BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RULEMAKING TO IMPLEMENT INITIATIVE MEASURE NO. 937 Second Comment Opportunity (CR 101)	DOCKET NO. UE-061895

SECOND COMMENTS OF PUBLIC COUNSEL (CR-101)

May 18, 2007

I. INTRODUCTION

Pursuant to the Notice of Extension of Time to File Comments of April 18, 200, the Public Counsel Section of the Washington Attorney General's Office (Public Counsel) respectfully submits this second set of comments. The comments address and propose some revisions to the draft rules, WAC 480-109, referenced in the April 18 Notice.

In our initial comments on Initiative 937, the Energy Independence Act, (Initiative or Act) Public Counsel identified that the public interest standard requires the Commission to weigh a utility's efforts at increasing energy conservation and renewable electric power generation against the cost-effectiveness and prudence of these utility decisions. We also focused on the integral role that stakeholders should play in that process and the need for clear measurement and reporting of conservation and renewable resource goals. These comments explore these issues further and attempt to incorporate our views into the draft rules circulated by the Commission.

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II. COMMENTS

Public Counsel supports the approach reflected in the Commission's draft rules. Public Counsel agrees that it is not necessary in this rulemaking to adopt a complex new regulatory framework, especially if based on undue speculation about future conditions. Our initial comments cautioned against premature conclusions that utility compliance with the Initiative will inevitably result in higher costs than the status quo. We said that any analysis of benefits versus costs must be made on a case-by-case basis with consideration of all of the complexities inherent in measuring success on these issues. The draft rules, along with our proposed amendments, offer the Commission sufficient guidance and flexibility consistent with the language of the Initiative.

A. Definitions--- Retail Revenue Requirement WAC 480-109-007(17).

Public Counsel supports adoption of the definition proposed in WAC 480-190-007(17) which states that the "retail revenue requirement" means "the normalized retail revenue supported by the general tariffs approved in a utility's most recent general rate case." RCW 19.285.050 (1)(a) establishes that a "utility shall be considered in compliance with an annual target created in RCW 19.285.040(2) for a given year if the utility invested four percent of its total annual retail revenue requirement on the incremental costs of eligible renewable resources, the cost of renewable energy credits, or a combination of both…" The annual retail revenue requirement is therefore the denominator in the equation and the value of the four percent is dependent upon the revenue requirement.

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The Act does not define "annual retail revenue requirement" and so the terms must be given their ordinary meaning.[1] The District of Columbia Court of Appeals, speaking through Circuit Judge Scalia, described the rate-making process, including the role of the revenue requirement. Citing numerous treatises, Judge Scalia explained that:

> A "cost of service" is a document filed by a rate-regulated utility showing all of the items requiring reimbursement from the ratepayers – its bottom line, in other words, is the "R" or "revenue requirement" element of the classic ratemaking formula R (revenue requirement) = C (operating costs) + Ir (invested capital or rate base times rate of return on capital). *See* T. Morgan, Economic Regulation of Business 219 (1976). *See also* E. Gellhorn & R. Pierce, Jr., Regulated Industries in a Nutshell 97 n. 1 (1982) (citing substantively identical formulae).[2]

The utility is given the opportunity to earn up to the amount of money equaling the revenue requirement, determined as the sum of operating costs and rate of return. Rates are set in a rate case based on that formula. For these reasons, the term "annual retail revenue requirement" in the Initiative, when applied to investor-owned utilities regulated under Title 80, means the last revenue requirement established by a general rate case. Commission basis reports do not provide a basis for establishing a revenue requirement. They are also inadequate since they are unaudited and untested

Some may express concern that continuing to define the term revenue requirement in this fashion will hamper greater purchases of renewable energy if the companies do not seek rate increases. Such speculation is not a reasonable justification for departing from the established

[1] *State v. Breshon* 115 Wn. App. 874, 878, 63 P.3d 871, 873 (2003) ("We give undefined statutory terms their common meaning…"); *State v. Walls*, 106 Wn. App. 792, 795, 25 P.3d 1052 (2001).

[2] *City of Charlottesville v. FERC*, 774 F.2d 1205 (D.C. Cir. 1984); *See also*, WAC 480-07-510(3)(e). A representation of the actual rate base and results of operation of the company during the test period, calculated in the

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meaning of the term "revenue requirement," a regulatory term of art. The statute does not re-define the term and neither should the rules.

B. Stakeholder Participation And IRP Matters -- WAC 480-109-010(1)(c) and (4).

Public Counsel's initial comments emphasized the importance of stakeholder involvement and appreciate those aspects of the draft rules encouraging such participation. We have amended the rule language to require utilities to use stakeholder groups in the conservation projection process and to clarify that stakeholder advisory groups or individual stakeholders will have an opportunity to make separate alternative recommendations to the Commission.

The language changes Public Counsel proposes to this effect in WAC 480-109-010(1)(c) and (4) are:

> (c) When developing this projection, utilities must use methodologies that are consistent with those used by the council in its most recent regional power plan. A utility may, with full documentation on the rational for any modification, alter the council's methodologies to better fit the attributes and characteristics of its service territory. A utility ~~may~~ shall use a stakeholder advisor group to review the methodologies and assumptions used to develop its projected ten year conservation potential.
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> (4) Commission staff or other interested parties, including the stakeholder advisory group or individual stakeholders, may file written comments, including alternative

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manner used by the commission to calculate the company's *revenue requirement* in the commission's most recent order granting the company a general rate increase. (emphasis added).

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recommendations, regarding a utility's projected conservation potential or its biennial conservation target within thirty days of the utility filing.

C. Annual Reporting Requirements – WAC 480-109-040.

The annual reporting requirements established by WAC 480-109-040 serve as the linchpin of the Act by ensuring enforcement and measuring success. Public Counsel makes very few changes to these provisions. Public Counsel adds language to WAC 480-109-040(1)(b) to ensure that those utilities who take the opportunity for an alternative means of meeting the Initiative's goals must meet a somewhat higher standard of reporting. The language in this regard reads as follows:

> (b) This report must state if the utility is using one of the alternative compliance mechanisms provided in 480-109-030 WAC instead of meeting its renewable resource target. ~~Utility's~~ A utility using an alternative compliance mechanism must include sufficient data, documentation and other information in its report to demonstrate that it qualifies to use that alternative mechanism. Failure to file sufficient data may result in the commission rejecting the utility's request to use the alternative compliance mechanism.

Finally, Public Counsel adds a requirement to WAC 480-109-040 that the Annual Report be made available through the Commission's website, through the utility's website and upon telephone or email request to the utility.

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D. Administrative Penalties – WAC 480-109-050.

1. Recovery in rates.

For the reasons discussed in our initial comments, Public Counsel does not believe that ratepayers should be responsible for paying penalties incurred by regulated utilities for failure to comply with state law. Those comments are incorporated here again by reference. Penalty amounts should not be collected in retail electric rates.

The Energy Independence Act does not provide any guarantee or entitlement to regulated utilities that they will be allowed to recover penalty amounts from ratepayers. Instead, the Act simply provides that "[t]he Commission shall determine *if* an investor-owned utility may recover the cost of this administrative penalty in electric rates [.]"[3] This recognizes and preserves the Commission's current ability to exercise its discretion regarding recovery of company expenditures in rates. The statutory provision creates a process, not a right of recovery. There is nothing in the language of the Act that changes the Commission's authority in this area, or the applicable existing law regarding whether ratepayers are responsible for paying the penalties imposed on a regulated company for violations of law.

Public Counsel believes the draft rule, WAC 480-109-050(4), is a reasonable effort to reflect this interpretation of the statute. It does not create an entitlement to recovery, but simply creates a mechanism for the utility to present a request for deferral of penalties and recovery in rates. The burden of proof is on the utility to show why rate recovery should be allowed and

[3] RCW 19.285.060(4)(emphasis added).

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why the company failed to comply with the law. The rule expressly recognizes that a request for recovery will be determined on the basis of existing law, policy, and precedent, as well as the public interest.

2. Customer notice – WAC 480-109-050(5).

Public Counsel proposes two modifications to the draft rule regarding customer notification. First, the statutory requirement that the notice be in "published form"[4] should be reflected in the rule as well. Public Counsel proposes that this term of the statute be implemented by requiring clear and conspicuous written notice to each individual customer. This could be accomplished by a "bill stuffer" or separate mailing at the company option.

Second, Public Counsel proposes additional language requiring notice to customers if the company is seeking to recover the penalty amount in rates and the specific proposed impact of the recovery.

With these proposed notice provisions, the rule would read as follows:

> (5) A utility that pays an administrative penalty under subsection (4), must notify its retail electric customers within three months of incurring a penalty stating the size of the penalty and the reason it was incurred. <u>The utility must also state whether it intends to seek recovery of the penalty amounts in rates, the specific amount to be recovered, the percentage of the total penalty which will be sought in rates, and the amount and percent of the rate increase that would result if the request were granted. Notification under this section must be provided clearly and conspicuously in written form to the individual customer</u>.

[4] RCW 19.285.060(3).

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E. Other Proposals.

It is Public Counsel's understanding that some parties have had discussions to try to develop some consensus on a set of proposed rules revisions. Public Counsel has not had significant involvement in that process. We respectfully reserve the right to comment on any new proposals put forward by other parties. Public Counsel has a concern with any effort by industry or environmental groups to significantly broaden the reach and complexity of these rules, including any efforts to modify ratemaking requirements and constrain the Commission's ability to review prudence and recoverability of company expenditures.

III. CONCLUSION

Public Counsel appreciates the opportunity to submit these second set comments. We look forward to our continued participation in this rulemaking, including reviewing the second set of comments offered by other stakeholders.

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