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To: David Danner  
Re: Docket Nos. UE-100170, UE-100176, and UE-100177  
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revisions to reported conservation achievement. Second, we provide a response to Commission Staff's request for clarification of statutory requirements of the EIA. Lastly, we briefly discuss our request that the Commission's Orders regarding conservation achievement provide guidance on the need for greater consistency in reporting of conservation savings achievement.

**A. Recommendations for 2010-2011 Biennial Conservation Achievement.**

Public Counsel recommends certain adjustments to utility-reported conservation achievement toward the biennial conservation target for 2010-2011, as discussed more fully in our July 16, 2012, written comments. Specifically, we recommend the following:

- In Docket UE-100176, we recommend Avista reduce their reported conservation savings achievement by 3,961,851 kwh for the *Simple Steps, Smart Savings*<sup>TM</sup> retail CFL program, so that reported savings are consistent with Commission conditions 6(b) and 6(c) of Order 01. We support an overall biennial conservation achievement of 165,505 megawatt-hours.<sup>1</sup>
- In Docket UE-100177, we recommend PSE reduce their reported conservation savings achievement by 7,938 MWh to incorporate the adjustment recommended by SBW in their review of PSE's reported savings, conducted pursuant to Condition (K)(6)(g) of the Settlement Agreement approved and adopted by the Commission in Amended Order 05. We support an overall biennial conservation achievement of 636,464 megawatt-hours.<sup>2</sup>
- In Docket UE-100170, we recommend PacifiCorp reduce their reported conservation savings achievement by 5,058,749 kwh to remove savings for the Energy Education in Schools program, so that reported savings are consistent with Commission conditions 6(b) and 6(c) of Order 02. We support an overall biennial conservation achievement of 87,611 megawatt-hours.

With these revisions, each of the companies would still exceed their biennial conservation target for 2010-2011. WAC 480-109-040(3) contemplates that a utility report of conservation may be revised as a result of Commission review, and if so, such a revised report must be submitted to the Commission and the Department of Commerce. Accordingly, we respectfully request the Commission order Avista, PSE, and PacifiCorp to file revised reports of conservation achievement, incorporating the revisions outlined above.

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<sup>1</sup> This recommendation is consistent with the Staff recommendation. Docket Nos. UE-100170, UE100176, and UE-100177, Comments of Commission Staff, July 16, 2012, p. 25.

<sup>2</sup> This recommendation is consistent with the Staff recommendation. *Id.*

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**B. Response to Staff Request for Clarification Regarding Pursuing “All” Conservation Under the EIA.**

In its July 16 Comments, Staff asked the Commission to provide a clarification on whether the EIA creates two different and distinct statutory standard regarding conservation achievement: (1) the conservation designed to meet the EIA targets; and (2) a separate level of conservation described by Staff as “all required conservation.”<sup>3</sup> Specifically Staff requested that:

[T]he 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>

Public Counsel agrees that utilities need to be engaged in the type of “adaptive management” practices that Staff identifies.<sup>5</sup> Adaptive management is a critical part of utility conservation program administration and regulation. It is reflected, *inter alia*, in ongoing utility program work, advisory group consultation, and EM&V processes. The Commission has the opportunity to review how the utilities are managing their programs when required plans and reports are filed with the Commission, including the biennial conservation plans (BCP), biennial conservation reports (BCR), and cost recovery tariffs. However, Public Counsel does not agree that there is a second or additional statutory requirement in the EIA that must be interpreted and implemented, for the following reasons.

Staff’s interpretation appears to isolate the first sentence of RCW 19.285.040 as a separate requirement distinct from the remainder of the statute.<sup>6</sup> Basic principles of statutory construction, however, require that a statute be read as whole to give full effect to every part.<sup>7</sup> If RCW 19.285.040(1) is read as a whole, it is plain that the immediately following subsections (1)(a)-(1)(e) explain and expand on the manner in which a utility “shall pursue all available conservation,” i.e., by identifying “*achievable* cost-effective conservation potential” in ten-year forecasts, and establishing a biennial target for “cost-effective conservation” based on the longer term “achievable” opportunities.<sup>8</sup>

The other aspects of the statutory scheme support the conclusion that the law contains a single standard. The EIA’s specific accountability and enforcement provisions in RCW 19.285.060, as

<sup>3</sup> Staff Comments, p. 7

<sup>4</sup> Staff Comments, p. 6 (emphasis added).

<sup>5</sup> Staff Comments, p. 7.

<sup>6</sup> RCW 19.285.040(1), states the basic conservation requirement, “Each qualifying utility shall pursue all available conservation that is cost-effective, reliable, and feasible.”

<sup>7</sup> *King County v. Central Puget Sound Growth Management Board*, 142 Wn. 2d. 543, 560 (2000)(intent determined from more than a single sentence).

<sup>8</sup> Section (1)(c) allows a utility to use high-efficiency cogeneration to meet conservation its targets.

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well as the detailed reporting and public disclosure provisions of RCW 19.285.070, are tied to progress on meeting the statutory conservation targets established in RCW 19.285.040. There is no reference to the additional standard hypothesized by Staff. Under principles of statutory construction, the expression of one statutory requirement mandates the exclusion of omitted requirements.<sup>9</sup> As a matter of statutory construction, the EIA's inclusion of the enumerated target-setting, reporting, accountability, and enforcement provisions, implies the exclusion of other requirements not stated.<sup>10</sup>

Staff's theory likewise finds no support in the WAC EIA rules. The General Order adopting the Commission's EIA rules states:

The Commission's responsibility in this matter is to develop rules that 'ensure the proper implementation and enforcement of [the act] as it applies to investor owned utilities. RCW 19.285.080(1). *Most sections of the act are specific and provide the Commission little discretion in determining the optimal implementation path.* [.]<sup>11</sup>

The Commission's EIA rules do not contain requirements, standards, reporting requirements or penalties related to Staff's additional standard. As the Commission noted, the EIA is quite specific, and does not afford significant discretion to the Commission to elaborate on or add to the statutory requirements.

As stated above, Public Counsel believes that companies should be utilizing adaptive management approaches in acquiring conservation resources. However, we do not believe these requirements are enumerated in the EIA. Expanding the requirements of the EIA would introduce a number of practical problems. Staff's theory clearly contemplates that a company could be in compliance with the target requirements of the EIA, and still be in violation of the statute. The existence of such a dual standard, however, would introduce significant uncertainty, complexity and regulatory burden into EIA compliance and enforcement process. As currently crafted, the target setting process creates a clear measure of the utility's efforts to achieve conservation goals. By contrast, Staff's interpretation could potentially result in a confusing scenario whereby a utility could meet its target, but nevertheless could be found out of compliance with the EIA, for example, because it failed to explore or adopt a new program or

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<sup>9</sup> *General Telephone of the Northwest, Inc. v. Washington Utilities & Transportation Commission*, 104 Wn. 460, 470 (1985) This is sometimes stated as the maxim *expressio unius est exclusio alterius*.

<sup>10</sup> For example, RCW 19.285.060(4), allows the Commission to consider adopting incentives for a utility to exceed its targets. This provision does not, however, allow the Commission to *require* a utility to exceed the statutory target, or penalize the company for failure to do so.

<sup>11</sup> *In the Matter of Adopting Rules to Implement The Energy Independence Act*, Docket UE-061985, General Order R-546, ¶23 (emphasis added).

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technology which in the view of Staff or another party should have been pursued.<sup>12</sup> Staff's comments acknowledge "the complexity involved in designing and implementing conservation programs," and that "the spectrum of 'all' cost-effective, feasible and reliable conservation is continuously evolving."<sup>13</sup>

For all the foregoing reasons, Public Counsel asks that the Commission clarify that there is not an additional statutory standard under the EIA for "all required conservation" distinct from the express standard for targets and potential.

### **C. Commission Guidance Regarding Desire for Greater Consistency.**

One of the common themes that emerged in the written comments filed July 16, 2012, and also at the July 27, 2012 Open Meeting, is that in the initial biennium of EIA implementation, the three electric IOUs used different methodologies and approaches to counting the reported conservation savings achievement. Public Counsel recognizes that for this initial biennium, consistency in reported savings is simply not feasible, and we acknowledge that there is a learning curve for all stakeholders associated with EIA implementation. However, we believe that, going forward, there should be greater consistency, so that all three of the electric utilities are reporting conservation savings in the same manner, or at the very least, substantially the same manner. Accordingly, we respectfully request that the Commission's Orders regarding compliance with EIA conservation requirements provide guidance as to whether consistency in approaches to reporting conservation savings is a principle that should be honored to the fullest extent possible.

Public Counsel recognizes that it may not be reasonable to expect absolute uniformity on all areas, and we acknowledge that as a result of EM&V there will be variations in savings based on factors such as weather and local conditions. However, there is a need for considerable improvement. Thus, we recommend that the Commission provide guidance in these orders that greater consistency on certain key issues, such as those discussed in the next section of our comments, is important, valuable, and furthers public interest in conservation. Accordingly, we recommend the Commission open a policy docket to resolve the issues described below, in an expeditious manner. We favor this approach because we believe the issues can be resolved more efficiently and flexibly than in a rulemaking, which may take a significant amount of time and add more complexity than is needed.

Given the significant variation in approaches taken by the companies in the 2010-2011 biennium, as reflected in the BCRs, we do not anticipate that reaching consensus on the issues discussed in the next section is very likely. In most cases, these issues did not arise overnight. Many issues

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<sup>12</sup> Staff does not address whether a utility would be subject to penalties for failure to meet this added standard, even though it had met the statutory targets.

<sup>13</sup> Staff Comments, p. 6.

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have been discussed for months, if not years, either in the Conservation Working Group, or utility advisory groups. Despite this ongoing dialogue, resolution has not been reached. We believe that at this time, parties are in a position to make recommendations, or possibly joint positions, in comments filed with the Commission. The Commission can then make a final determination based on the record. We should have resolution by March, 2013, because beginning in April and July, 2013, companies will begin extensive work with the advisory groups to determine biennial targets for 2014-2015.<sup>14</sup>

### **III. Issues To Be Resolved In A Policy Proceeding**

As stated above, there are a number of issues raised by parties in this proceeding that Public Counsel believes would benefit from additional stakeholder discussion and comment. We therefore recommend that these issues be addressed in a separate policy proceeding. These issues can be separated into two general categories—conservation savings issues and regulatory issues. The section below describes these issues briefly and, in some instances, Public Counsel has included what is our preferred approach at this stage. However, we have only provided limited discussion here, rather than our final recommendations, as we suggest a separate process to thoroughly address these issues.

#### **A. Conservation Savings Issues.**

Within this topic there are three different sub-issues that we believe need to be addressed, including: (1) NEEA savings, (2) when changes to unit energy savings (UES) estimates are appropriate, and (3) a common definition for critical terms, including ‘baseline.’ Through the course of reviewing the three electric utilities’ biennial conservation reports, it became clear that the utilities approach these issues in different ways. This impacts how each company reports savings toward its conservation target. These inconsistencies in approach make it impossible to make a direct, “apples-to-apples” comparison of the conservation achievement of one utility to another.

On all of these issues, Public Counsel strongly believes that we should strive for greater consistency, so that all three electric utilities are reporting savings in substantially the same manner.

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<sup>14</sup> The Commission’s conditions approving targets for 2012-2013 require PSE to begin working with the CRAG in April, 2013, while Avista and PacifiCorp must begin working with their advisory groups in July, 2013, on the development of conservation targets for the 2014-2015 biennium. UE-111881 (PSE), Order 01, June 14, 2012, condition (9)(b); UE-111882 (Avista), Order 01, February 12, 2012, condition (9)(b); UE-111880 (PacifiCorp), Order 01, April 26, 2012, condition (9)(b).

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### **1. NEEA savings.**

For NEEA savings the challenge is whether utilities should be held accountable for potentially large fluctuations in savings achievement as more up-to-date information becomes available, whether saving should be “deemed,” or some combination of the two approaches. In addition, NEEA savings may be calculated using different methodologies. Public Counsel’s preference at this point is to for all three utilities to utilize the approach PSE has taken in the past several years, which is more conservative, and allows for the utility to focus on its efforts on the areas in its conservation portfolio over which is has more direct control.

### **2. Changes to Unit Energy Savings.**

A second sub-issue that emerged related to counting savings is whether an IOU can and/or should hold constant the assumed UES used in preparing its conservation potential assessment and setting its target, and what point in time a utility should incorporate UES modifications. As to when changes to savings estimates should be made, the challenge is how to balance a potential utility interest in having greater certainty at the front-end when targets are set, with a public interest to treat conservation as a resource and have reported savings most closely match actual savings delivered at the meter. Our preference is to make annual adjustments to savings estimates, even if those changes are mid-biennium, and report against the updated savings estimates. This is the approach PSE has historically taken to reporting savings. Also, we support independent third-party verification of reported savings, consistent with Avista’s approach for this biennium. This approach encourages adaptive management to evolve and improve programs over time.

### **3. Common definition of critical terms such as “baseline.”**

The third issue related to how conservation savings are calculated is whether there should be common definitions of critical terms, such as ‘baseline conditions.’ This is another example of where the IOU’s are taking different approaches to estimating and counting savings. For example, in this biennium Cadmus, on behalf of Avista, modified RTF savings estimates for the Energy Star Appliances and Refrigerator and Freezer Recycling Programs to remove what it considered to be a “net-to-gross” adjustments. In Public Counsel’s views, however, the RTF approach is not a “net-to-gross” adjustment, but instead reflects the development of baseline conditions in a manner consistent with the Council’s methodology.

To the extent companies continue to rely on very divergent assumptions regarding baseline conditions, the risk is an erosion of public confidence in conservation as a resource. We believe the RTF approach, which PSE has followed, is most appropriate and consistent with Council guidelines.

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## **B. Regulatory Issues.**

A number of these issues are largely associated with developing consistency in the regulatory practices and procedures for each of the utilities. Particularly, we believe there should be greater consistency in (1) utility reporting of conservation achievement, (2) verification of savings through a third-party portfolio review for each utility,<sup>15</sup> and (3) the assessment of DSM prudence. Additionally, the issue of confidentiality was raised in this process, which we will address alongside these other regulatory issues below.

### **1. Reporting of Conservation Achievement**

As discussed in Public Counsel's July 16, 2012 Comments, the biennial conservation reports filed by Avista, PacifiCorp, and PSE are quite different in terms of the volume of material provided, as well as the organization and structure of the report. We believe that, going forward, a common template should be developed, in order to provide for greater consistency in the reporting of conservation achievement and facilitate Commission and stakeholder review of the biennial conservation reports.

Of the Biennial Conservation Reports filed with the Commission, Public Counsel found PSE's to be the most useful in terms of layout and content, and is a useful model as a starting point for any specific requirements going forward. However, we recognize that there may be some elements that need to be added or excluded from any specific template in order to meet the needs of all three companies, which could be addressed in a policy docket.

### **2. EM&V Consistency - Third-party Portfolio Verification.**

In the 2010-2011 biennium, both PSE and Avista were required to retain an independent, third-party to review reported conservation savings. However, the specific wording of the requirements, as well as the methodologies of the third-party evaluations differed. The review of Avista's electric conservation programs was completed in a way that resulted in an overall realization rate comparing reported savings to gross verified savings.<sup>16</sup> PSE's review took a different approach; the methodology for PSE's portfolio savings review included a high-level portfolio review, a project-level review, targeted on-site verification, and a specific program review of two programs. The scope did not incorporate statistically significant sampling. While SBW, as third-party reviewer, found few areas of concern, the review team noted "this scope of

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<sup>15</sup> In the matrix sent by Staff on July 27, 2012, this issue was labeled as "Consistency of EM&V Frameworks." Public Counsel believes that each company should have an EM&V framework that reflects the specific EM&V needs of its portfolio, programs, and operations, which means that they will not be absolutely identical across the three companies. The issue we discuss here is specifically related to the scope and methodology of the third-party portfolio verification.

<sup>16</sup> Public Counsel Comments, July 16, 2012, p. 24.



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work [became] more problematic when it is called upon to deliver justification for defensible quantified adjustments to the program claims.”<sup>17</sup>

For the 2012-2013 biennium, each company has a condition requiring evaluation of the company’s reported savings. However, again, the wording varies slightly for each company and each is subject to interpretation. Thus, there is a possibility that even though each company has a similar requirement for review, the methodology of the portfolio verification, and how those results are treated, could differ. In a policy docket, parties can consider whether the portfolio verification should include statistically significant sampling for measures with savings that are large and/or have greater uncertainty. We appreciate that PSE and Avista have begun discussions with their advisory groups regarding the scope of the 2012-2013 portfolio verification.

**3. Assessment of DSM Prudence.**

While Public Counsel agrees with much of Staff’s discussion regarding the criteria for analyzing prudence of conservation programs, and also that a prudence assessment could be incorporated into the current cycle of review, we also have a number of concerns with this proposal, two of which are discussed here.

Specifically, Public Counsel does not agree with Staff’s position that “the conservation advisory groups have been developed to substitute for the board of directors.”<sup>18</sup> The role of the board of directors cannot be replaced by the advisory committee. Prudent management decision-making remains the responsibility of the utility and its board, and cannot be delegated to an outside group. The Commission approved conditions for each company that clearly reflect these roles for the companies and the advisory groups.<sup>19</sup> While the advisory groups do important work, they do not play a role on par with that of the board of directors, and it is ultimately the company’s responsibility to ensure its programs are performing prudently.

Additionally, Public Counsel has concerns with Staff’s statement that “the ongoing review process that has developed for each utility’s portfolio is effectively a prudence review.”<sup>20</sup> This

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<sup>17</sup> SBW Independent Third Party Review of PSE’s 2010-2011 Electric Conservation Energy Savings, Appendix B, p. B-4.

<sup>18</sup> Staff Comments, p. 9.

<sup>19</sup> According to the conditions, the companies have “the sole responsibility for complying with RCW 19.285 and WAC 480-109” and that “the conditions regarding the need for a high degree of transparency, and communication and consultation with external stakeholders, diminish neither [the company’s] operational authority nor its ultimate responsibility for meeting the biennial conservation target approved herein.” Additionally, the conditions state that each company “must demonstrate the prudence and cost-effectiveness of its conservation programs to the Commission after the savings are achieved.”

<sup>20</sup> Staff Comments, p. 10.

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process<sup>21</sup> can certainly provide some context and a framework to encourage prudent decision-making. However, Public Counsel believes there must be an opportunity for parties to challenge prudence in an adjudicatory setting, if necessary. If no party requests an adjudication, the Commission, in its discretion, can base a finding on the review process, or on other information it may receive or request.

We believe the importance of the prudence issue, and the number of complicating factors make this a subject that should be addressed in further detail in a policy docket.

#### **4. Confidentiality.**

In general, Public Counsel believes that utility reporting and supporting documentation provided to the UTC regarding its conservation programs should not be considered confidential. Consequently, we do not believe a protective order would typically be necessary. In the unlikely event that a utility anticipates its biennial conservation plan (BCP), or biennial conservation report (BCR), or other regulatory filings, will contain confidential information, the utility should inform its conservation advisory group of this in a timely manner, and should also request that a protective order be issued in the docket so that parties may appropriately review any documents the utility is seeking to designate as confidential.

#### **IV. Conclusion**

Public Counsel appreciates the opportunity to provide comments on issues pending in EIA conservation dockets for the 2010-2011 biennium. In summary, we recommend that the Commission address the following in its Orders in the EIA conservation dockets:

- Approve the biennial conservation achievement for all three utilities based on Public Counsel's recommended adjustments discussed in our July 16, 2012 Comments, and require that the companies file revised reports of conservation achievement;
- Clarify that there is not an additional statutory standard under the EIA for "all required conservation" distinct from the express standard for targets and potential; and,
- Provide guidance on the need for greater consistency in reporting of conservation savings achievement.

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<sup>21</sup> See, Staff Comment, p. 5, for a visual representation for the planning and reporting process, as laid out in the commission's orders approving the companies' 2012-2013 biennial conservation targets.

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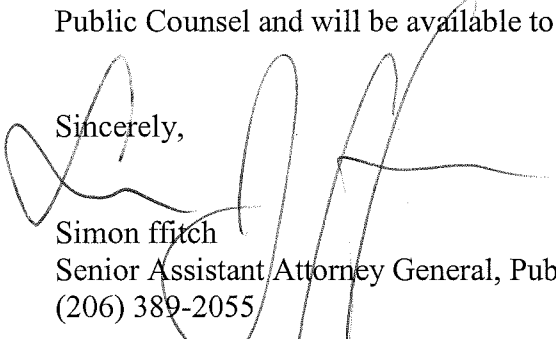
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We recommend that the Commission address the following issues in a subsequent policy proceeding:

- Issues related to counting conservation savings, including specifically, NEEA savings, when changes to savings estimates are appropriate, and a common definition for critical terms such as “baseline.”
- Regulatory issues including, content and structure of biennial conservation reports, scope of third-party portfolio verifications, DSM prudence, and confidentiality of information in conservation filings with the UTC.

Mary Kimball and Stefanie Johnson will attend the August 9, 2012, Open Meeting on behalf of Public Counsel and will be available to respond to any questions regarding these comments.

Sincerely,



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