

CTED Draft Rules – Updated July 17, 2007 -- Energy Efficiency

Comments of the NW Energy Coalition and Northwest Energy Efficiency Council August 15, 2007

NWEC and NEEC submit these comments in response to CTED's July 17 Draft Rules to implement the Energy Independence Act, RCW 19.285 ("Draft Rules"). The following comments are specific to the energy efficiency provisions in the Draft Rules. As always we appreciate the opportunity to provide written comments and to participate in the stakeholder meetings.

I. Introduction

The May 1, 2007 draft rules included a set of "key principles" as reference points during discussions of draft rule language:

- Rules should support the overall purpose of the initiative.
- Rules should encourage innovation and stretch goals.
- Rules should encourage the most efficient implementation of cost-effective conservation within a utility's service territory.
- Rules should allow for the uniqueness of Qualifying Utility circumstances.
- Rules should focus on documentation requirements that make it simple for the State Auditor to determine a utility's compliance with the law.
- Rules should allow for improvement over time.
- Rules should support the public's access to each utility's decision-making process as it relates to the implementation of this statute.

In addition to these key principles, we believe that the final rules should be straightforward and encourage prudent and compliant utility conduct. The following comments reflect these guidelines.

There are four important, substantive issues related to implementation of the conservation provisions that are not properly addressed in the Draft Rules yet are important to meeting the key principles listed above.

First, the Draft Rules should allow CTED to update the conservation targets based upon the most recent Northwest Power and Conservation Council (Council) Power Plan as the Council updates its plan every five years.

Second, the Draft Rules should maintain a very narrow definition of "consistent with" the Council methodologies in order to provide clear guidance and consistency across all the qualifying utilities.

Third, the Draft Rules provide a utility with the option to decide whether or not to include distribution and production efficiency opportunities in its biennial conservation target. Yet the

Rules do not clarify that any savings from production and distribution measures can not displace the end use customer conservation acquisition obligations as outlined by the Council methodology and adopted as part of the utility's ten-year and biennial targets.

Fourth, the Draft Rules allow utilities under certain circumstances to retrospectively reduce their conservation targets to avoid paying a penalty for shortfall. The statute does not provide a *force majeure* clause related to meeting the conservation standard or any other authority for an after the fact reduction in a utility's conservation target.

Our comments discuss the four key issues raised above; each discussion includes proposed rule language. Then we discuss other issues that should be addressed in the rulemaking by rule number; again, each discussion includes proposed rule language.

II. Key Conservation Compliance Issues

A. CTED Use of Most Recent Council Plan

We understand certain utility interests believe it would be unlawful for CTED to “automatically” update its rules to ensure that utilities are identifying their “achievable cost-effective conservation potential” under “methodologies consistent with” future publications of the Council's regional power plans. We even have heard argument that CTED is banned from conducting future rulemaking proceedings to update its administrative rules after the Council publishes its 6th, 7th, and later plans. These allegations miss the fundamental workings of RCW 19.285.040.¹

The utilities' sweeping allegations of unconstitutionality seem to stem from two theories (1) that RCW 19.285.040 and/or CTED's rules would require them automatically to comply with unknown future requirements of federal law, thus impairing procedural due process rights of notice and comment; or (2) that Washington has somehow delegated rulemaking authority to the federal government. Neither theory is correct.

First, RCW 19.285.040 does not automatically incorporate any future federal statutes, rules, or other requirements at all. It is true that “*adoption of future* federal rules, regulations or statutes would be an unconstitutional delegation of legislative power.” *State v. Readers Digest Association, Inc.*, 81 Wash.2d 259, 275 (1972) (emphasis in original). But the Energy Independence Act does no such thing. The statute instead uses the Council's regional power plans as a technical guide and benchmark for determining conservation potential for qualifying utilities in Washington. The Act allows utilities to *use a range of methodologies* to identify their 10-year conservation potential, so long as those methodologies are “consistent” with

¹ RCW 19.285.040 is presumed to be constitutional. *Diversified Investment Partnership v. DSHS*, 113 Wn.2d 19 (1989) (“A statute is presumed constitutional and the party challenging it has the burden to prove it is unconstitutional beyond a reasonable doubt”) (*citing State v. Brayman*, 110 Wn.2d 183, 193, 751 P.2d 294 (1988)). CTED's task here is to faithfully implement the plain language of the statute.

methodologies used in the most recently published Council regional power plan. Thus, RCW 19.285.040 is more akin to the statute comfortably upheld in *State v. Readers Digest Association, Inc.*, which provided that Washington’s courts are to be guided by federal precedents in implementing the state’s consumer protection laws, but left the ultimate decision up to the state courts.

Indeed, the type of reference to federal authority found in RCW 19.285.040(1)(a) is commonplace in Washington law. For instance, a 2003 addition to Washington’s water quality laws allows the state department of agriculture to be delegated authority to issue “rules, permits, programs, and directives” for water quality limitations at animal feeding operations, and requires: “Adoption or issuance and implementation shall be accomplished so that compliance with such animal feeding operation and concentrated animal feeding operation rules, permits, programs, and directives will achieve compliance with all federal and state water pollution control laws.” RCW 90.48.260.

Nor does the Energy Independence Act serve as an unlawful delegation of legislative power. The obvious purpose of RCW 19.285.040’s reference to Council’s regional power plans is to ensure Washington’s diverse utilities conduct their analyses of conservation potential in a consistent manner, and in accord with accepted tools of the trade. This type of “legislative shorthand” is perfectly acceptable, and commonly used in different areas of Washington law.

As the Washington Supreme Court said in *Diversified Investment Partnership*, “Although purely legislative powers are nondelegable, the Legislature may delegate administrative power to fill in the interstices of the law if the Legislature defines generally what is to be done, which administrative body is to accomplish the specified purposes, and what procedural safeguards are in effect to control arbitrary administrative action.” 113 Wn.2d at 25 (citing *Hi-Starr Inc. v. Liquor Control Board*, 106 Wn.2d 455, 458 (1986), and *Barry & Barry Co. v. DMV*, 81 Wn.2d 155, 159 (1973)). The law recognizes that “constitutionally permissible delegations of administrative power concerning the application of the law may take the form of interstitial administrative action or contingent legislation.” *Id.* (citing L. Tribe, *American Constitutional Law* § 5-17, at 362 (2d ed. 1988)). RCW 19.285.040 clearly defines what is to be accomplished by the utilities: pursue all cost-effective conservation. The statute defines the key terms “cost-effective” and “conservation,” and also references the methodologies in the Council’s regional plans to identify conservation potential.

CTED’s proposed implementation of RCW 19.285.040 provides procedural safeguards for utilities. The draft rules are clear that the methodologies in the Council’s 5th Plan are the current guideposts for identifying conservation potential. Proposed WAC 194-37-050 (1). In order to update the conservation potential methodologies to those used in the Council’s 6th Plan, CTED will be required to conduct a rulemaking proceeding, and all utilities will have more than ample opportunity to present their views on the methodologies proposed and used in that 6th Plan.² In short, the Energy Independence Act builds in more than ample procedural safeguards. CTED

² It is also worth noting that each Council regional plan is prepared pursuant to an extensive public process, wherein each Washington utility will be expressly notified, invited, and given multiple opportunities for comment; and that the Council itself includes two representatives appointed by the Washington Governor.

has the plain authority to update its rules to ensure the most recent Council plans are used to identify 10-year conservation potential and 2-year conservation targets.

B. Consistency with the Power and Conservation Council Methodology

There are two central issues here: the first is what does “consistent with” really mean and what is considered a methodology vs. an assumption or input? The second is how does the interpretation of “consistent with” apply to the determination of avoided cost.

On the first point, RCW 19.285.040 (1)(a) requires utilities to identify their achievable cost-effective conservation potential “using methodologies consistent with those used by the Pacific Northwest electric power and conservation planning council in its most recently published regional power plan”. The context of much of the rulemaking for conservation turns on the requirements associated with this statutory language. In the context relevant to RCW 19.285.040 (1)(a), Webster’s Third New International Dictionary defines “consistent” as “marked by agreement and concord” or “coexisting and showing no noteworthy opposing, conflicting, inharmonious, or contradictory qualities or trends.” The term “methodology” is defined in Webster’s to mean “a body of methods, procedures, working concepts, rules, and postulates employed by a science, art, or discipline” or “the processes, techniques, or approaches employed in the solution of a problem or in doing something : a particular procedure or set of procedures.” Comments received by CTED at public meetings and in written form from other stakeholders have expressed a desire to stray from the common sense definition of these terms to develop rules that are overly flexible in application resulting in conservation processes and outcomes that do not adhere in principle or form to the practices and procedures used by the Council. This rule development process should not be a negotiation forum by which parties express their desire for how they wish the statute to have been written, but instead one in which guidelines for action are established that are consistent with the actual statutory language.

Specifically, this is evident in the proposed rules that describe avoided cost (WAC 194-37-050 (2)(G)(i)(b)). Council’s methodology for assessing avoided cost is clear and has been articulated directly to CTED and stakeholders by Council conservation staff. Avoided cost is a market price that does not include either a utility’s own embedded resources or Bonneville Power Administration rates. The July 17 Draft Rule at WAC 194-37-050(2)(G)(i)(b) deletes the previously included language that made this point specifically.

Avoided cost is a critical component in determining cost-effectiveness. CTED’s July 12 draft of the avoided cost language, distributed to a subset of conservation workgroup members, indicated that the then newly proposed avoided cost language was “based in the definition of cost-effective in the law which references the definition in the Power Act and the Council methodology.” While the Draft Rules differ in some respects from the July 12 draft, the first sentence is very similar and we assume the same rationale is being applied. It is important to recognize that RCW 19.285.030 (5) references RCW 80.52.030 for the definition of cost-effective. The definition in RCW 80.52.030 derives from the definition of cost-effective (at 839a(4)(a)) in the Pacific Northwest Electric Power Planning and Conservation Act of 1980 – the statute that created the Council.

The term “incremental” is central to the RCW 80.52.030 definition of “cost-effective”: “Cost effective means that a project or resource is forecast: . . . (b) To meet or reduce the electric power demand of the intended customers at an estimated incremental system cost no greater than that of the least cost [similar alternative resource].” That term, by its dictionary definition (Webster’s defines “incremental” as “of, relating to, constituting, or resulting from increments, increase, or growth”) and common usage in the energy industry (such as through estimation of avoided costs under PURPA) seeks to identify the cost of the marginal resource that is procured to serve load growth, not the embedded costs of serving existing load.

The Council must follow the provisions of that statute when developing its regional plan. Thus, the analysis in the Fifth Power Plan must be consistent with the definition of cost-effective in the 1980 Act – and therefore its methodology to equate avoided cost with market price is consistent with that Act. The Council does not include utility embedded resources or BPA federal hydropower resources in its market price, and utilities should be specifically restricted from doing so as well. Indeed, if the Council had used embedded resources or BPA federal hydropower resources to calculate avoided cost, it would have identified **significantly less** conservation potential in the region. We submit that if a proposed methodology to identify conservation potential leads to such a radically different result from the Council, it simply cannot be deemed to be “consistent with” Council’s methodology. Using such inconsistent methodologies would violate both the intent and the plain language of the Energy Independence Act.

Proposed Revised Rules

194-37-050 Documenting Conservation Targets

(2)(G)(i)(b) Avoided costs equal a forecast of market prices, which represents the cost of the next increment of similarly available and reliable power supply available to the utility for the life of the energy efficiency measures to which it is compared. Avoided cost shall not be based upon the cost of a utility’s own embedded resources or a Bonneville Power Administration rate of general application that includes the hydroelectric resources of the federal base system as defined by 16 USC 839a. A utility may rely on the NWPCC’s most current calculation of avoided costs or may calculate its own forecast of market prices to determine avoided costs.

C. Distribution and Production Efficiency

The central mandate of RCW 19.285.040 (1) requires utilities to “pursue all available conservation that is cost-effective, reliable, and feasible.” RCW 19.285.030(4) defines the term “conservation” as “any reduction in electric power consumption resulting from increases in the efficiency of energy use, production, or distribution.” CTED rules implementing this provision must remain faithful to these central terms. We support the Draft Rule language that allows utilities to capture production and distribution energy savings in addition to the end use customer conservation targets.

Because the Council's Fifth Plan focused on end-user conservation potential, and did not evaluate production and distribution efficiency improvement at all, a minor question arises as to how distribution and production efficiency improvements should be documented for purposes of identifying 10-year conservation potential under RCW 19.285.040(1)(a) and 2-year conservation targets under RCW 19.285.040(1)(b).

That said, the core "methodology" used in the Fifth Plan for determining cost-effectiveness can be applied to identify 10-year conservation potential and 2-year conservation targets for distribution and production savings. As described above, that core methodology is the establishment of a market-based avoided cost to determine the cost-effectiveness of conservation measures.

Utilities that choose to include production and distribution efficiency improvements in their target must ensure that this assessment is additive to their estimates of end-use improvements. CTED rules must not allow production and distribution efficiency improvements to dilute or reduce end-use conservation potential. Any CTED rule that allows utilities to escape the core requirement of RCW 19.285.040(1) (to acquire all cost-effective conservation from end-use, production, and distribution sources) would be unlawful.

The Draft Rules appropriately require a utility to distinctly document the portion of the 10-year potential and biennial target due to each of end-use, production, and distribution efficiencies.

Proposed Revised Rules

194-37-050 Documenting Targets

(2)(A) A utility shall use the Conservation Calculator, the Modified Conservation Calculator or the Utility Specific Analysis to establish the end-use conservation portion of its ten-year conservation resource potential and biennial conservation target. For a utility that includes production and or distribution efficiency measures in its ten year conservation resource potential and its biennial conservation target, it will use the Utility Specific Analysis to establish the production and distribution portion of its ten-year conservation resource potential and biennial conservation target for production and or distribution efficiencies. A utility's ten-year conservation resource potential shall be the combined total of all cost-effective achievable conservation in end-use, production and distribution available to that utility.

That portion of a ten-year resource conservation potential ~~and or~~ and biennial conservation target by a utility that includes calculations of efficiency gains from utility production and or distribution efficiency measures as a portion of the potential or target shall carry the stamp of a registered professional engineer licensed by the Washington Department of Licensing.

194-37-060 Documenting Savings

(1)(a) Conservation savings in the production and distribution measures beyond that forecasted in the biennial target, cannot be used to meet the full biennial target if it results in the failure of capture of all cost effective savings in the end use customer measures.

(2) A measure or program can be reported as “conservation” if it demonstrates the following: ... (C) Meets the definitions of conservation and of cost effective as contained in WAC 194-37-030, and ...

D. Before and After the Fact Adjustment of the Conservation Target

We see nothing in the statutory language that provides for the reduction of a conservation target from the pro-rata share of the 10 year conservation resource potential as proposed in WAC 194-37-050 subsection (2)(E)(ii). While the Department has argued that a utility service territory may not exactly mimic the “regional composite”, it has also provided two additional methods that account for variation among utilities. As such, we do not support, nor see the permissive statutory language that allows for, a reduction in conservation targets from 100% of cost effective and achievable conservation to 95%.

WAC 194-37-060 (10) provides utilities with the ability to retrospectively reduce their biennial conservation targets. This subsection of the rules creates an exemption from RCW 19.285.040 which does not exist in the statute, and therefore must be struck.

RCW 19.285.040 (1) is clear that each utility “shall pursue all available conservation that is cost-effective, reliable, and feasible,” and shall develop 10-year conservation potential assessments and biennial conservation targets to accomplish this goal. In providing an enforcement mechanism, RCW 19.285.060 (1) states, “Except as provided in subsection (2) of this section, a qualifying utility that fails to comply with the energy conservation or renewable energy targets established in RCW 19.285.040 shall pay an administrative penalty to the state of Washington in the amount of fifty dollars for each megawatt-hour of shortfall.” Subsection (2) then references the three alternative compliance paths available to utilities in meeting the **renewables** standard: the 1% cost cap for utilities without load growth in RCW 19.285.040(2)(d), the *force majeure* clause applicable to the renewable energy target in RCW 19.285.040(2)(i), and the standard 4% cost cap in RCW 19.285.050(1). The statute does not provide any *force majeure* provision or other exception for shortfall in meeting the conservation standard. The rules therefore exceed the authority of the statute by providing utilities with a mechanism for reducing their conservation targets retrospectively to avoid paying a penalty for shortfall. CTED simply has no authority under the statute to create an exemption from RCW 19.285.040(1), when the Energy Independence Act did not create such an exemption.

Moreover, as drafted the proposed rule at WAC 194-37-060 (10) is unworkable as a practical matter, and invites legal disputes about the feasibility or infeasibility of conservation measures, whether the targeted customers were “likely to achieve savings,” what constitutes making an offer “directly to the customers,” and what constitutes a “good faith effort to persuade the customer(s) to install the conservation measure.” In short, this provision violates the Energy Independence Act.

Proposed Revised Rules

194-37-050 Documenting Development of Targets

(2) E. ii. Any utility that publishes a ten-year conservation resource potential and biennial target with the end-use portion of its target equal to or higher than ~~95%~~ 100% of its target calculated using the conservation calculator has effectively documented its biennial target setting requirement for the end-use efficiency portion.

194-37-060 Documenting Savings

Strike subsection (10) in its entirety.

III. Other Conservation Issues

WAC 194-37-030 Definitions

(4) With regard to the definition of “Available”, we note that the word available is used again in the definition itself. This should be modified to avoid confusion.

(7) Clarify that the term “Power Plan” in the definition of Conservation Calculator refers to the most recently published Plan.

(8) Cost-effective is defined in RCW 19.285.030 as having the same meaning as defined in RCW 80.52.030. RCW 80.52.030 defines the term “cost-effective” as indicated in the Draft Rules. However, the Draft Rules are missing the accompanying definition of the term “system cost.” That term is included in the referenced statutory definition of cost-effective. If these Draft Rules include the definition of cost-effective from that statute rather than simply referencing the statute, they must also include the definition of system cost (either within the definition of cost-effective, or separately).

(18) The definition of NWPPC also should refer to the short name “Northwest Power and Conservation Council.”

(22) We recommend a grammatical change to clarify this definition.

Proposed Revised Rules

(4) “Available” means, in the context of conservation resource assessments and conservation potential, the conservation measure is a proven technology ~~available from~~ provided by vendors in the Pacific Northwest.

(7) “Conservation Calculator” means a spreadsheet or piece of software developed by the ~~Pacific Northwest Electric Power and Conservation Planning Council (NWPPC)~~ that can determine a utility’s ten-year conservation resource potential and two-year biennial

conservation target. The conservation calculator employed by NWPCC shall be deemed to be consistent with the most recently published Power Plan. It is available at www.nwcouncil.org.

- (8) “Cost-effective” means that a project or resource is forecast:
- A. To be reliable and available within the time it is needed; and
 - B. To meet or reduce the electric power demand of the intended consumers at an estimated incremental system cost no greater than that of the least-cost similarly reliable and available alternative project or resource, or any combination thereof. “System Cost” means an estimate of all direct costs of a project or resource over its effective life, including, if applicable, the costs of distribution to the consumer, and, among other factors, waste disposal costs, end-of-cycle costs, and fuel costs (including projected increases), and such quantifiable environmental costs and benefits as are directly attributable to the project or resource.

(18) “NWPCC” means Pacific Northwest Electric Power and Conservation Planning Council, also known as the Northwest Power and Conservation Council.

(22) “Reliable” means, in the context of conservation resources, that the annual energy production from a conservation measure including those regarding operator behavior can be estimated using generally recognized engineering principles ~~including those regarding operator behavior.~~

WAC 194-37-040 Conservation Reporting Requirements

With regard to subsection (1), the Draft Rules provide flexibility in the tracking mechanism used by a utility to report its annual and biennial conservation achievements. While we appreciate that flexibility would be limited to systems approved by CTED, we nevertheless have concerns with deviating from use of a single approved system. According to the key principles, “rules should focus on documentation requirements that make it simple for the State Auditor to determine a utility’s compliance with the law.” The more utilities diverge in how they report information to CTED and the Auditor, the more difficult it will become for that information to be properly analyzed and assessed in determining compliance with the law.

Proposed Revised Rules

(1) Each utility will use the tracking system of the NWPCC’s Regional Technical Forum “Planning, Tracking and Reporting System;” ~~or an alternative reporting system approved by the department~~ to report ~~their~~ its annual and biennial local conservation achievements. Each utility can report using the default values embedded in the NWPCC’s Planning, Tracking and Reporting System or the utility may use its own inputs as documented per WAC 194-37-060 (2) (D), WAC 194-37-060 (8), and WAC 194-37-060 (9). A summary of this reported data, including savings by customer class, will be included in the annual report to the department.

WAC 194-37-050 Documenting Development of Conservation Targets

Does subsection (2)(A) intend to allow a utility to use the NWPCC's conservation calculator to determine end-use conservation potential, then use the utility specific analysis to determine additional savings from production and distribution? Or does it intend for a utility to only be able to include production and distribution savings if its entire analysis is based on the utility specific approach? And how does the modified conservation calculator work in this regard? CTED needs to clarify this section.

With regard to subsection (2)(B), the first sentence ("A utility deducts all cost-effective conservation captured in each biennium, starting in 2010, from its future conservation resource potential") should be struck. Of the three methods for determining conservation potential and biennial targets, only the Conservation Calculator (standard or Modified) method requires that a utility deduct biennial conservation gains from its computed 10 year conservation potential. For utilities that choose to use the Utility Specific Analysis method, their subsequent "ground up" resource potential assessments will naturally account for prior conservation achievements. The Utility Specific Analysis method is a dynamic model.

With regard to subsection (2)(G)(i)(h), the achievable potential for "lost opportunity" resources should read 65%.

Proposed Revised Rules

(2) B. ~~A utility deducts all cost-effective conservation captured in each biennium, starting in 2010, from its future conservation resource potential.~~ If a utility is establishing its 10-year resource potential or biennial conservation target using the Conservation Calculator, it deducts this achievement from its share of the NWPCC's conservation resource potential.

(2) G. i. h. Use of the NWPCC's twenty-year achievable conservation penetration rates of 85% for retrofit measures and ~~60~~ 65% for new construction or long-lived product measures.

WAC 194-37-060 Documenting Savings

Subsection (2) requires clarification in the introductory clause and in subpart (D).

Subsection (4)(C) requires clarification with regard to treatment of conservation savings due to codes and standards. The current language is ambiguous, implying with use of the word "deduct" that a utility could double-count the savings achieved through codes and standards. Instead, the language needs to be clear that a utility's future conservation potential is less than it otherwise would have been if the newly adopted codes and/or standards had not been implemented.

As discussed with regard to WAC 194-37-040 (1), subsection (9) should refer solely to use of the Regional Technical Forum's "Planning, Tracking and Reporting System" to provide the Auditor with consistency in savings documentation across utilities.

With regard to use of high efficiency cogeneration in meeting a utility's conservation target, subsection (11) needs to specify that the incremental savings achieved can be counted only in the

first year of operations of the facility. RCW 19.285.040(1)(c) specifies that savings will be “counted towards meeting the biennial conservation target in the same manner as other conservation savings.” In accordance with commonly accepted methodologies, including those used by the Council, conservation savings are counted in the first year of program implementation based on the number of units expected to be delivered multiplied by the expected savings per unit. Thus, the rules must clarify that a utility can only count the savings in the year in which the cogeneration facility comes on line.

Proposed Revised Rules

(2) A measure or program can be reported as “conservation” if ~~it~~ the utility can demonstrates the following: ...

(D) The NWPCC includes the measure or program in its power plan, or the measure or program is not identified by the NWPCC, but it meets the definitions of cost-effective in RCW 19.285.030, and the utility included the conservation resource in the analysis and results of integrated resource plan pursuant to RCW 19.280.030 and its conservation targets pursuant to RCW 19.285.040.

(4) C. Savings from new federal minimum energy efficiency standards or Washington State building energy code improvements or state appliance codes and standards, as proportionate to their utility’s service territory, towards meeting a biennial conservation target in the biennium in which they become effective. After that biennium, ~~utilities deduct these~~ a utility may no longer count savings from those specific codes and/or standards in its conservation resource potential assessment. and from the utility’s next 10-year conservation target as captured conservation that is no longer available potential.

(9) Conservation savings from utility programs beginning in 2010 for custom measures shall be developed pursuant to the NWPCC’s Custom Requirements available through the Regional Technical Forum’s “Planning, Tracking and Reporting System.” ~~or through a similar analytical framework approved by the department.~~

(11) A utility may count towards the utility’s biennium end-use conservation target, during the first ~~biennium~~ year of the high efficiency cogeneration facility’s operations, high efficiency cogeneration owned and used by a retail electric consumer to meet the consumer’s heat and power needs. ...