

BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

NO. UE-100177

PUGET SOUND ENERGY, INC.'S  
MOTION FOR SUMMARY  
DETERMINATION

**I. INTRODUCTION AND RELIEF REQUESTED**

1. Puget Sound Energy, Inc. ("PSE" or "the Company"), by and through undersigned counsel, hereby submits its Motion for Summary Determination pursuant to WAC-480-07-380(2). PSE requests a summary determination on threshold legal issues relating to PSE's Report Identifying PSE's Ten-Year Achievable Conservation Potential and Biennial Conservation Target Pursuant to WAC 480-109-010(3) ("Report") filed in this docket on January 29, 2010.
2. As discussed in more detail below, PSE's Report complies with the letter and spirit of the rules adopted by the Washington Utilities and Transportation Commission ("Commission" or "WUTC") to implement the Energy Independence Act, Chapter 19.285 RCW (the "Act"), and further complies with the Act itself. PSE projected a ten-year conservation potential using both its Integrated Resource Plan ("IRP") and the current power plan published by the Northwest Power and Conservation Council ("Conservation Council"). PSE filed its Report identifying its ten-year conservation projection and its biennial conservation target. PSE's biennial conservation target is a proration of its ten-year conservation potential, which PSE documented in its Report. PSE sought public participation in the development of its ten-year conservation potential and its two-year biennial target.

3. Other parties have read the requirements of Chapter 19.285 RCW and Chapter 480-109 WAC more expansively than the actual language supports—to the point that they have read out the plain language of the Act and its implementing rules. Such an overly broad reading is inappropriate and contrary to law. The Commission should reject such expansive interpretations that are not supported by the law and its implementing rules.

## II. STATEMENT OF FACTS

### A. PSE Sought Public Participation in the Development of Its Conservation Potential and Target and Outlined the Extent of Participation in its Report

4. PSE involved Commission Staff and the public in the development of its ten-year conservation potential and two-year conservation target over the past two years. Public discussions regarding the development of conservation potentials and targets have taken place since April 2008.<sup>1</sup> The form of discussions has been varied: public meetings, public IRP Advisory Group ("IRPAG") meetings, Conservation Resource Advisory Group ("CRAG") meetings, Commission Open Meetings, Commission-hosted public meetings, meetings with Commission Staff, and emails to public interest groups.<sup>2</sup> The following is a brief chronology of the public involvement.
5. A discussion of the potential methodology for developing the conservation potential began at the April 3, 2008 IRPAG meeting.<sup>3</sup> IRPAG meetings on November 20, 2008, January 22, 2009, April 23, 2009, and June 25, 2009 discussed methods for developing the conservation metrics.<sup>4</sup> Also on June 25, 2009, PSE convened a CRAG meeting where the development of conservation targets was discussed.<sup>5</sup>
6. On August 28, 2009 the comment period ended for the 2009 IRP.<sup>6</sup> PSE presented its 2009 IRP to the Commissioners at an Open Meeting on September 10, 2009.<sup>7</sup>

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<sup>1</sup> Declaration of Eric Englert at ¶ 4.

<sup>2</sup> Report at 2.

<sup>3</sup> See Report at 3; Declaration of Eric Englert at ¶ 5.

<sup>4</sup> See Report at 3; Declaration of Eric Englert at ¶ 5.

<sup>5</sup> See Report at 3; Declaration of Eric Englert at ¶ 5.

<sup>6</sup> Declaration of Eric Englert at ¶ 6.

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

7. On September 3, 2009, PSE participated in a public meeting hosted at the WUTC.<sup>8</sup> In that meeting, the Conservation Council presented over 70 slides describing its methodology, major assumptions, and its target-setting process.<sup>9</sup> Slide number 39 within the Conservation Council's 78-slide presentation describes how utilities can develop their target; the Conservation Council specifically recommends that: "Utilities can just use the utility target calculator."<sup>10</sup>
8. CRAG meetings were held on September 15 and October 14 of 2009.<sup>11</sup> At those meetings, the development of a conservation target range was discussed.<sup>12</sup> On November 2, PSE emailed draft descriptions, budgets, cost-effectiveness, and evaluation plans of PSE's conservation programs for 2010–2011 to CRAG members.<sup>13</sup>
9. On November 17, 2009, PSE personnel traveled to the WUTC's office to discuss conservation potentials with WUTC staff members.<sup>14</sup> PSE filed its conservation programs for 2010–2011 with the Commission on November 30, 2009.<sup>15</sup>
10. PSE convened a public IRPAG meeting on December 15, 2009, and further development of the conservation potential and target range was presented at that meeting.<sup>16</sup>
11. By December 31, 2009, PSE had projected its ten-year potential based on the two allowable sources—its most recent IRP and the Conservation Council's current (Fifth) power plan target.<sup>17</sup> While not required to give notice of its ten-year potential at that time, given that the final report was due January 31, 2010, PSE notified (via e-mail) members of the CRAG and members of the public who participate in the IRPAG public meetings regarding the ten-year projections.<sup>18</sup>

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<sup>8</sup> *Id.* at ¶ 7.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; Exhibit A to the Declaration of Eric Englert.

<sup>11</sup> Declaration of Eric Englert at ¶ 8.

<sup>12</sup> *See id.*; Report at 3.

<sup>13</sup> Declaration of Eric Englert at ¶ 8.

<sup>14</sup> *Id.* at ¶ 9.

<sup>15</sup> *Id.* at ¶ 10.

<sup>16</sup> *See id.* at ¶ 11; Report at 3.

<sup>17</sup> *See* Declaration of Eric Englert at ¶ 12.

<sup>18</sup> *See id.*

12. On January 25, 2010, PSE notified interested public parties via email about further refinements to its identification of a biennial target and ten-year conservation potential.<sup>19</sup> On January 27, PSE convened a meeting to review the final development of its conservation potential and biennial target.<sup>20</sup> Members of the public and stakeholders participated in this meeting, including representatives from the Conservation Council, Northwest Energy Coalition ("NWECC"), Northwest Energy Efficiency Alliance ("NEEA"), Northwest Energy Efficiency Council ("NEEC"), Industrial Customers of Northwest Utilities ("ICNU"), The Energy Project, and PacifiCorp.<sup>21</sup>

13. PSE filed the Report on January 29, 2010.<sup>22</sup> The Report provides a table documenting the public meetings and communications addressing PSE's conservation potential and biennial target.<sup>23</sup>

**B. Events Leading to the Further Development of PSE's Conservation Potential**

14. The Company's decision to use the Conservation Council's Fifth Power Plan as the basis for its ten-year achievable conservation potential was driven by four sets of drivers, which have come into sharp focus since December 2009:

- Uncertainty about approval of the Company's 2010–2011 projected level of conservation program expenditures.
- Uncertainty about customer tolerance for upward pressure on rates due to higher conservation program expenditures.
- Uncertainty about the Company's ability to recover lost margins from conservation.
- Uncertainty about the treatment of penalties for failing to achieve the conservation targets.<sup>24</sup>

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<sup>19</sup> *Id.* at ¶ 13.

<sup>20</sup> *Id.* at ¶ 14.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at ¶ 15.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at ¶ 17.

15. The Company's 2010–2011 conservation program tariffs, with a preliminary budget, were presented to the Commission for approval at an open meeting on December 23, 2009.<sup>25</sup> During the comment period on the Company's filing, some parties raised questions about the magnitude and feasibility of the Company's proposal.<sup>26</sup> These questions resulted in the opening of a Commission Staff investigation into the Company's proposed conservation expenditures for 2010–2011.<sup>27</sup> This investigation was not concluded until March 25, nearly one-quarter-year into calendar year 2010.<sup>28</sup>
16. The Company's 2009 IRP does not address issues with respect to tolerance for rate impacts from conservation expenditures and regulatory issues such as lost margins.<sup>29</sup> The conservation potential in the 2009 IRP was developed without regard to these uncertainties. Therefore, the Company has determined that the most reasonable course of action for complying with Chapter 480-109 WAC and determining the minimum level for its ten-year conservation potential and biennial conservation target is to use the Conservation Council's Fifth Power Plan.<sup>30</sup>

### III. STATEMENT OF ISSUES

#### A. Ten-Year Conservation Potential

1. Whether WAC 480-109-010(1) allows a utility to project its cumulative ten-year conservation potential using either (1) the most recent IRP, or (2) the utility's proportionate share of the Conservation Council's current power plan targets for the state, regardless of which source provides the higher projection.

2. Whether WAC 480-109-010(3) requires a utility to explain why it identified the source of its ten-year conservation potential as either (1) the most recent IRP or (2) the utility's proportionate share of the Conservation Council's current power plan targets for the state.

3. Whether the option in WAC 480-109-010(1)(a)(ii) to derive a ten-year projection from the "conservation council's current power plan" allows a utility to use the plan that is currently in effect as of the date the projection is filed with the WUTC.

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<sup>25</sup> *Id.* at ¶ 18.

<sup>26</sup> *Id.*

<sup>27</sup> *See id.*; Docket No. U-091954.

<sup>28</sup> Declaration of Eric Englert at ¶ 18.

<sup>29</sup> *Id.* at ¶ 19.

<sup>30</sup> *Id.* at ¶ 20.

4. Whether WAC 480-109-010(1), which states that a utility must project its cumulative ten-year conservation potential by January 1, 2010 and every two years thereafter, requires a utility to file its projection by January 1.

5. Whether WAC 480-109-010 prohibits a utility from further developing and finalizing its projected ten-year conservation potential after it makes a projection on January 1st, and before it files its final report with the WUTC by January 31.

**B. Biennial Conservation Target**

1. Whether a utility's biennial conservation target complies with WAC 480-109-010(3)(b) where the utility uses Option 2 of the Conservation Counsel's Target Calculator (target based on utility share of total regional retail sales by a sector) for the years 2010 and 2011.

2. Whether WAC 480-109-010 limits the range that may be used in setting a biennial conservation target.

3. Whether a utility is subject to penalties only if conservation falls below the lower end of an approved biennial conservation target range.

**C. Other Report Requirements**

1. Whether the public participation outlined in PSE's report is sufficient to meet the requirements of WAC 480-109-010(3).

2. Whether a report filed pursuant to WAC 480-109-010(3) must include program detail such as: detailed program descriptions; measures, incentives and eligibility requirements; detailed program budgets; cost-effectiveness standards; projected program cost-effectiveness; evaluation plans; annual and quarterly progress reports; and cost recovery tariffs.

**IV. EVIDENCE RELIED UPON**

17. In support of its Motion for Summary Determination, PSE relies upon the documents and evidence on file in this docket and the Declaration of Eric Englert with its attached exhibit.

**V. ARGUMENT**

**A. Summary Determination Standard**

18. WAC 480-07-380(2) provides that a party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor. In considering a motion made under WAC 480-07-380(2), the Commission will consider the standards applicable to a motion made under Civil Rule 56 of

the Civil Rules for Superior Court. CR 56 is the summary judgment rule. CR 56(b) provides that a party against whom a claim is asserted may move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof. Summary judgment is appropriate where, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."<sup>31</sup>

19. The Commission must view the evidence in the light most favorable to the non-moving party; however, the non-moving party may not rely upon speculation or on argumentative assertions that unresolved factual issues remain.<sup>32</sup> A mere scintilla of evidence is not enough to establish the existence of a material fact; rather, a party must set forth specific facts which disclose the existence of a material fact.<sup>33</sup> When there are no factual issues and the dispute can be resolved, or narrowed by answering questions of law, as in the present case, summary judgment is favored as an important part of the process of resolving the dispute.<sup>34</sup>

## **B. Ten-Year Conservation Potential**

### **1. A Utility May Project Its Conservation Potential Based on Either Its IRP or Its Proportionate Share of the Conservation Council's Current Power Plan Targets for the State**

#### **a. The rules implement the requirements of Chapter 19.285 RCW**

20. The purpose of the rules in Chapter 480-109 WAC "is to establish rules that electric utilities will use to comply with the requirements of the Energy Independence Act, chapter 19.285 RCW."<sup>35</sup> Such rules were contemplated and authorized by the statute, which states that "[t]he commission may adopt rules to ensure the proper implementation and enforcement of this chapter as it applies to investor-owned utilities."<sup>36</sup>

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<sup>31</sup> CR 56(c); *see also* *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990).

<sup>32</sup> *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

<sup>33</sup> *Id.* at 9, 17.

<sup>34</sup> *See id.* at 9.

<sup>35</sup> WAC 480-109-001.

<sup>36</sup> RCW 19.285.080.

**b. The language of the rule is plain and unambiguous**

21. The plain, unambiguous language of WAC 480-109-010(1) permits a utility to project its ten-year conservation potential based on the utility's proportionate share of the Conservation Council's current power plan targets for Washington. The WAC provides as follows:

- (1) By January 1, 2010, and every two years thereafter, each utility must project its cumulative ten-year conservation potential.
  - (a) This projection need only consider conservation resources that are cost-effective, reliable and feasible.
  - (b) This projection must be derived from and reasonably consistent with one of two sources:
    - (i) The utility's most recent IRP, including any information learned in its subsequent resource acquisition process, or the utility must document the reasons for any differences. When developing this projection, utilities must use methodologies that are consistent with those used by the conservation council in its most recent regional power plan. A utility may, with full documentation on the rationale for any modification, alter the conservation council's methodologies to better fit the attributes and characteristics of its service territory.
    - (ii) The utility's proportionate share, developed as a percentage of its retail sales, of the conservation council's current power plan targets for the state of Washington.

22. The rule language cited above expressly provides utilities the option of selecting from "one of two sources" in deriving its ten-year projection, and it does not place any constraint upon this choice. Similarly, subsections (3)(b) and (3)(c) of the rule, which discuss reporting requirements for the ten-year projection, do not indicate that this choice is restricted in any manner:

- (b) This report must identify *whether the conservation council's plan or the utility's IRP and acquisition process were the source of its ten-year conservation potential*. The report must also clearly state how the utility prorated this ten-year projection to create its two-year conservation target.
- (c) *If the utility uses its integrated resource plan and related information to determine its ten-year conservation potential*, the report must



describe the technologies, data collection, processes, procedures and assumptions the utility used to develop these figures. This report must describe and support any changes in assumptions or methodologies used in the utility's most recent IRP or the conservation council's power plan.<sup>37</sup>

23. Because WAC 480-109-010(1) unambiguously allows PSE to use the Conservation Council's Fifth Power Plan, the Commission should not engage in rules of construction or interpretation to reach a meaning other or different from the plain meaning of the regulation. The Washington Supreme Court has stated that "[a]n unambiguous rule or regulation is not subject to judicial construction."<sup>38</sup>

**c. The statutory language supports PSE's interpretation of the rules**

24. The language of RCW 19.285.040 further clarifies a utility's right to use the Conservation Council's plan to determine its ten-year conservation potential. The statute states as follows:

- (1) Each qualifying utility shall pursue all available conservation that is cost-effective, reliable, and feasible.
  - (a) By January 1, 2010, *using methodologies consistent with those used by the Pacific Northwest electric power and conservation planning council in its most recently published regional power plan*, each qualifying utility shall identify its achievable cost-effective conservation potential through 2019.<sup>39</sup>

25. The statute mandates that utilities use methodologies consistent with those used by the Northwest Power and Conservation Council in its most recently published regional power plan to identify its achievable cost-effective conservation potential.<sup>40</sup> There should be no dispute that PSE's use of the Conservation Council's Fifth Power Plan is a methodology consistent with the Conservation Council's methodology—given that PSE is using the Conservation Council's methodology to project its conservation potential.

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<sup>37</sup> WAC 480-109-010(3)(b), (c) (emphasis added).

<sup>38</sup> *State v. Cannon*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002).

<sup>39</sup> RCW 19.285.040(1)(a) (emphasis added).

<sup>40</sup> RCW 19.285.040(1)(a).

**d. There are no additional steps required if a utility elects to use the Conservation Council's Plan**

26. The Commission should reject arguments by other parties that PSE is required to take additional steps to identify its achievable cost-effective conservation potential beyond the steps set forth in WAC 480-109-010 that require a utility to use either its IRP or the Conservation Council's current plan. The language of the statute and rule, when read together, make clear that there is no further requirement when the Conservation Council's current plan is used. As noted above, the statute generally requires the identification of the achievable cost-effective conservation potential through 2019. In WAC 480-109-010(1), the rules detail how such identification shall occur. "This projection need only consider conservation resources that are cost-effective, reliable and feasible"<sup>41</sup> and this projection can "be derived from and reasonably consistent with"<sup>42</sup> "[t]he utility's proportionate share, developed as a percentage of its retails sales, of the conservation council's current power plan targets for the state of Washington."<sup>43</sup> Thus, the requirement to pursue and identify cost-effective, reliable and feasible conservation can be met by using the Conservation Council's most recently published plan. Period. There is no further derivation or identification of conservation savings required if the Conservation Council's plan is used.

**e. A utility is not required to choose the source that results in the highest conservation level**

27. The Commission should likewise reject arguments by other parties that a utility must choose the higher of the two options—the utility's IRP or the Conservation Council's plan. Such an interpretation is in derogation of the plain language of the rules that allows *either* source to be used by a utility to project its "cost-effective, reliable and feasible" conservation. Reading WAC 480-109-010 to require a utility to use the source that results in the higher level of conservation would be a strained interpretation of the rules. If the Commission had intended to require utilities to select the source resulting in the highest projection of cost-effective, reliable, and

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<sup>41</sup> WAC 480-109-010(1)(a).

<sup>42</sup> WAC 480-109-010(1)(b).

<sup>43</sup> WAC 480-109-010(1)(b)(ii).

feasible conservation potential, then the Commission could have easily added language to this effect. Given the absence of such a requirement, the language of the regulation plainly contemplates that the two sources are equally acceptable.<sup>44</sup>

28. RCW 19.285.040 does not require a utility to choose the source that results in the highest level of conservation. As discussed above, the statute makes clear that a utility should use methodologies consistent with the Conservation Council's most recently published plan to identify its achievable cost-effective conservation. And, as discussed above, the rules further clarify this requirement by allowing the "cost-effective" conservation to be identified using either the IRP or the Conservation Council's current plan. Thus, the statutory requirement to "pursue all available conservation" circles back to the same point—a utility has the option to use either its IRP or the Conservation Council's plan as the source for projecting its ten-year conservation potential.

**f. The Commission must abide by the rules it adopted**

29. Contrary to assertions by other parties, the general language of RCW 19.285.040(1)(e) allowing the Commission to "rely on its standard practice for review and approval of investor-owned utility conservation targets" does not mean that the Commission may disregard the specific standards it adopted for utilities to use in projecting their ten-year conservation potential and establishing their biennial conservation target. The Commission has relied on its standard practice in establishing rules that implement the statute and provide utilities specific direction as to how to comply with the requirements of the law. The reference in the statute to the Commission's "standard practice for review and approval" cannot be construed as a roving mandate to impose new and different requirements than what the Commission has formally adopted in rulemaking proceedings pursuant to the Administrative Procedure Act, Chapter 35.04 RCW. For the Commission to take the position that a utility must do more than what the

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<sup>44</sup>*See Cannon*, 147 Wn.2d 41 at 57 ("This court will not add to or subtract from the clear language of a statute, rule, or regulation even if it believes the Legislature, or . . . [Agency], intended something else but did not adequately express it unless the addition or subtraction of language is imperatively required to make the statute rational.") (citation omitted).

Commission prescribed in the implementing rules, Chapter 480-109 WAC, and specifically, WAC 480-109-010(1)-(3) which set forth the requirements for projecting the ten-year conservation potential, establishing the biennial conservation target, and filing a report documenting the ten-year and biennial target, would violate principles of due process.<sup>45</sup> Such an interpretation would also violate traditional canons of construction.<sup>46</sup>

## **2. The Rules Do Not Require a Utility to Explain the Basis for Choosing the IRP or the Conservation Council's Plan**

30. The Commission should reject arguments by other parties that PSE's filing is deficient because it does not explain the rationale for choosing the Conservation Council's current plan as the basis for its ten-year conservation potential.<sup>47</sup> There is no requirement in the WAC for such an explanation. A utility is required to "identify whether the conservation council's plan or the utility's IRP and the acquisition process were the source of its ten-year conservation potential."<sup>48</sup> A utility is also required to explain how it prorated the ten-year projection to create its two-year conservation target.<sup>49</sup> If a utility bases its ten-year conservation potential on its IRP, it must describe the technologies, data collection, processes, procedures and assumptions the utility used to develop these figures.<sup>50</sup> If the utility makes changes in assumptions or methodologies from its IRP or the Conservation Council's power plan it must describe and support such changes.<sup>51</sup> But

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<sup>45</sup> See *Silverstreak, Inc. v. Wash. Dep't of Labor and Indus.*, 159 Wn.2d 868, 889, 154 P.3d 891 (2007) (prohibiting agency from retroactively applying new, broader interpretation of regulation). It is a fundamental tenet of administrative law that a regulated entity has a right to know the standards to which it will be held. See Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.5 (4th ed. 2002) ("due process requires that a party be given adequate and timely notice of the issues it must address and the manner in which it can raise those issues"); *Baker-Chaput v. Cammett*, 406 F. Supp. 1134 (D.N.H. 1976) ("the establishment of written, objective, and ascertainable standards is an elementary and intrinsic part of due process"); *Port Terminal R.R. Ass'n v. United States*, 551 F.2d 1336, 1343 (5th Cir. 1977) ("[W]hen [regulated entities] appear before the [Interstate Commerce] Commission, they are entitled to know by what standards they are going to be judged. . . . [I]n fairness, standards should not be changed without due notice.") (internal quotations and citation omitted).

<sup>46</sup> See *Cannon*, 147 Wn.2d 41 at 57; *Ingram v. Dep't of Licensing*, 162 Wn.2d 514, 526, 173 P.3d 259 (2007) (refusing to read additional requirements into evidentiary rule and stating "we are wary of . . . promulgating additional rules under the guise of interpreting them").

<sup>47</sup> See, e.g., Staff Comments Evaluating Elec. Util. Conservation Reports under the Energy Independence Act, RCW 19.285 (I-937), Docket Nos. UE-100177, et. al., pp. 5–6 (March 5, 2010) (hereinafter, "Staff Comments").

<sup>48</sup> WAC 480-109-010(3)(b).

<sup>49</sup> *Id.*

<sup>50</sup> WAC 480-109-010(3)(c).

<sup>51</sup> *Id.*

there is no requirement that a utility explain why it chose to use the Conservation Council's plan instead of its IRP, or vice versa. The Commission should reject other parties' entreaties to read such a requirement into the rules and deem PSE's Report insufficient for the lack of such explanation, when the requirement of an explanation is conspicuously absent from the rules.

**3. The Conservation Council's Fifth Power Plan Was the Current Plan When PSE Filed Its Report**

31. As discussed above, WAC 480-109-010(1)(b) allows PSE to project its ten-year conservation potential using the Conservation Council's *current* power plan targets for the state of Washington. It is undisputed that the power plan in effect when PSE filed its Report was the Fifth Power Plan.<sup>52</sup> The statutory language is similar, requiring the ten-year conservation potential to be established consistent with methodologies used by the Conservation Council "in its most recently published regional power plan."<sup>53</sup> The *draft* Sixth Plan, which had not yet been finalized, approved, or published when PSE projected its ten-year conservation potential or filed its Report, was not a *current* plan. Where, as here, the rule expressly provides for a utility to use the current plan and the statute refers to the "most recently published" plan, PSE complied with the rule when it based its ten-year conservation potential on the Fifth Power Plan—the plan currently in effect at the time PSE projected its conservation potential and filed its Report.

32. The appropriateness of the use of the Fifth Power Plan is further demonstrated by rules promulgated by the Washington Department of Commerce, Trade and Economic Development ("CTED") to implement the Energy Independence Act. These rules, applicable to consumer-owned electric utilities that are subject to the Energy Independence Act, codify the use of the Fifth Power Plan to document these utilities' compliance with Chapter 19.285 RCW.<sup>54</sup>

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<sup>52</sup> See Comments of Public Counsel, Docket No. UE-100177, p. 9 (March 5, 2010) (stating that the Sixth Plan was adopted after PSE filed its Report) (hereinafter "Comments of Public Counsel"); Staff Comments at p. 6 (same).

<sup>53</sup> RCW 19.285.040(1)(a).

<sup>54</sup> See WAC 194-37-070(3) (requiring utilities to document their establishment of ten-year and biennial targets using methodologies consistent with those in the Fifth Power Plan).

**4. The Rules Do Not Require the Ten-Year Conservation Potential to Be Filed Prior to the January 31 Report**

33. The rules require each utility to *project* its cumulative ten-year conservation potential by January 1.<sup>55</sup> There is no requirement in the rules that this projection be filed or otherwise published by January 1. In contrast, the rules require that by January 31, a utility *file* a report identifying its ten-year achievable conservation potential and its biennial conservation targets.<sup>56</sup>

34. Commission Staff requested PSE and other utilities to *file* their ten-year conservation potential prior to January 1, 2010.<sup>57</sup> In response, PSE notified Commission Staff that the rules did not require such a filing.<sup>58</sup> Ultimately, PSE sent an email to the IRPAG and CRAG public interest groups identifying the ten-year conservation potential based on the IRP and based on the Conservation Counsel's Fifth Power Plan.<sup>59</sup> Commission Staff then filed the email from PSE.<sup>60</sup>

35. A plain reading of the rules makes clear that the only filing required is the Report, due on or before January 31. The Commission should make a determination that the implementing rules do not require the filing of a utility's ten-year conservation potential prior to the January 31 Report.

**5. The Rules Do Not Prohibit a Utility from Further Developing and Finalizing Its Ten-Year Conservation Potential Between January 1 and January 31, When the Report Is Filed**

36. As discussed above, the rules require that a utility project its ten-year conservation by January 1, but do not require that the projection be filed by that date. There is similarly no prohibition against a utility further developing and finalizing its projected ten-year conservation potential after it has been identified, but before it has been filed as part of the January 31 Report.

37. Here, PSE projected its ten-year conservation potential prior to January 1, 2010, as required by WAC 480-109-010(1) and RCW 19.285.040(1)(a).<sup>61</sup> The projection was consistent

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<sup>55</sup> WAC 480-109-010(1).

<sup>56</sup> WAC 480-109-010(3).

<sup>57</sup> See Declaration of Eric Englert at ¶ 12.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See Declaration of Eric Englert at ¶ 12.

with both PSE's IRP and the Conservation Council's Fifth Power Plan.<sup>62</sup> Prior to filing its Report identifying its ten-year achievable conservation potential and its biennial conservation target pursuant to WAC 480-109-010(3), PSE undertook additional analysis and consideration of the ten-year conservation potential during the month of January.<sup>63</sup> After seeking further public participation, PSE ultimately decided to use the Conservation Council's Fifth Power Plan as its source for the ten-year conservation potential in its Report that was filed January 29.<sup>64</sup> PSE complied with the letter and spirit of the law and implementing rules. There is nothing in the rules or the law that prohibit a utility from further developing and finalizing its ten-year conservation potential in the thirty-day time period after projecting its ten-year potential and before filing its Report.

### **C. Biennial Conservation Target**

#### **1. PSE's Biennial Conservation Target Complies With the Rules and Statute**

38. PSE complied with the requirements of RCW 19.285.040(1)(b) and WAC 480-109-010 in projecting its ten-year conservation potential and establishing a biennial conservation target that is a pro rata share of the ten-year conservation potential. The statute requires the following:

- (b) Beginning January 2010, each qualifying utility shall establish and make publicly available a biennial acquisition target for cost-effective conservation *consistent with its identification of achievable opportunities in (a) of this subsection*, and meet that target during the subsequent two-year period. At a minimum, each biennial target must be no lower than the qualifying utility's pro rata share for that two-year period of its cost-effective conservation potential for the subsequent ten-year period.<sup>65</sup>

39. WAC 480-109-010 requires as follows:

- (2) Beginning January 2010, and every two years thereafter, each utility must establish a biennial conservation target.
  - (a) The biennial conservation target must identify all achievable conservation opportunities.

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<sup>62</sup> See *id.*

<sup>63</sup> See *id.* at ¶¶ 13–14, 17–19.

<sup>64</sup> See *id.*

<sup>65</sup> RCW 19.285.040(1)(b) (emphasis added).

- (b) The biennial conservation target must be no lower than a pro rata share of the utility's ten-year cumulative achievable conservation potential. Each utility must fully document how it prorated its ten-year cumulative conservation potential to determine the minimum level for its biennial conservation target.
- (c) The biennial conservation target may be a range rather than a point target.

40. Both the statute and the rule make clear that the biennial conservation target is derived from the ten-year conservation potential. The statute states that the biennial acquisition target shall be consistent with the utility's identification of its ten-year *achievable opportunities*. The rule requires the biennial target to identify all *achievable opportunities* and states that the biennial conservation target can be no lower than a pro rata share of the utility's ten-year conservation potential.<sup>66</sup> Read together, it is reasonable to conclude that the achievable opportunities in a utility's biennial target are a subset of its achievable opportunities in its ten-year conservation potential. Moreover, the reporting requirement under WAC 480-109-110(3)(b) specifically states that the biennial target is to be created from the utility's ten-year projection: "The report must also clearly state how the utility prorated this ten-year projection to create its two-year conservation target."

41. PSE's Report complies with the statute and rules. PSE's biennial target is a subset of its ten-year conservation potential. PSE used the Conservation Council's target calculator to develop its prorated biennial target.<sup>67</sup> This is consistent with the Conservation Council's methodology.<sup>68</sup>

## **2. The Rules Allow a Utility to Set Its Biennial Conservation as a Range Rather than a Point Target**

42. WAC 480-109-010(2)(c) allows a utility to establish a biennial conservation target this is a range rather than a point target. Moreover, there is no limit on the breadth of the range that a utility may use as a biennial target.

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<sup>66</sup> WAC 480-109-010(2)(a), (b).

<sup>67</sup> Report at 2.

<sup>68</sup> See RCW 19.285.040(1)(a).



43. If the Commission rejects PSE's ten-year conservation potential or its biennial target, PSE anticipates filing a revised report with a biennial target that is a range rather than a point target. The target would range from the prorated share of PSE's conservation potential identified by use of the Conservation Council's plan and the prorated conservation identified through PSE's IRP. For purposes of efficiency, it makes sense for the Commission to rule now on whether PSE may set such a biennial conservation target. Because both the IRP and the Conservation Council's plan are appropriate sources for projecting ten-year conservation potential, and because the statute and rules do not set any limits on the use of a range for the biennial conservation target (other than that it be prorated from the ten-year conservation potential), the Commission should rule that PSE may use such a range for its biennial conservation target.

**3. Penalties Are Triggered Only if Conservation Falls Below the Lower End of an Approved Biennial Conservation Target Range**

44. Because WAC 480-109-010(2)(c) allows a utility to set its biennial conservation target as a range rather than a point target, a utility that sets its target as a range should not be subject to penalties unless its conservation level falls below the lower end of the approved biennial conservation target range. This is consistent with RCW 19.285.060(1), which imposes administrative penalties on a utility that "fails to comply with the energy conservation . . . targets" established by the Act. As long as a utility achieves conservation levels within its target range, it should not be subject to administrative penalties.

45. The Commission rules are silent on this issue. And as discussed above, in the event PSE is required to refile its biennial target, PSE expects to file its revised biennial target as a range, rather than a point target. It is reasonable for the Commission to provide clarity on the issue of administrative penalties prior to such filing so that PSE will have notice of the point at which it may be subject to penalties.

## **D. Other Reporting Issues**

### **1. PSE Properly Involved the Public and Commission Staff in the Development of PSE's Conservation Metrics**

46. Consistent with WAC-480-109-010(3), PSE outlined extensive Public and Commission Staff participation in the development of PSE's conservation metrics. As Public Counsel acknowledges, "PSE did, in fact, engage in a robust public process. PSE's engagement of stakeholders and the public in the development of its conservation programs, potential and targets is well recorded . . . ."<sup>69</sup> Public Counsel and Staff now claim, however, that because PSE's ultimate conservation potential and biennial target did not conform exactly to stakeholders' expectations, this extensive public process did not satisfy the requirements of WAC 480-109-010(3)(a).<sup>70</sup> This argument is untenable. WAC 480-109-010(3)(a) states merely that public participation is "essential." The rule does not prescribe a particular process for participation; it does not prescribe a specific time length for participation; and it does not prescribe a specific end product of participation. The only concrete requirement regarding public participation in WAC 480-109-010(3)(a) is the requirement that a utility outline the extent of such participation in its January 31 report, which PSE indisputably did.

47. Public Counsel and Commission Staff would imply a requirement that utilities give determinative weight to stakeholder input. Such a requirement would be particularly inappropriate in the context of a utility's decision regarding whether to use its IRP or the Conservation Council's plan as the basis for its ten-year conservation potential, given that the Commission's regulations plainly provide that either option is equally acceptable.

### **2. The Additional Program Details Described by Staff Are Not Required by WAC 480-109-010(3)**

48. Commission Staff suggests that each utility must include with its report information including detailed program descriptions; measures, incentives, and eligibility requirements; detailed program budgets; cost-effectiveness standards; projected program cost-effectiveness;

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<sup>69</sup> Comments of Public Counsel at p. 4

<sup>70</sup> *Id.* at pp. 3–6; Staff Comments at p. 6.

evaluation plan; annual and quarterly progress reports; and cost-recovery tariffs.<sup>71</sup> WAC 480-109-010(3) contains no such informational requirements, however. The rule provides simply that the report must (1) identify the utility's ten year conservation potential and biennial target; (2) outline the extent of public and commission staff participation in the development of these conservation metrics; (3) identify whether the conservation council's plan or the utility's IRP was the source of the ten-year conservation potential; and (4) clearly state how the utility prorated its ten-year conservation potential to create its biennial target.<sup>72</sup> Only if the utility uses its IRP to derive the ten-year conservation potential must the report include additional information.<sup>73</sup>

49. The language in RCW 19.285.040(1)(e) that "[t]he commission may rely on its standard practice for review and approval of investor-owned utility conservation targets" should not be interpreted as requiring PSE to include all the detail behind its conservation program in its biennial target filing as Commission Staff asserts. As discussed above, the rules adopted by the Commission do not require such detail to be included in the biennial filing. Indeed, PSE has already filed this detailed information with the Commission in its November 30, 2009 filing and its February 2010 filing. Requiring this information to be filed in the biennial report would be duplicative and is not required by the express language of the Commission's rules.

50. Commission Staff further asserts that, if a company relies on the Conservation Council's current plan to calculate its ten-year conservation potential and biennial target, the Council's target is only a "starting point" and "there is a need to supplement that value with direct-use of gas programs, actual agricultural pumping, and measures that are implemented by the company that do not match well the Counsel menu of conservation measures."<sup>74</sup> Again, this is inconsistent with the plain language of the rule that allows the utility's conservation potential to be derived from and reasonably consistent with the "utility's proportionate share, developed as a percentage of its retail sales, of the conservation council's current power plan targets for the state of

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<sup>71</sup> Staff Comments at p. 3.

<sup>72</sup> WAC 480-109-010(3).

<sup>73</sup> See WAC 480-109-010(3)(c).

<sup>74</sup> Staff Comments at p. 5.

Washington."<sup>75</sup> As detailed in PSE's Report, PSE used the Conservation Council's Target Calculator that was posted on its website on January 27, 2010 to determine its ten-year conservation potential.<sup>76</sup> PSE used Option #2 of the Target Calculator, which, according to the Conservation Council, calculates a "target based on utility share of total regional retail sales by sector."<sup>77</sup> PSE used the two specific years (2010 and 2011) as listed on the Conservation Council's calculator.<sup>78</sup> Thus, PSE's conservation potential, biennial target and Report comply with WAC 480-109-010 and RCW 19.285.040 because the ten-year potential uses methodologies consistent with those used by the Conservation Council,<sup>79</sup> the biennial conservation target is a pro rata share for *that* two-year period (2010–2011)<sup>80</sup> and PSE's Report documents the source of its ten-year conservation potential and how it prorated its ten-year conservation potential to determine its biennial conservation target.<sup>81</sup>

## VI. CONCLUSION

51. The Commission should determine that PSE's Report complies with Chapter 480-109 WAC and Chapter 19.285 RCW. PSE initially identified its ten-year conservation potential using both its IRP and the then-current plan of the Conservation Council. Prior to filing its biennial Report, PSE engaged in additional analysis of its conservation potential and decided to use the Conservation Council's plan as the source of its ten-year conservation potential. PSE properly prorated its ten-year conservation potential, using the conservation calculator on the Conservation Council's website. PSE timely filed its Report, and documented the public participation in the development of its conservation potential and biennial target. Accordingly, the Commission should grant PSE's motion for summary determination,

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<sup>75</sup> WAC 480-109-010(1)(b)(ii).

<sup>76</sup> See Report at 2.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See RCW 19.285.040(1)(a).

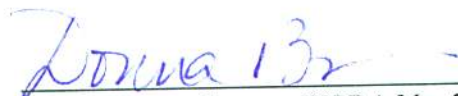
<sup>80</sup> See RCW 19.285.040(1)(b); WAC 480-109-010(2)(b).

<sup>81</sup> See WAC 480-109-010(2)(b).

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