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May 9, 2014

RE: DOCKET NO. UE-131723 (I-937 rulemaking)

The NW Energy Coalition submits the following comments in response to the Commission's April 9 Notice of Opportunity to File Written Comments regarding the Energy Independence Act (I-937, WAC 480-109) rulemaking. We appreciate Staff's efforts to propose modifications to the existing rules to enhance clarity and effective implementation of the law. We respond to some of those proposed modifications here and remind the Commission of a few additional issues we raised in our scoping comments (submitted December 2, 2013). We address certain key substantive issues first, then provide a set of additional comments in order of the issues as they are presented within WAC 480-109.

KEY SUBSTANTIVE ISSUES

Staff's proposal to expand the rules to address pursuit of "all" conservation has merit but would benefit from further refinement.

We agree with the basic premise of the argument presented in the March 21, 2014 memo to Staff from Assistant Attorney General Steven W. Smith. In essence, the memo contends that the biennial conservation target is a subset of a broader requirement for utilities to pursue all cost-effective conservation that is available, reliable and feasible. As we discussed in 2010 in conjunction with the first utility filings of biennial conservation plans,[1] RCW 19.285.040(1) requires each utility to "pursue all available conservation that is cost-effective, reliable, and feasible." This requirement is plain and unambiguous.[2] The word "all" in the statute means "the whole amount" or "as much as possible," and the word "available" means "accessible" or "obtainable."[3]

In reviewing a utility's biennial conservation plan, the overriding consideration should be whether it advances I-937's stated purpose.[4] The Act declares, as a fundamental matter of policy, "*increasing energy conservation* and the use of appropriately sited renewable facilities builds on the strong foundation of low-cost hydroelectric generation in Washington state and will promote energy independence in the state and the Pacific Northwest region."[5] This declaration sets out the

[1] Docket No. UE-100177, NW Energy Coalition's Response to Motions for Summary Determination, 4/19/2010, ¶¶ 8-12.
[2] *See* Young v. Estate of Snell, 134 Wn.2d 267, 279, 948 P2d 1291 (1997); State ex rel. Royal v. Board of Yakima County Comm'rs. 123 Wn23 451,451, 869 P2d 56 (1994) (meaning of a statute must be derived from the wording of the statute itself where the statutory language is plain and unambiguous).
[3] Merriam-Webster Dictionary; see also American Legion v. Walla Walla, 116 Wn.23 1, 8, 802 P.2d 784 (1991) (court relies on dictionary definition for plain meaning of word).
[4] *See Dep't of Transp. v. State Employees' Ins. Bd*., 97 Wn.2d 454, 458-59, 645 P.2d 1076 (1982).
[5] RCW 19.285.020.

voters' intent to go beyond the status quo and stimulate a utility to acquire greater levels of energy efficiency.

As one of the primary organizational authors of I-937, we can provide some additional history on this issue. Prior to the development of the Initiative, the Legislature considered several bills (from 1998 through 2004) to establish variations on a clean energy standard. The investment standard approach considered in the early years ultimately became revised to a performance standard approach with specific, numeric percentage targets for qualifying utilities.[6] When crafting the policies for inclusion within I-937, a group of state, regional and national experts discussed the limitations of setting a specific numeric target generally applicable to the broad range of utilities in Washington, including challenges associated with picking the "right" number. Instead, we opted to focus on the end-goal, i.e., pursuing all cost-effective conservation. Hence the statutory language establishing the key conservation goal for I-937: "Each qualifying utility shall pursue all available conservation that is cost-effective, reliable, and feasible."[7] We recognized that each utility would need to establish its own specific numeric target to help achieve that goal and to ensure energy efficiency efforts could be monitored over time. We provided a common set of ground rules for the utility target-setting process, including a requirement for utilities to use methodologies consistent with those used by the Northwest Power and Conservation Council. And we linked the biennial target to a penalty mechanism to deter noncompliance.

Staff has raised the issue of the "pursue all" language in several forums since the first target-setting processes in 2010, including during the 2011 Washington Conservation Working Group process. During that process, Coalition staff referred to the biennial target as the primary mechanism for compliance with I-937's conservation standard, even while recognizing that the utility targets fall short of achieving all cost-effective conservation due to limitations with the Council's methodologies, flexible interpretation of the pro rata calculation, and other reasons. At that time, we did not see a path forward for achieving the ultimate goal of I-937 – pursuit of all available conservation that is cost-effective, reliable and feasible – in a manner that set clear expectations and provided for measurable results outside of the biennial target process. Our thinking on this issue continues to evolve, and is influenced by a recent trend toward removing cost-effective conservation opportunities from investor-owned utilities' biennial targets, for example, savings from regional market transformation activities conducted by the Northwest Energy Efficiency Alliance and savings from pilot programs. We understand the rationale for excluding those types of programs that are outside the utility's full control from a target with an associated penalty for noncompliance, but the statute intended for the biennial targets to be as inclusive as possible to ensure the broader goal of pursuing all conservation is met. Thus we appreciate Staff's efforts to identify areas of conservation activity that may not fall within the biennial target but remain important for a utility to pursue. That said, we remain concerned that some of the proposed revisions to the rules, while prescriptive, are subject to interpretation and

[6] *See for example* 2001 legislative session, SB 6027, Sec. 4(1) and (2), proposing to establish a resource diversity standard with at least 1.25% of a utility's resources coming from energy efficiency, ultimately growing to at least 2.5% from energy efficiency. *Also see* 2003 legislative session, HB 1544, Sec. 3(1), proposing to establish an energy efficiency resource standard initially set at 0.75% of annual retail load and growing to 0.85% of annual retail load. *Also see* 2004 legislative session, HB 2333, Sec. 3(1) and HB 2477, Sec. 3 for similar proposed energy efficiency resource standards.

[7] RCW 19.285.040(1)

speculation, and could result in endless debates among stakeholders regarding whether a utility met its obligations under the Act. Further, some of the proposed requirements may not be practicable or feasible in all biennia, as explained below.

The proposed revisions to the rules include a requirement to develop and implement programs to acquire available conservation from all of the identified measures. (WAC 480-109-010(4)(a)(ii)(A)). One such measure is high-efficiency cogeneration, which may not be practicably available within a utility's service territory and therefore program development would be a waste of time. The list of measures also includes code enforcement. This should be broadened to say "energy code development, enforcement, training and education." The Commission should be more clear as to expectations with measures such as codes in that code enforcement, for example, is not a traditional activity for an investor-owned utility; however, providing funding to local government for code enforcement is something that utilities have done in the past. More guidance should be provided in the proposed rules regarding how such efforts would be measured and verified. We would support rule language that also directed utilities to detail why opportunities for acquiring conservation from the identified measures were included or not in the program portfolio.

Similarly, the proposed rules state, "A utility's conservation portfolio must contain programs that are not included in the biennial conservation target and are available, cost-effective, reliable, and feasible. (WAC 480-109-010(4)(a)(ii)(B), emph. added) Yet it is possible that a utility will establish its biennial target in a comprehensive manner with a focus on accelerated acquisition of energy efficiency. Setting this type of directive could have the unintended consequence of motivating a utility to purposefully reduce its target to ensure it has sufficient additional opportunities to meet the terms of this rule. Ultimately, our preference is to have as much conservation included within the biennial target as possible for ease of implementation, transparency, and general public understanding.

Finally, we agree with Staff that a utility should continuously manage its conservation programs to adapt to changing market conditions and consider emerging technologies. (WAC 480-109-010(4)(a)(iv)) That strikes us as good business practice, and a reasonable expectation within the framework of the utility's pursuit of all conservation. In the context of the proposed rules, however, we are unclear how compliance with that provision would be measured and assessed. In addition, it is important to ensure that the rule encouraging research on emerging technologies does not create conflict with the Northwest Energy Efficiency Alliance's existing emerging technology research program.

In sum, we appreciate Staff's efforts to add substance to the statute's directive to pursue all conservation. We are interested in further discussing how best to accomplish this goal while providing all stakeholders with sufficient clarity and certainty to avoid concerns about future second-guessing of conservation program efforts. The more measurable the desired outcomes are, the better.

Staff's proposal to eliminate the option of a biennial target range should be adopted.

The rules adopted in 2007 provided utilities with the option of establishing a biennial conservation target range rather than a point target (see subsection (2)(c) of the existing rules). We support Staff's proposal here to eliminate that option. As we argued in 2007, the statute does not support allowing a range.[8] RCW 19.285.040(1)(b) requires each qualifying utility to "establish and make publicly available a biennial acquisition target for cost-effective conservation ... and meet that target ..." The dictionary definition of "target" is a "mark to shoot at" or "a goal (as a date, figure, production level, or quota) set or proposed for achievement."[9] Moreover, the interpretation of a target as a range instead of a point estimate would make other provisions of the law impossible to administer.[10] Specifically, the biennial target "must be no lower than" the pro rata share of the 10-year plan. RCW 19.285.040(1)(b). The possible minimum biennial target becomes nonsensical if the 10-year target is a range, which must be split pro rata into biennial ranges, and then those ranges are compared to a minimum. Second, RCW 19.285.060(1) imposes penalties on a utility for failure to meet its conservation target, levied on a per MWh basis. In order to give meaning to the ability to levy a penalty for non-compliance, the level of compliance must be established at a set number.

As we predicted, the allowed use of a range for the past three biennia has generated confusion and disagreement among stakeholders with regard to the parameters for establishing a range and how a penalty would be applied should a utility meet the low but not the high end of the range.[11] All three utilities established a point target for the 2010-2011 biennium, but Avista and PacifiCorp elected to establish a range for the 2012-2013 biennium.[12] PacifiCorp again proposed a target range in 2014-2015, but the Commission instead ordered a point target:

> While PacifiCorp has proposed ranges for its ten-year conservation potential and biennial conservation target, we find that such ranges are not practical or in the public interest. As Staff explains, the Commission's rules allow for ranges only for the target, not the Company's potential. Further, when a utility can fulfill its conservation target through a range of megawatt-hours, the utility only need reach the lowest number within the range to have complied with its target.[13]

Updating the rules to eliminate the option of a biennial target range will better reflect the statutory intent and reflect the Commission's decision in Docket No. UE-132047. Though ironically, we note that if adopted as proposed, Staff's bifurcation of the biennial target and the duty to pursue all conservation (as described in the preceding section) will lead to each utility

[8] *See for example* Docket No. UE-061895, Comments of the NW Energy Coalition et al, July 9, 2007, at p. 15. *Also see* Docket No. UE-061895, Comments of the Northwest Energy Efficiency Council and the NW Energy Coalition, September 26, 2007, at pp. 1-2.
[9] *See* Webster's Third New International Dictionary 2341 (2002).
[10] *See* Scott v. Cascade Structures, 100 Wn. 2d 321, 617 P.2d 415 (1980) (holding that statutes should not be interpreted in a manner that would lead to an unreasonable result).
[11] *See for example* Docket No. UE-100177, Order 04, ¶¶ 77-85.
[12] *See for example* Docket No. UE-111880 (PacifiCorp), Order 01, ¶ 22; Docket No. UE-111882 (Avista), Order 01, ¶ 23. Final review of compliance with the Commission's orders in these dockets has not yet occurred.
[13] Docket No. UE-132047, Order 01, ¶ 17.

establishing a conservation acquisition range, with the lower end being the biennial target subject to penalties for noncompliance and the upper end reflecting opportunities outside of that target.

ADDITIONAL ISSUES

WAC 480-109-007 (Definitions)

The definition of "pro rata" in (18) should be modified according to Staff's proposal.

The proposed modified definition of pro rata reflects the original intent of the law to ensure each biennial conservation target at a minimum represents a proportionate share of the utility's 10-year conservation potential. The definition in the existing rules enables a utility to define pro rata however it wishes, rendering the term meaningless. The Coalition discussed this issue at length in the 2007 rulemaking, providing legal argument that the term must be construed in accordance with its plain meaning.[14]

WAC 480-109-010 (Conservation and Energy Efficiency Resource Standard)

The rules should be modified to ensure savings from high efficiency cogeneration are counted in the same way as savings from other efficiency programs.

RCW 19.285.040(1)(c) specifies, "the reduction in load due to high efficiency cogeneration shall be … counted towards meeting the biennial conservation target in the same manner as other conservation savings." The proposed rules appear to exclude this critical provision, and should therefore be modified to reflect the statutory directive. (See WAC 480-109-010(4)(b)(iv)) We also note that the proposed rules state, "A utility may count as conservation savings a portion of the electricity output of a high-efficiency cogeneration facility …", but do not specify the meaning of the term "portion." Additional clarity here would be helpful.

The rules should provide guidance regarding how savings from behavioral programs will be measured and verified.

As discussed in our December 2 scoping comments in this docket, the rules should provide explicit guidelines regarding how savings from behavioral programs can be measured, verified and counted toward a utility's biennial targets. Numerous options exist for determining savings from behavior-based programs; these rules can set clear expectations for consistent treatment of those savings among the three IOUs.

The rules should clarify a utility's options should an RTF deemed savings number change within the biennium.

The proposed rules require a utility to use unit energy savings (UES) values and protocols approved by the Regional Technical Forum (RTF) in most circumstances. (WAC 480-109-

[14] *See for example* Docket No. UE-061895, Comments of the NW Energy Coalition et al, July 9, 2007, at p. 13. *See also* Docket No. UE-061895, Comments of the Northwest Energy Efficiency Council and the NW Energy Coalition, September 26, 2007, at p. 1.

010(6)) As discussed in our December 2 scoping comments, the rules should address a utility's options should the RTF change UES values for a particular measure mid-biennium. We are amenable to a utility being able to hold its deemed RTF savings value constant at least for the calendar year, even if the RTF changes that value mid-year, given a utility cannot modify its biennial target. For example, if a utility established its biennial target based on certain assumptions regarding RTF deemed savings, then the RTF changed some of those deemed savings numbers in the second year of the biennium, the utility should be able to rely on its original savings estimate for the entire biennium. If the RTF changed its deemed savings number in the first year of the biennium, a utility should be able to keep its deemed savings constant for that first year then adaptively manage its programs in the second year to account for any excess or deficit. Such adaptive management fits within the context of the earlier discussion regarding pursuit of all conservation. To the best of our knowledge, the RTF in recent years has not increased any UES values, but we don't preclude that possibility – and the rules should be modified in a way that is agnostic as to whether deemed savings increase or decrease (i.e., a utility should treat either circumstance equally).

Staff's proposal to alter the method for evaluating cost-effectiveness of low-income energy efficiency programs should be adopted.

Proposed WAC 480-109-010(8) provides an alternative method for evaluating the cost-effectiveness of low-income energy efficiency programs using a Savings-to-Investment Ratio (SIR) generated by the Department of Commerce. The proposed rules also provide that "low-income conservation programs may be excluded from portfolio-level cost-effectiveness calculations." Under the proposed revised rules, low-income conservation programs would continue to be reflected in a utility's biennial target and compliance filing within the context of end-use efficiency, among other conservation types. This is critical, as low-income customers help pay for utility conservation programs through the relevant conservation riders and should be able to participate fully in the programs offered. The proposed rules appear to acknowledge that low-income participation in utility energy efficiency programs may be more difficult and costly to achieve than participation by other entities due to the delayed maintenance of the structures being served as well as additional repair or health and safety measures that must be implemented. While strictly adhering to the cost tests applied to non low-income programs may render it more difficult to deliver energy efficiency to low-income, it is important to have a system that provides guidance to the energy investments.

The Commission has supported the use of a modified Total Resource Cost (TRC) test for evaluating low-income energy efficiency programs (e.g., PSE tests its low-income programs against a threshold of 0.667)[15]. In the absence of a clear statement from the Commission as to what lower level TRC is acceptable across all three utilities, the SIR will indicate what measures should be installed.

At this time, the SIR approach appears to be a reasonable compromise, though it is important to realize that the SIR approach accounts only for direct energy saved and does not account for any of the additional benefits that accrue from providing low-income energy efficiency services. Finally, we support the ability to exclude the low-income program from a utility's portfolio cost-

[15] See PSE's Electric Tariff G Schedule 83, Sec. 9(a).

effectiveness test, but suggest the rules be further revised to require utilities to also conduct the portfolio cost-effectiveness test with low-income services included to demonstrate the minimal impact that low-income programs have on the entire suite of programs offered.

WAC 480-109-BBB

The proposed rules in subsection (3)(a) regarding the contents of a utility's biennial conservation report seem appropriate for the Commission but may be excessive for the Department.

The Department of Commerce has developed a worksheet for all qualifying utilities to use when submitting their biennial conservation plans. Staff's proposed rules include substantial additional information, such as various program evaluations and adaptive management activities taken by the investor-owned utilities. For simplicity and ease of administration, the Commission may want to consider bifurcating its rules to clarify that an investor-owned utility needs to submit to the Department only the information required in RCW 19.285.070(1) and any additional information that the Department specifically requests (which may be subject to change over time).

Further, subsection (3)(b) requires a utility to provide a summary of its biennial conservation report to its customers, but the rules do not provide any specificity regarding the contents of that summary. The data of most interest to customers includes the conservation target, the actual savings achieved, the budget and the actual expenditures; most of those items are specified in the law's reporting requirements (*see* RCW 19.285.070).

Finally, we note that the proposed rules (*see* Subsection 3(a)(v)) include a requirement for each utility to submit, as part of the biennial report, an independent third-party evaluation of portfolio-level biennial conservation savings achievement. Prior to this, the requirement to conduct an independent evaluation has been part of individual utility "conditions lists" adopted by the Commission. For example, one of Puget Sound Energy's (PSE) conditions has focused on hiring an independent evaluator to examine portfolio level savings in each biennium.[16] Avista and PacifiCorp have faced a similar condition in certain biennia.[17] We see the benefit of including this as a requirement in the rules for consistency among the utilities as long as the scope of each evaluation remains open and subject to negotiation among the utility conservation advisory groups. With PSE, the evaluation scope has changed over time based on the perceived need in each biennium. In addition, having been involved in these comprehensive evaluations through our role in the utility advisory groups, we recognize they are time and resource intensive, which should also be a consideration when determining scope.

[16] Docket No. UE-100177, settlement agreement dated Sept. 3, 2010 (as adopted in Order 05), Sec. K(6)(g); Docket No. UE-111881, Order 01, ¶ 35 (g); Docket No. 132043, Order 01, Attachment A, Sec. 6(g).
[17] Docket No. UE-111880 (PacifiCorp), Order 01, ¶ 27 (f); Docket No. UE-132045 (Avista), Order 01, Attachment A, Sec. 6(g); Docket No. UE-132047 (PacifiCorp), Order 01, Attachment A, Sec. 6(f)

Thank you again for the opportunity to provide comments. I look forward to participating in the stakeholder workgroup on May 15.

Sincerely,

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