PUGET SOUND ENERGY
The Energy To Do Great Things

Puget Sound Energy
P.O. Box 97034
Bellevue, WA 98009-9734
PSE.com

May 9, 2014

***Via* Commission Web Portal**

Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
1300 S. Evergreen Park Drive S.W.
Olympia, Washington 98504-7250

**Re: Docket UE-131723: Comments of Puget Sound Energy, Inc. on Rulemaking for Energy Independence Act, WAC 480-109**

Dear Mr. King:

Puget Sound Energy, Inc. ("PSE") appreciates the opportunity to provide comments on procedural and legal issues arising from the consideration of new rules for implementing the Energy Independence Act ("EIA") by the Washington Utilities and Transportation Commission (the "Commission"). In the Notice of Opportunity to File Written Comments, dated April 9, 2014, the Commission encouraged stakeholders to submit written comments on seven questions and written comments on its draft rules. Attached is a copy of PSE's written comments on the proposed draft rules in the Commission requested template.

## SEVEN QUESTIONS

PSE respectfully submits the following comments on the seven questions identified in the Notice of Opportunity to File Written Comments.

1. **How should an historic period be selected to best account for climatic variability and cyclical climate patterns?**

2. **What is the appropriate number of years of river discharge data a model should use to provide unbiased calculations of incremental hydroelectric production?**

3. **How does a normal or average historic river discharge calculated with shorter historic periods compare to one calculated with multiple decades of data?**

4. **How does the use of a greater number of years in the data set for determining the normal or average historic water year increase the administrative burden?**

In the context of the WUTC's proposed draft rule that seeks to limit the number of reasonable methodologies to calculate the incremental hydropower calculation, PSE does not believe that WUTC should prescribe one (or three) specific methodologies, nor should it prescribe into rule the inflexibility of a set number of years in a historic period, nor a set number of years of river discharge data a model should use. The WUTC has not provided an explanation why it seeks to limit the number of reasonable methodologies that may be used in the future to calculate the incremental hydropower calculation. The law does not require that the Commission require the use of a specific methodology to calculate incremental hydropower. The rules should continue to allow the Commission and utilities flexibility to consider reasonable methods that have supporting rationales.

5. **Is it necessary for the Commission to require the use of a specific methodology to calculate integration costs?**

The law does not require that the Commission require the use of a specific methodology to calculate integration costs. The rules should continue to allow the Commission and utilities flexibility to consider reasonable methods that have supporting rationales.

6. **On which metrics should the Commission rely to monitor energy and emissions intensity trends in utility service territories?**

The law does not require that the Commission require the use of metrics to assess the utilities' broader progress in meeting the EIA's policy to "increase[e] energy conservation" and "protect clean and water". If the law required such a metric it would have prescribed a specific metric. The legislature reviewed and amended the EIA in the most recent legislative session. However, there was no attempt to amend the law so that the existing language "increase[e] energy conservation" and "protect clean and water" should be treated as a separate requirement under the law. The legislature is presumed to

have knowledge of how current law is interpreted by administrative agencies. If the legislature chose not to correct such an interpretation by amending the law, it is reasonable to conclude that the existing interpretation of the law is consistent with legislative intent.

Therefore based on the words in the law and the intent of the legislature, the Commission should not establish reporting metrics to monitor energy and emissions intensity trends – doing so would be contrary to the law and the legislature.

**7. Should the rule require reports to include available energy and emissions intensity metrics?**

The law does not require that the Commission require the use of metrics to assess the utilities' broader progress in meeting the EIA's policy to "increase[e] energy conservation" and "protect clean and water". If the law required such a metric it would have prescribed a specific metric. The legislature reviewed and amended the EIA in the most recent legislative session. However, there was no attempt to amend the law so that the existing language "increase[e] energy conservation" and "protect clean and water" should be treated as a separate requirement under the law. The legislature is presumed to have knowledge of how current law is interpreted by administrative agencies. If the legislature chose not to correct such an interpretation by amending the law, it is reasonable to conclude that the existing interpretation of the law is consistent with legislative intent.

Therefore based on the words in the law and the intent of the legislature, the Commission should not establish reporting metrics to monitor energy and emissions intensity trends – doing so would be contrary to the law and the legislature.

## SPECIFIC COMMENTS ON PROPOSED RULES

In addition the comment form (Attachment 1) PSE makes the following two high-level observations:

1) transferring select conservation conditions to the rules is *ad hoc* and will lead to additional unnecessary complexity and confusion; and

2) the legal interpretation and imposition of a separate requirement to "pursue all available conservation that is cost-effective, reliable and feasible" is unnecessary and inconsistent with the structure and language of the law and the Commission's past interpretation of the law.

**1) Transferring select conservation conditions to the rules is *ad hoc* and will lead to additional unnecessary complexity and confusion.**

It appears that the WUTC intended to transfer some of the key biennial conditions to the WAC, while omitting others. In so doing, some of the original intent of the conditions—agreed upon in a collaborative process with their advisory groups—was altered. PSE believes that care must be exercised when considering moving conditions to rules, as doing so reduces the utilityand its advisory groupthe ability to adaptively manage in a dynamic conservation environment.

PSE believes that the collaborative process will be disrupted by moving selected and altered conditions into the WAC, where they will be memorialized well beyond the deliverable conditions, biennially vetted by utilities' advisory groups. Furthermore, by moving only certain conditions into the WAC, inefficiencies are introduced. Stakeholders will need to a review & update the WAC more often than optimal (for example, in the proposed revision to 480-109-010(1)(b): "[….] utilities must use the methodologies that are consistent with those used by the council's Sixth Northwest Conservation and Electric Power Plan." With the seventh power plan coming out soon, this rule will be quickly obsolete).

Additionally, moving only select conditions will make the biennial condition revision process more complicated for all stakeholders, thus decreasing efficiency and effectiveness, while hindering the practical execution of utility conservation programs.

**2) The legal interpretation and imposition of a separate requirement to "pursue all available conservation that is cost-effective, reliable and feasible" is unnecessary and inconsistent with the structure and language of the law and the Commission's past interpretation of the law.**

The Commission has proposed to take existing language in the Energy Independence Act ("EIA" or "the Act") that has not been changed since Initiative 937 was passed in 2006, and create a new rule that reads new meaning into the existing language and sets new requirements for the existing language that were not present in the past. The proposed new rule and its accompanying requirements (i) are not consistent with the structure and language of the EIA or the Commission's interpretation of the Act, (ii) are not supported by the legislative intent as set forth in new statutory provisions adopted by the legislature in 2014; and (iii) are likely to create confusion and uncertainty.

Staff's Proposed Rule Change is Inconsistent with the Structure and Language of the Act and the Commission's Past Interpretation of the Act:

In Dockets UE-100170, UE-100176 and UE-100177, Commission Staff previously attempted to read the Energy Independence Act in a manner that imposes a separate requirement to "pursue all available conservation that is cost-effective, reliable and feasible" separate from the stated

requirements in the Act to (a) identify a ten-year achievable cost-effective conservation potential; and (b) establish a biennial acquisition target for cost-effective conservation that is no lower than a pro rata share of the ten-year potential.[1] Such a reading of the Act was generally opposed by stakeholders who participated in these dockets as inconsistent with the language, structure and intent of the Act.[2] The Commission did not impose a separate requirement to "pursue all conservation in the final orders in these dockets."[3]

Staff's current proposal to amend the rules and interpret the EIA as containing two separate requirements to "pursue all available conservation" and establish a biennial acquisition target for cost-effective conservation" remains inconsistent with the language, structure and intent of the EIA. Because this issue has been resurrected by Commission Staff in the current rulemaking, some of the points made in opposition to Staff's proposal in the 2010 dockets are worth repeating:

> 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.[4] Basic principles of statutory construction, however, require that a statute be read as whole to give full effect to every part.[5] 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.[6]

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[1] *See* Dockets UE-100170, UE-100176, and UE-100177, Staff Comments pp. 6-7 (July 16, 2012) p. 15-16 ("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. ") , Public Counsel Comments pp. 3-5 (Aug. 2, 2012); Dockets UE-100170 and UE-100177, Attachment A to Open Meeting Memo, p. 2 (Aug. 9, 2012).

[2] *See, e.g.,* Dockets UE-100170, UE-100176, and UE-100177, Public Counsel Comments pp. 3-5 (Aug. 2, 2012); Supplemental Comments of Renewable Northwest Project and NW Energy Coalition, p. 7 (Aug. 2, 2012) ("Ultimately, meeting the biennial target is the fundamental conservation requirement in the law."); Dockets UE-100177, Comments of PSE p. 3 (Aug. 2, 2012) (describing Staff's proposed "two targets" as "highly subjective and subject to interpretation that is not appropriate to this compliance issue for determination in this docket.").

[3] *See, generally,* Final Orders in Dockets UE-100170, UE-100176, and UE-100177.

[4] 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."

[5] *King County v. Central Puget Sound Growth Management Board*, 142 Wn. 2d. 543, 560 (2000)(intent determined from more than a single sentence).

[6] Section (1)(c) allows a utility to use high-efficiency cogeneration to meet conservation its targets.

> 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 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.[7] 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.[8]
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> 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 technology which in the view of Staff or another party should have been pursued.[9] 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."[10]

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[7] *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.*.

[8] 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.

[9] 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.

[10] Dockets UE-100170, UE-100176, and UE-100177, Public Counsel Comment Letter (Aug. 2, 2012) (quoting Staff Comments, p. 6).

The above arguments against Staff's proposed expansive reading of the language in RCW 19.285.040(1) apply with equal force in this rulemaking. Moreover, the Commission has previously recognized that the language "[e]ach qualifying utility shall pursue all available conservation that is cost-effective, reliable, and feasible" requires a utility to establish a 10-year conservation potential and a biennial conservation target. For example, in Docket UE-121165 the Commission ordered as follows:

> PSE's obligation under RCW 19.285.040(1) to pursue all available conservation that is cost-effective, reliable, and feasible – by identifying an achievable ten-year conservation potential, establishing a biennial conservation target, and meeting the targets – does not require a qualified utility to include as "conservation" its capital investments in electric power production equipment, where such capital investments do not reduce electric power consumption.

Staff's Proposed Rule Change is Inconsistent with Legislative Intent as Set Forth in the 2014 Legislative Session

The legislature reviewed and amended the EIA in the most recent legislative session. However, there was no attempt to amend the law so that the existing language "pursue all conservation" should be treated as a separate requirement under the law. The legislature is presumed to have knowledge of how current law is interpreted by administrative agencies. If the legislature chose not to correct such an interpretation by amending the law, it is reasonable to conclude that the existing interpretation of the law is consistent with legislative intent.

Although the legislature *did not* amend the EIA to impose a separate requirement on utilities to "pursue all conservation" -- above and beyond the expressly stated requirements to establish a ten-year conservation potential and a biennial conservation target -- the legislature *did* amend the law to help utilities meet their biennial conservation targets. The legislature considered the testimony from supporters, including the Commission, that there needs to be a mechanism that allows utilities to smooth out conservation achieved over time and allow conservation achieved in excess of biennial conservation targets to be recognized in subsequent biennia.[11] Thus, the intent of the legislature in passing this amendment was to loosen the requirements of the RCW 19.285.040 so that excess conservation achieved in one biennial period could be carried over to a subsequent period, thereby helping to avoid imposition of administrative penalties for a utility's failure to achieve its conservation target. It would be duplicitous for the Commission to remain silent on the issue of a new requirement to "pursue all conservation" when the legislature reviewed the proposed bill a few months ago, and to now impose this new and separate requirement by rulemaking, particularly where the Commission has previously declined to

[11] House Bill Report, ESHB 1643, pp. 3-4 (As passed Legislature).

interpret the Act in this way. The new amendment to the Act does not contemplate such an interpretation, and the legislative history shows no evidence of discussion of this new and separate requirement.

Staff's Proposed Rule Change Is Likely To Create Confusion and Uncertainty

Staff's proposed rule language in 480-109-010(4) is likely to create confusion as to utilities' requirements under the law and the proposed rules. There is considerable overlap between the requirements to "pursue all conservation" in WAC 480-109-010(4) and the existing requirements to establish a ten-year conservation potential and a biennial conservation target in WAC 480-109-010(1) and (2).

For example, both WAC 480-109-010(1) and (4) address conservation "potential." Subsection (1) requires the utility to project its cumulative ten-year conservation potential every two years by considering all conservation resources that are cost-effective, reliable, and feasible; subsection (4)(a)(i) requires a utility to "identify the cost-effective, reliable, and feasible potential of possible technologies and conservation programs in the utility's service territory." It is not clear whether subsection (4) is restating the requirements of subsection (1) in slightly different terms, broadening the requirement of subsection (1), or establishing a new requirement. The use of the terms "potential" and the descriptors "cost-effective, reliable, and feasible" creates confusion between these two subsections.

Similarly, it is not clear how the requirement to "develop portfolio" in WAC 480-109-010(4)(a)(ii) differs from the requirements in subsection (1) and (2) to establish a ten-year conservation potential and a biennial conservation target. Subsection (4)(a)(ii)(B) states that "[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." It is not clear if the portfolio is tied to the ten-year conservation potential referenced in subsection (1). It is not clear what type of programs would be "available, cost-effective, reliable, and feasible" but not already included in the biennial conservation target.

PSE has no objection to an adaptive management approach to its conservation portfolio, and uses such an approach under the existing law and rules. The ongoing requirements of biannual conservation target setting and identification of ten-year conservation potential necessarily result in such an adaptive approach to the conservation portfolio. Staff's attempt to further define this adaptive process is not necessary, and rather than clarifying the law, is likely to create more confusion.

PSE appreciates the opportunity to provide the above comments to the issues identified above in the Notice of Opportunity to File Written Comments. Please contact Mr. Eric Englert at (425) 456-2312 or myself at (425) 456-2110 for additional information about this filing.

Sincerely,

Ken Johnson
Director, State Regulatory Affairs