not require any additional identification of conservation savings if the Council's plan is used.²⁰⁹ PSE argues that Staff is incorrect when it states that a utility's Report must contain detailed program descriptions; measures, incentives, and eligibility requirements; detailed program budgets; cost-effectiveness standards; projected program cost-effectiveness; evaluation plan; annual and quarterly progress reports; and cost-recovery tariffs.²¹⁰ According to PSE, the Commission's

²⁰⁸ PSE's Motion, ¶ 26.

²⁰⁹ *Id.*

²¹⁰ PSE's Motion, ¶ 48.

rules do not require such comprehensive information.²¹¹ In addition, PSE maintains that it has already provided the Commission with the details surrounding its conservation program in its November 30, 2009, filing as well as its February 2010 filing.²¹²

- 101 According to Staff, the Commission cannot fulfill its obligation to determine if a utility is in compliance with the Act unless that utility provides adequate information including identifying the utility’s achievable conservation opportunities and showing that the utility is “pursu[ing] all available conservation that is cost-effective, reliable, and feasible.”²¹³ Staff maintains that the Commission cannot determine whether PSE is in compliance with the Act unless PSE “shows its work.”²¹⁴
- 102 ICNU acknowledges that PSE has two optional sources from which it can determine its conservation potential.²¹⁵ ICNU argues, however, that PSE is wrong in stating that “no further derivation or identification of conservation savings is required if the [Council’s] plan is used.”²¹⁶ ICNU asserts that both the Act and the rules provide the Commission with the authority to review all aspects of the Company’s conservation plan to determine compliance.²¹⁷ ICNU contends that the goal of the Act and subsequent rules is to “develop the most reasonable and accurate plan, not the plan that has an arbitrarily high or low amount of conservation.”²¹⁸

²¹¹ *Id.*

²¹² *Id.*, ¶ 49.

²¹³ Staff’s Response, ¶ 37, citing RCW 19.285.040(1). Public Counsel defers to Staff’s arguments, but notes that it is PSE’s burden of proof to demonstrate that it is in compliance with the Act. Public Counsel’s Response, ¶ 38.

²¹⁴ *Id.*

²¹⁵ ICNU’s Response, ¶ 4, quoting PSE’s Motion, ¶ 26.

²¹⁶ *Id.*, ¶ 7.

²¹⁷ *Id.*, ¶¶ 5-6, citing RCW 19.285.040(1)(e) and WAC 480-109-010(4)(c).

²¹⁸ *Id.*, ¶ 8.

103 PSE contends that the Commission chose two sources from which a utility could project its achievable, cost-effective, feasible, and reliable conservation.²¹⁹ As a result, PSE argues, whatever projection is ultimately derived from the chosen source is the utility's achievable, cost-effective, feasible, and reliable conservation projection.²²⁰ PSE asserts that, as long as the utility correctly uses the chosen source for the projection, "this ends the inquiry."²²¹

104 **Decision.** If the potential and therefore the target in a utility's report is developed using the utility's IRP, WAC 480-109-010(3)(c) requires a broad range of information be included in the report. PSE filed its Report with a potential based on the Council's Target Calculator. Neither the Act nor our rules specify the filing of particular program details with the Company's Report in such a case. However, the particular level of detail required for a filing does not absolve the Company of its burden of proof in identifying its potential and target include all cost-effective conservation. The review process for PSE to demonstrate that it met its burden is described in WAC 480-109-010(4) and the details necessary for PSE to demonstrate its burden during that process guides the utility on the detail it needs to file with its Report. We grant PSE's Motion in part as to potentials based on Council methodology derived numbers and deny in part for IRP-based potentials.

III. CONCLUSION

105 Based on the foregoing, we find PSE's Report insufficient due to the lack of public participation in the development of its ten-year projected potential and the biennial target in its Report as well as the inconsistency between the projected potential PSE identified on December 31, 2009 and its biennial target contained in its Report filed on January 29. We reject PSE's Report and, consistent with paragraph 68, direct the Company to re-file its Report in compliance with the Act and our rules and using the IRP-based numbers PSE originally used in projecting its potential.

²¹⁹ PSE's Reply, ¶ 13.

²²⁰ *Id.*

²²¹ *Id.*

FINDINGS OF FACT

106 Having discussed above in detail the evidence received in this proceeding concerning
all material matters, and having stated findings and conclusions upon issues in dispute
among the parties and the reasons therefore, the Commission now makes and enters
the following summary of those facts, incorporating by reference pertinent portions of
the preceding detailed findings:

107 (1) The Washington Utilities and Transportation Commission is an agency of the
State of Washington, vested by statute with authority to regulate rates, rules,
regulations, practices, and accounts of public service companies, including
electrical companies.

108 (2) Puget Sound Energy, Inc., (PSE) is a “public service company” and an
“electrical company” as those terms are defined in RCW 80.04.010 and those
terms otherwise are used in Title 80 RCW. PSE is engaged in Washington
State in the business of supplying utility services and commodities to the
public for compensation.

109 (3) In 2006, Washington State voters passed Initiative Measure No. 937 which
was codified as the Energy Independence Act (the Act) at RCW 19.285 *et seq.*

110 (4) The Act requires qualifying utilities which serve more than twenty-five
thousand customers in the state of Washington to pursue all available
conservation that is cost-effective, reliable, and feasible. *RCW 19.285.040(1).*

111 (5) The Act also requires qualifying utilities to identify their ten-year achievable
cost-effective conservation potential by January 1, 2010. *RCW*
19.285.040(1)(a).

112 (6) The Act mandates that qualifying utilities establish and make publicly
available a biennial target for cost-effective conservation, and that the biennial
target is consistent with the potential identified by January 1. *RCW*
19.285.040(1)(b).

- 113 (7) The Act gives responsibility of determining investor-owned utility compliance with the Act to the Commission. *RCW 19.285.040(1)(d)*.
- 114 (8) The Act allows the Commission to rely on its standard practice for review and approval of utility conservation targets in the examination of a qualifying utility's ten-year conservation potential. *RCW 19.285.040(1)(e)*.
- 115 (9) The Commission adopted permanent rules to implement the Act on November 30, 2007.
- 116 (10) The Commission's rules require qualifying utilities to file their biennial targets and ten-year achievable conservation potential by January 31, 2010. *WAC 480-109-010(3)*.
- 117 (11) The ten-year conservation potential may be based upon either the utility's most recent integrated resource plan or the utility's proportionate share of the Council's current power plan targets for the state of Washington. *WAC 480-109-010(1)(b)(i)-(ii)*.
- 118 (12) Public participation by Staff and the public in the development of the ten-year conservation potential and the biennial target is deemed essential under the Commission's rules. *WAC 480-109-010(3)(a)*.
- 119 (13) On December 31, 2009, PSE identified its projected ten-year conservation potential using its 2009 integrated resource plan as the basis for its 427.9 aMW potential and its projected biennial target ranging from 69.4 aMW to 90.3 aMW at the customer meter level.
- 120 (14) PSE filed its Report on January 29, 2010, including its reported ten-year conservation potential using the Northwest Power and Conservation Council's (Council) Fifth Power Plan Target Calculator in the amount of 213.7 aMW and its reported biennial target of 42.2 aMW.

- 121 (15) On February 10, 2010, the Council adopted its Sixth Power Plan.
- 122 (16) At the March 11, 2010, open meeting, the Commission ordered the matter set for further hearing based on PSE's failure to provide sufficient information to allow for a determination to be made on its Report.
- 123 (17) PSE, Staff, Public Counsel, and the NW Energy Coalition (NWECC) each filed motions for summary determination on April 6, 2010.
- 124 (18) The parties have not presented any genuine issues of material fact.

CONCLUSIONS OF LAW

- 125 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:
- 126 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings.
- 127 (2) Summary judgment is properly entered if there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *WAC 480-07-380(2); CR 56(c)*.
- 128 (3) In resolving a motion for summary judgment, a court must consider all the facts submitted by the parties and make all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Activate, Inc., v. State, Dept. of Revenue, 150 Wn.App. 807, 812, 209 P.3d 524, 527 (2009), citing Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005)*.

- 129 (4) The Act does not give PSE unrestrained discretion as to the methodology it employs to project its potential since PSE is required to derive their projections from the source that facilitates pursuit of all available conservation that is cost-effective, reliable, and feasible.
- 130 (5) PSE is not required to explain its reasons for choosing either of the source options over the other in developing its potential.
- 131 (6) As between the Council's Fifth and Sixth Power Plan, PSE was not required to use the Sixth Power Plan in developing its potential since the Sixth Plan had not been adopted by the time PSE filed its Report.
- 132 (7) The Commission's rules do not require PSE to file its projected potential by January 1, however, requiring PSE to do so on a prospective basis would facilitate an expeditious examination of PSE's Report and provide clarity as to the public process PSE employed in developing its potential.
- 133 (8) PSE is not prohibited from making minor modifications to its potential between January 1 and 31 as long as the biennial target established in PSE's Report is still consistent with the projected potential identified by January 1 and PSE has allowed for the public participation of Staff and the public in the development of PSE's potential and biennial target.
- 134 (9) PSE's Report is insufficient since its biennial target is inconsistent with the projected potential it identified on December 31, 2009, and the reported potential and biennial targets lacked public participation from Staff or the public.
- 135 (10) The Commission should reject PSE's Report and PSE should be required to re-file its Report in accordance with the Act and the rules so that the biennial target is consistent with the projected potential identified on December 31, 2009.

- 136 (11) The Council's Target Calculator is not a methodology consistent with those used by the Council in its power plan and should not be used by PSE as a source in developing its potential and biennial target.
- 137 (12) Staff and the public did not have an opportunity to participate in the development of the conservation metrics within PSE's Report. The January 27, 2010, meeting was not sufficient to meet the requirement of WAC 480-109-010(3)(a).
- 138 (13) PSE is required to include program details within its Report if PSE used IRP-based numbers to develop its potential but is not required to do so if it uses the Council's methodology.

ORDER

THE COMMISSION ORDERS THAT:

- 139 (1) Puget Sound Energy, Inc.'s Motion for Summary Determination is granted as to Issues 2, 3, and 4.
- 140 (2) PSE's Motion for Summary Determination is denied as to Issues 1, 7, and 10.
- 141 (3) PSE's Motion for Summary Determination is granted in part and denied in part as to Issues 6 and 11.
- 142 (4) PSE's Report is rejected and PSE is to re-file the Report in accordance with the Act and the Commission's rules within ten days of the effective date of this order.
- 143 (5) The Commission Staff's Motion for Summary Determination is granted as to Issues 5 and 6.

- 144 (6) Public Counsel's Motion for Summary Determination is granted as to Issue 10.
- 145 (7) The NW Energy Coalition's Motion for Summary Determination is granted as to Issue 6.

Dated at Olympia, Washington, and effective June 4, 2010.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.