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## **M E M O R A N D U M**

**DATE:** March 21, 2014

**TO:** Deborah Reynolds, Assistant Director, Conservation and Energy Planning,  
Regulatory Services Division  
Steve Johnson, Senior Policy Advisor, Policy and Research

**FROM:** Steven W. Smith, Assistant Attorney General

**SUBJECT:** **Pursuit of all Available Conservation and Biennial Target**

As requested, I have reviewed the Staff's interpretation of an IOU's duty to "pursue all available conservation that is cost-effective, reliable, and feasible" as used in Chapter 19.285 (the EIA). The background of this request is a provision of the draft EIA conservation rules that provides that this duty includes the requirement that the utility's conservation portfolio contain programs that are not included in the biennial conservation target.<sup>1</sup> The basis for this requirement is Staff's view that the duty to "pursue all available conservation that is cost-effective, reliable, and feasible" and the duty to establish a biennial acquisition target for cost-effective conservation<sup>2</sup> are two separate requirements.

### **Prior Staff Recommendations**

The Staff has consistently interpreted the "pursue all" duty and the biennial target as distinct items. In March 2010, Staff commented on the first conservation reports filed by the three electric IOUs. In those comments Staff noted that while the biennial target provides a minimum level of expected performance, the statute also calls for a maximum effort to pursue the acquisition of as much cost-effective conservation as is reliable and feasible. Meeting the floor in order to avoid penalties is not the same as pursuing all available conservation that meets the statutory criteria.<sup>3</sup>

In comments filed in 2012, the Staff again addressed this distinction:

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<sup>1</sup> Draft WAC 480-109-010(4)(a)(ii)(B).

<sup>2</sup> RCW 19.285040(1) and (1)(b).

<sup>3</sup> Staff Comments Evaluating Electric Utility Conservation Reports Under the Energy Independence Act, RCW 19.285 (Dockets UE-100170, 100176 and 100177), at p. 15 (March 5, 2010).

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“The EIA requires qualifying utilities to ‘pursue all available conservation that is cost-effective, reliable and feasible.’ Biennial conservation targets are based on the most current information available at that time. During the course of a biennium new information may arise regarding new technologies, updated standards and codes, and improved program design and implementation. Staff recognizes the complexity involved in designing and implementing conservation programs, and that constant program adjustment to the latest information is difficult, especially as it pertains to the pursuit of all cost-effective conservation given that the spectrum of ‘all’ cost-effective, feasible and reliable conservation is continuously evolving. Staff requests that the Commission clarify what is meant by ‘pursuing all,’ how ‘pursuing all’ is distinct from simply meeting the target, and what information would be sufficient for determining whether the companies have indeed pursued all cost-effective, reliable and feasible conservation.”<sup>4</sup>

In Staff’s view, key indicators that a company is “pursuing all” is the extent to which the company is adaptively managing conservation programs and portfolios, including continuing cost-effective programs, discontinuing programs that are no longer cost-effective, and exploring potential new programs or technologies.<sup>5</sup> Thus, the biennial target is a floor based on the information available at the time it is set, while the duty to “pursue all” is evolving continuously.

In response to the filings for the current biennium, the Staff raised the “pursue all” requirement as the basis for requiring the companies to pursue conservation outside of the biennial target. One example is the removal of NEEA savings from the target. Staff recommended that the Commission adopt a condition that the companies pursue regional electric market transformation outside of the target.<sup>6</sup> The Commission did impose this condition in its orders recognizing, at least implicitly, that some of the conservation pursued would be beyond the target.<sup>7</sup>

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<sup>4</sup> *In the Matter of Evaluating Electric Utility Conservation Achievements Under the Energy Independence Act, RCW 19.285 and WAC 480-109* (Dockets UE-100170, 100176, and 100177) Staff Comments at p. 6 (July 16, 2012).

<sup>5</sup> *Id.* at 7.

<sup>6</sup> Staff Comments Regarding Electric Utility Reports on Ten-Year Achievable Conservation Potential and Biennial Conservation Targets (Dockets UE-132043, 132045, and 132047), at p. 6-7 (December 3, 2013).

Other examples are Staff’s willingness to allow Avista’s Home Energy Reports program as either in or out of the target but still an obligation under the pursue all duty. And Staff recommended, and the Commission ordered, PSE to remove CVR cost recovery from the conservation rider. The order does not address whether PSE must pursue CVR, but Staff stated that it was an obligation under the “pursue all” duty.

<sup>7</sup> *Puget Sound Energy*, UE-132043, Order 01, Attachment A, Condition (1)(b); *Avista*, UE-132045, Order 01, Attachment A, Condition (6)(h); *PacifiCorp*, UE-132047, Order 01, Attachment A, Condition (6)(h).

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Moreover, the Commission has recognized more directly that a utility has the potential to achieve cost-effective conservation beyond the biennial target. The final order in the PSE decoupling petition states:

“PSE commits to accelerate its acquisition of energy efficient resources as part of the Amended Decoupling Petition. The Company will accelerate its acquisition of cost-effective electric efficiency resources to achieve 105 percent of the targets set by the Commission.”<sup>8</sup>

As discussed below, Staff’s approach also finds support in the both current statute and amendments to the EIA enacted this session.

### **The Statutory Criteria for the Two Requirements are Different**

The statute uses different criteria to define the two duties. The criteria for the overarching goal to “pursue all” are four: all available, cost-effective, reliable, and feasible. The criteria for the biennial target are two: cost-effective and achievable. I have not found any legislative history<sup>9</sup> to explain the intent behind the different criteria. One could argue that the two sets of criteria mean the same thing using different language. On the other hand, Staff’s interpretation has been that the “pursue all” criteria cast a wider net and that the target is a subset of that. This interpretation finds support in the rule of statutory construction that where certain language is used in one instance and different language in another, there is a difference in legislative intent.<sup>10</sup>

### **The Passage of ESHB 1643 May Confirm that the Requirements are Separate**

Finally, whatever the uncertainty about the relationship between two duties in the past, the 2014 session of the Legislature appears to have settled the issue going forward. ESHB 1643 passed on March 5th, 2014.<sup>11</sup> That bill, among other things, provides that a utility achieving conservation in excess of its biennial acquisition target may use that excess to help meet the next two biennial targets. Allowing the banking of some achieved conservation necessarily means that the “pursuing all” universe of conservation is greater than the biennial target.

If you have any further questions on this issue, please let me know.

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<sup>8</sup> Docket UE-121697, Order 07, at page 49 (June 25, 2013).

<sup>9</sup> The legislative history of a citizens’ initiative consists largely of the voters’ pamphlet.

<sup>10</sup> *UPS v. Dep’t of Revenue*, 102 Wn. 2d 355, 362, 687 P. 2d 186 (1984). The rules of construction applied to statutes also apply to initiatives. *Roe v. Teletech Customer Care Management*, 171 Wn.2d 736, 746, 257 P.3d 586 (2011).

<sup>11</sup> The Governor signed the bill on March 17<sup>th</sup>.