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November 16, 2007

Howard Schwartz
Washington Department of Community,
Trade and Economic Development
PO Box 43173
Olympia, WA 98504-3173

Re: Chelan PUD's response and comments to CTED proposed rules for the Energy Independence Act
E-filed to howards@cted.wa.gov and carolees@cted.wa.gov

Dear Howard:

Thank you for the opportunity to comment on Washington State Department of Community, Trade and Economic Development's (CTED) proposed rules for implementing the Energy Independence Act. We appreciate all of the efforts being made by CTED to solicit, collect and compile input from interested parties with many different viewpoints. Chelan PUD has reviewed the October 3, 2007 CR-102 Proposed Rule Making, focusing on potential discrepancies between it and the initiative, and we have suggested ways that the draft rule could be brought into conformance with the statute. Our primary purpose for doing so is to protect our customers from regulatory requirements and constraints that are not based upon the language of the initiative and either do not add value or restrict the flexibility afforded utilities by the initiative.

Chelan PUD appreciates the modifications CTED has made to the draft rules in response to our previous comments dated March 20, May 29, and August 15, 2007, each of which are included herein by reference. In particular, we appreciate that CTED dropped its highly restrictive definition of "feasible," eliminated "discrete" from the definition of "conservation," and dropped the provision that would have barred a utility from counting conservation measures identified after its conservation targets were established.

However, we continue to have major concerns as to both the conservation-related provisions and the renewables-related provisions of the draft regulations. As to the conservation-related provisions, our concerns are that: (1) the rules continue to misconstrue the initiative's requirement that utilities identify conservation measures using methodologies "consistent with" those used by the Northwest Power Planning Council ("Council"); (2) the rules continue to unlawfully delegate authority to the Council regarding the methodology used to establish conservation targets; (3) the rules do not provide sufficient flexibility to accommodate a consumer-owned utility's obligations with respect to the expenditure of public funds pursuant to the Washington State Constitution; (4) the rules will cause consumer-owned utilities to spend their limited time and resources on meeting the bureaucratic and complicated documentation requirements, rather than focusing on evaluating and implementing appropriate conservation measures; and (5) certain important provisions must not be removed, as was suggested by other interested parties at CTED's November 9 public hearing.

As to the renewables-related provisions, our concerns are that: (1) the draft regulations do not provide sufficient flexibility regarding the timeframe within which utilities must demonstrate compliance with the RPS percentage requirements; and (2) certain important provisions must not be removed, as was suggested by other interested parties at CTED's November 9 public hearing.

Each of these concerns are addressed below, and reflected in the enclosed redline of the draft rules. We appreciate your consideration of both our comments and the corresponding suggested edits. Please note that there are some relatively minor suggested edits that are not addressed in this letter.

A. Conservation-Related Issues

1. The Draft Regulations are Contrary to and Violate Key Provisions of the Initiative

(a) The Statute is clear in its language and intent.

We remain concerned regarding CTED's interpretation of RCW 19.285.040(1), the key provision relating to conservation. The statute specifically provides in part that:

> "(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. At least every two years thereafter, the qualifying utility shall review and update this assessment for the subsequent ten-year period.

> (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…" (Emphasis added).

This statutory provision accomplishes the following:

First, it takes a "bottom-up" rather than a "top down" approach to pursuing conservation. It does so by placing the responsibility for pursuing all "cost-effective, reliable, and feasible" conservation on each qualifying utility, not on CTED or the Council. In order to determine what is "cost-effective, reliable, and feasible," each qualifying utility must apply professional judgment based on its specific facts and circumstances.

Second, consistent with a bottom-up approach, it provides qualifying utilities with substantial flexibility to make appropriate decisions. The initiative mandated specific percentages with respect to renewables, but did not do so with respect to conservation. It also could have mandated that each qualifying utility achieve its pro rata share of the regional conservation goal established by the Council in its Fifth Power Plan, but it did not do so.

Third, consistent with a bottom-up, flexible approach, the statute provides only a very limited role for the methodologies used by the Council. RCW 19.285.040(1) provides for a two-step process. First, under subsection (a), each qualifying utility is to "identify its achievable cost-effective conservation potential…." In doing so, the utility is required to use methodologies "consistent with" those used by the Council; but there is no statutory requirement that a utility use the same methodologies as the Council. Second, under subsection (b), each qualifying utility establishes its acquisition target consistent with the utility's identification of achievable opportunities under subsection (a) but it need not be consistent with any methodology used by the Council. In other words, pursuant to the statute, the Council's methodologies play a limited role when a qualifying utility is identifying its conservation potential, and no role when a utility is establishing its acquisition target. In fact, the only mention of the Council in the initiative is in RCW 19.285.040(1)(a) relating to the identification of achievable cost-effective conservation potential.

(b) The proposed rules are contrary to the clear language and intent of the statute.

The proposed regulations largely ignore these principles, and instead impose a top-down, inflexible approach that interjects the Council's methodologies into the conservation-related work of qualifying utilities to the greatest extent possible. The draft includes three options regarding conservation, but each of them effectively binds the discretion and judgment of qualifying utilities to an extent far beyond that which is allowed by the initiative.

The first option is the Conservation Calculator Option. This option provides that a qualifying utility "will document its calculation of its pro rata biennial conservation targets based on its

share of regional load ***using the*** NWPCC's conservation calculator." WAC 194-37-070(4)(a). (Emphasis added). This proposed rule is contrary to and violates RCW 19.285.040(1) in two respects. First, instead of requiring that qualifying utilities use methodologies "consistent" with those used by the Council, it simply requires the utility to use the Council's conservation calculator. More importantly, this provision effectively dictates each qualifying utility's conservation target. According to the description of the conservation calculator on the Council's website:

> The purpose of this calculator is to provide utilities with a simple means to compute "their share" of the Northwest Power and Conservation Council 5th Plan's regional conservation target. This calculator is intended to provide utilities with an "approximation" of the level of conservation they should target in order to be consistent with the Council's regional goals.

This directly contravenes RCW 19.285.040(1)(b), which, as described above, provides that qualifying utilities are to "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**,…." (Emphasis added.) Nothing in the initiative even remotely suggests that qualifying utilities are to establish their conservation target by simply plugging numbers into the Council's conservation calculator to determine their share of the Council's regional conservation goal.

The Conservation Calculator Option removes any doubt as to its purpose by further providing that a utility that publishes a ten-year conservation target with the customer sector portion "equal to or higher than its target calculated using the conservation calculator has effectively documented its biennial target setting requirement for customer conservation." WAC 194-37-070(4)(b). At least implicitly, a qualifying utility that establishes a target of ***less than*** that calculated using the conversation calculator ***has failed to effectively document*** its target setting requirement. In other words, a qualifying utility must not only use the conservation calculator to establish its conservation target, but it must also meet or exceed its share of the Council's regional conservation goal, as determined by the conservation calculator.

The second option is the Modified Conservation Calculator Option. As its name suggests, it too requires qualifying utilities to use the Council's conservation calculator for purposes of establishing conservation targets. Thus, it violates RCW 19.285.040(1) for the same reasons that the Conservation Calculator Option does. The only difference with the "modified" option is that a qualifying utility is allowed to make seven specified "adjustments" to the Council's conservation calculator based on the factual circumstances of the utility. For example, the utility can "increase or decrease load growth rates." Although allowing some adjustments is preferable to not allowing any adjustments, this does not obviate the fact that this option requires qualifying utilities to use the Council's conservation calculator to set targets.

The third option is the Utility Analysis Option. Although this option purports to only require that conservation targets be established using an analytical methodology "consistent with" 15

detailed Council procedures, it violates the statute for much the same reasons as the other two options: by requiring more than consistency with Council methodologies, and by requiring qualifying utilities to use Council methodologies in establishing their conservation targets.

For example, this proposed option mandates that utilities "Include a ten percent bonus for conservation measures as defined in 16 U.S.C. §839a of the Pacific Northwest Electric Power Planning and Conservation Act." WAC 194-37-070(6)xiii. This language lends itself to only one interpretation: utilities must include bonuses in the very same way the Council does.

Similarly, this option attempts to dictate each utility's estimated customer conservation penetration rates by citing the penetration rates that the Council has found achievable:

> The NWPCC's twenty-year achievable penetration rates are eighty-five percent for retrofit measures and sixty-five percent for lost opportunity measures achieved through a mix of utility programs and local, state and federal codes and standards. The NWPCC's ten-year achievable penetration rates are sixty-four percent for non-lost opportunity measures and twenty-three percent for lost-opportunity measures; the weighted average of the two is a forty-six percent ten-year achievable penetration rate; WAC 194-37-070(6)xii.

The message is clear: those utilities that include lower estimates of customer conservation penetration rates than the Council may be found to have not satisfied the requirements of the Utility Analysis Option; otherwise, why include these specific Council methods in the regulations?

(c) How the proposed rule could comply with the statute.

Instead of these three options, CTED should, as we've suggested in our earlier comments, adopt the approach taken by the Washington Utilities and Transportation Commission (WUTC) in its draft regulations implementing the investor-owned utility provisions of the same statute. The WUTC draft rule provides that: "When developing this projection [of its ten-year conservation potential], 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 rationale for the modification, alter the Council's methodologies to better fit the attributes and characteristics of it service territory." WAC 480-109-010(i).

Although the reference to the "most recent regional power plan" gives rise to the unconstitutional delegation problem discussed in the following section of our comments, that can easily be remedied by substituting the "Fifth Power Plan." Otherwise, this language is fully consistent with both the initiative and the Washington State Constitution. Such an approach reflects both the language and spirit of the initiative's requirement that a utility use methodologies that are "consistent with" those used by the Council when identifying conservation potential, but need not do so when establishing conservation targets. This approach would provide the level of

flexibility and decision-making afforded to a consumer-owned utility as provided in the initiative.

2. Portions of the Draft Regulations Would Delegate Legislative Authority in a Manner that Violates the Washington State Constitution

As noted in our earlier comments, the "most recently published" regional power plan should be interpreted in the regulations as the Council's Fifth Power Plan, which existed at the time that the initiative passed. Draft regulations that depend on future power plans or new requirements developed by the Council after passage of the initiative, are an unconstitutional delegation of legislative authority.

Both the Conservation Calculator Option and the Modified Conservation Calculator Option violate this constitutional principle. The Conservation Calculator Option provides that the "conservation calculator will use methodologies consistent with the most recently published Power Plan." WAC 194-37-040(7). It also provides that: "If the NWPCC updates its conservation calculator within twelve months of an even-numbered year, a utility may choose to use the NWPCC's most recent conservation calculator **or the immediately preceding version.**" (Emphasis added.)

By requiring usage of the most recent conservation calculator or the immediately preceding version, it is clear that the Conservation Calculator Option includes versions of the conservation calculator contained in Power Plans adopted after the date of enactment. In other words, once the Council revises the conservation calculator a second time, even a utility that chooses to use "the immediately preceding version" will be required to use a version developed by the Council after the date of the initiative's enactment.

Based on the legal authority we cited on page 2 of our May 29 comment letter, this renders the Conservation Calendar Option an unconstitutional delegation of legislative authority. *See State v. Dougall*, 89 Wn.2d 118, 122-23 1977) ("While the legislature may enact statutes which adopt existing federal rules, regulations, or statutes, legislation which attempts to adopt or acquiesce in future federal rules, regulations or statutes is an unconstitutional delegation of legislative power and thus void."); *Diversified Investment Partnership v. Department of Social and Health Services*, 113 Wn.2d 19, 24-25 (1989) ("A statute must be complete in itself when it leaves the hands of the Legislature. It is well settled in Washington that the Legislature may not constitutionally attempt to adopt future federal law by statute. If it were to do so, the substance of the law would be incomplete when it passed the Legislature, thus transferring the power to render judgment on an issue to the federal government.") (Citations omitted.)

The Modified Conservation Calculator Option provides that a utility "will document consistency with the NWPCC's methodologies by modifying its ten-year potential and biennial target as identified through the use of the conservation calculator by making the following adjustments to the NWPCC's analysis in the NWPCC's ***most recently published*** power plan" (emphasis added). As with the Conservation Calculator Option, requiring consistency with methodologies adopted

by the Council after the date of enactment is an unconstitutional delegation of legislative authority.

In fact, it is our understanding that Council staff modified the conservation calculator after passage of the initiative, at the request of CTED, so that it could be used to assign each qualifying utility its share of the Council's regional conservation target. This is exactly the type of post-enactment action by an entity outside the control of the Legislature that constitutes an unconstitutional delegation of legislative authority.

3. Consumer-owned Utilities Must Conduct their Conservation Programs in a Manner that does not Violate the Washington State Constitution's Ban on the Gifting of Public Funds

The fact that the proposed rules are contrary to and violate the provisions of the statute affording a consumer-owned utility flexibility in its decision-making is even more troubling in light of the special limitation imposed on the consumer-owned utilities by the Washington State Constitution. A consumer-owned utility, as a municipal corporation, is prohibited by the State Constitution from giving away money or property. Specifically, Article 8, Section 7 provides that:

> No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

In the context of conservation, this means that consumer-owned utilities must be careful that the money they expend in helping their customers conserve energy does not constitute an unconstitutional gift.

Article 8, Section 7 was interpreted and applied by the State Supreme Court in Tacoma v. Taxpayers, 108 Wn.2d 679 (1987). That court recognized that a municipal utility may invest in cost-effective conservation measures for the purpose of making available a source of electricity resulting from customer energy savings – basically, buying back energy. The court approved Tacoma's methodology for determining whether the measures were cost effective to that utility. The court approved the expenditure of monies when the payment to the ratepayer "specifically depend[ed] upon the predicted amount of electricity saved in the first year." Id. at 704. The court noted that it was the utility's measurement of the first year payback period that "distinguishes Tacoma's program from cases where we found insufficient consideration." Id. at 704. The court also distinguished Tacoma's program from cases where the court found that "generalized public benefit is not sufficient consideration" for the expenditure of public funds. Id. at 704.

Chelan PUD recognizes that the Tacoma decision also includes some *dicta* suggesting, but not clearly stating, that public benefit resulting from conservation can be weighed by a utility in determining whether a conservation investment is a gift for purposes of Article 8, Section 7.

Consumer-owned utilities must determine for themselves how best to comply with the actual holding in that case. For consumer-owned utilities, this constitutional mandate supersedes any statutory provision, including the initiative.

The constitutional limitation certainly allows a consumer-owned utility to make investments in conservation measures that make good business sense and have a reasonable "payback" of energy and that determination is to be made from the standpoint of its ratepayers. Each consumer-owned utility is responsible for making a judgment, based upon its own factual circumstances, as to the sufficiency of the monetary benefit received from its expenditure of ratepayer dollars. In order to be able to make those judgments consistent with the State Constitution, consumer-owned utilities must be accorded the flexibility provided in the statute.

Thus, it is essential, from both a statutory and constitutional perspective, that CTED adopt the above-cited language from the WUTC regulations.

4. Council methodologies have no role in the process by which utilities demonstrated that they have met their conservation targets.

After inserting the Council's methodologies into the target-setting process, in violation RCW 19.285.040(1), the draft regulations proceed to insert Council methodologies into the process by which qualifying utilities demonstrate that they have met their targets. There is no statutory basis for requiring the use of Council methodologies in the target-setting process, as discussed in Section 1 above, nor is there a statutory basis for requiring the use of Council methodologies as part of the process by which qualifying utilities demonstrate that they have met their targets. Therefore, all references in the regulations to Council methodologies in the context of either of these processes should be stricken.

In addition to exceeding CTED's statutory authority, the conservation reporting requirements in the proposed regulations are unduly burdensome. For example, they require that all reports include the "summary of the data the utility reports to the 'Planning, Tracking and Reporting System'" of the Council's Regional Technical Forum (RTF). WAC 194-37-060(1). They also require that "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.**"** WAC 194-37-080(9).

Chelan PUD does not currently report or utilize the RTF reporting system, and to do so, adds another layer of unnecessary process. Although the draft regulations specify that "an alternative reporting system approved, in advance of the reporting year, by the department" can be used, we understand based on conversations with CTED staff, that it would be very unlikely that CTED

would approve deviations from the RTF tracking system. Chelan PUD specifically requests that CTED clarify that qualifying utilities are not required to: (1) participate in the RTF, (2) use methodologies approved by the RTF, or (3) use the RTF reporting system.

Without these clarifications, time and resources that could be spent on researching and funding energy efficiency measures will instead be spent following the time-consuming reporting and documentation process established by the RTF. For example, except for lighting, almost all of the energy efficiency measures the District has funded under our Resource$mart program are considered "custom projects" by the RTF. These include fast-acting doors, adjustable speed fan controls, etc. Significant delay would result if Chelan PUD has to follow the RTF's Custom Project process and have each of these measures reviewed and approved by the RTF before being implemented. Chelan PUD respectfully requests that CTED clarify that once a qualifying utility identifies its conservation potential using methods consistent with the Council's methodologies, that it can establish its targets and move forward toward meeting them without further delay or approvals.

5. Additional Comments, Concerns and Clarifications

CTED received public comments at the hearing on November 9, 2007 to strike "production and distribution" from the definition of conservation. WAC 194-37-040(6). Such a deletion would clearly violate the statutory definition of conservation, which includes both production and distribution. RCW 19.285.030(4). It would also constitute a substantive change of the draft regulations for purposes of RCW 34.05.340(1).

B. Renewables-Related Issues

1. Utilities Should be Given Flexibility with respect to Compliance with the RPS percentage Requirements

We are aware that there has been considerable controversy regarding the interpretation of RCW 19.285.040(2)(a), particularly regarding the phrase "**by** January 1, 2012." (Emphasis added.) Renewable advocates have argued that this means that utilities must have signed contracts in place on January 1, 2012, sufficient to meet the three percent requirement for 2012. Some utilities have instead pointed to RCW 19.285.040(2)(e), which provides that a utility's requirements may be satisfied "for any given year with renewable energy credits produced during that year, the preceding year, **or the subsequent year,"** arguing that a utility has until December 31, 2013 to satisfy the three percent requirement for 2012. (Emphasis added.)

Chelan PUD finds these interpretations neither workable nor compelled by the language of the statute. The first interpretation requires the utility to anticipate the number of credits it will need for 2012 by January 1 of the target year. This is particularly problematic in the case of a utility, such as Chelan PUD, that will be using incremental hydro to satisfy at least a portion of its renewable requirements. Obviously, it is impossible to foresee on January 1 what type of water year or weather patterns will unfold for the remainder of that year. Utilities should not be forced

to guess regarding such an important matter, particularly when faced with potential liability for monetary penalties.

RCW 19.285.040(1)(e) provides that a renewables requirement "may" be met for any given year with renewable energy credits produced during that year, the preceding year, or the subsequent year. Because the initiative uses "may, " CTED must allow utilities to use credits accumulated over a three-year period. Although the draft regulations could be more clear, Chelan PUD believes that WAC 194-37-110(2)(a)(i)(C) is consistent with this interpretation.

2. Additional Comments, Concerns and Clarifications

CTED received two public comments at the hearing on November 9, 2007 that caused Chelan PUD particular concern. First, there was a recommendation to strike "the utility may demonstrate that if it acquired RECs in the subsequent year to make up for any performance deficiency and for nonmaterial under-estimates in load projections" from WAC 194-37-110(2)(a)(i)(C). Chelan PUD firmly believes that the final regulations should include this provision in order to account for variability in river flows, etc. Second, there was a recommendation to strike WAC 194-37-190(1)(d) regarding the use of a utility's own resource as a substitute resource. Chelan PUD firmly believes that the final regulations should include this provision in order to accurately reflect situations where a utility's own resource is the "next best" generation resource. Chelan PUD opposes both of these recommendations, and suggests that removal or substantial modification of these provisions would constitute a substantive change of the draft regulations for purposes of RCW 34.05.340(1).

Finally, CTED received public comments at the November 9 hearing regarding the future REC market and the availability of RECs to satisfy the requirements of draft regulations. As discussed many times at the CTED meetings during the development of these regulations, Chelan PUD and many other utilities continue to express concerns about the future REC market for many reasons. In particular, we are concerned about market instability caused by the lack of available RECs and increased demand caused by the requirements of the initiative. We are very concerned about the strong potential for increased prices and market instability and believe that the interests of the ratepayers can only be served through a flexible approach to the timeframe within which utilities may acquire RECs.

Again, we appreciate your hard work on these regulations, and look forward to continuing to work closely with you on bringing them to a successful conclusion.

Sincerely,

Gregg Carrington
Director of External Affairs

Attachments

Chelan PUD Redline, Attached to Nov. 16, 2007 Comment Letter to CTED

Chapter 194-37 WAC

ENERGY INDEPENDENCE NEW SECTION

NEW SECTION

WAC 194-37-010 Purpose and scope. The purpose of this chapter is to implement the requirements of the Energy Independence Act, chapter 19.285 RCW.

NEW SECTION

WAC 194-37-020 Applicability. The provisions of this chapter apply to consumer-owned electric utilities that provide electrical service to more than twenty-five thousand retail customers in the state of Washington.

NEW SECTION

WAC 194-37-030 Severability. If any provision of this chapter or its application to any person or circumstance is held invalid, the remainder of the chapter or the application of the provision to other persons or circumstances is not affected.

NEW SECTION

WAC 194-37-040 Definitions. The definitions in chapter 19.285 RCW apply throughout this chapter. Some of those definitions are included here, in addition to rule-specific definitions, to assist in understanding this chapter.

(1) "Auditor" means:

(a) The Washington state auditor's office or its designee for consumer-owned utilities under its jurisdiction, such as a public utility district formed under Title 54 RCW, a municipal electric utility formed under Title 35 RCW, or any other public entity authorized by law to sell electricity for retail use, the Washington state auditor's office or its designee;

(b) An independent auditor selected by a utility that is not under the jurisdiction of the state auditor, such as a cooperative formed under chapter 23.86 RCW or an electric mutual

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corporation or association formed under chapter 24.06 RCW, an independent auditor selected by such a utility.

(2) "Annual revenue requirement" means that portion of a utility's annual budget approved by its governing body for the target year that is intended to be recovered through retail electricity sales in the state of Washington in the target year, or as otherwise documented by the utility pursuant to WAC 194-37-150.

(3) "Average water generation" means the average megawatt-hours of generation from a hydroelectric project over a period of ten consecutive years or more, taking into account differences in water flows from year to year.

(4) "Biennial target" means a utility's biennial conservation target.

(5) "BPA" means the Bonneville Power Administration.

(6) "Conservation" means any reduction in electric power consumption resulting from increases in the efficiency of energy use, production, or distribution.

(7)

Deleted: "Conservation calculator" means a spreadsheet or piece of software developed and maintained by the NWPCC to approximate a utility's ten-year potential. The conservation calculator will use methodologies consistent with the most recently published *Power Plan*. It is available at www.nwcouncil.org.

(8) "Cost-effective" means, as defined in RCW 80.52.030, 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.

(c) For purposes of this paragraph, the term "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.

(9) "Council" means the Washington state apprenticeship and training council within the department of labor and industries.

(10) "Customer" means a person or entity that purchases electricity for ultimate consumption and not for resale.

(11) "Department" means the department of community, trade, and economic development.

(12) "Distributed generation" means an eligible renewable resource where the facility or any integrated cluster of generating units has a generating capacity of not more than five megawatts. If several five-megawatt or smaller projects are located in the same immediate area

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but are owned or controlled by different developers, each qualifies as a separate, independent distributed generation project. For the purposes of this rule, an eligible resource or group of similar eligible resources cannot be subdivided into amounts less than five megawatts solely to be considered distributed generation.

(13) "Eligible renewable resource" means:

(a) Electricity from a generation facility powered by a renewable resource other than fresh water that commences operation after March 31, 1999, where:

(i) The facility is located in the Pacific Northwest; or

(ii) The electricity from the facility is delivered into Washington state on a real-time basis without shaping, storage, or integration services (an eligible renewable resource within the Pacific Northwest may receive integration, shaping, storage or other services from sources outside the Pacific Northwest and remain eligible to count towards a utility's renewable resource target); or

(b) Incremental electricity produced as a result of efficiency improvements completed after March 31, 1999, to a hydroelectric generation project owned by one or more qualifying utilities (see definition of qualifying utility in chapter 19.285 RCW) and located in the Pacific Northwest or to hydroelectric generation in irrigation pipes and canals located in the Pacific Northwest, where the additional electricity generated in either case is not a result of new water diversions or impoundments.

(14) "Fifth power plan" means *The Fifth Northwest Electric Power and Conservation Plan* produced by the NWPCC. The Fifth power plan is available at www.nwcouncil.org.

(15) "Incremental hydropower" means the incremental amount of kilowatt-hours of electricity generated from a base or constant amount of water.

(16) "Integrated cluster" of eligible renewable resources means colocated projects owned or controlled by the same entity that feed into the same substation.

(17) "Load" means the amount of kilowatt-hours of electricity delivered in the most recently completed year by a utility to its Washington retail customers.

(18) "Nonpower attributes" means all environmentally related characteristics, exclusive of energy, capacity, reliability, and other electrical power service attributes, that are associated with the generation of electricity from a renewable resource, including but not limited to the facility's fuel type, geographic location, vintage, qualification as an eligible renewable resource, and avoided emissions of pollutants to the air, soil, or water, and avoided emissions of carbon dioxide and other greenhouse gases.

(19) "NWPCC" means Pacific Northwest Electric Power and Conservation Planning Council also known as the Northwest Power and Conservation Council. Its calculation of avoided costs and publications are available at www.nwcouncil.org.

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(20) "Pacific Northwest" means the area consisting of:

(a) The states of Oregon, Washington, and Idaho, the portion of the state of Montana west of the Continental Divide, and such portions of the states of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin; and

(b) Any contiguous areas, not in excess of seventy-five air miles from the area referred to in (a) of this subsection, which are a part of the service area of a rural electric cooperative customer served by the BPA on December 5, 1980, which has a distribution system from which it serves both within and without such region.

(21) "Qualified incremental hydropower efficiency improvements" means the installation or modification of equipment and structures, or operating protocols that increase the amount of electricity generated from the same amount of water. These may include rewinding of existing generators, replacing turbines with more efficient units and changing control systems to optimize electricity generation, and improvements to hydraulic conveyance systems that decrease head loss. They do not include additions to capacity by increasing pondage or elevation head, or diverting additional water into the project.

(22) "Qualifying utility" means an electric utility, as the term "electric utility" is defined in RCW 19.29A.010, that serves more than twenty-five thousand customers in the state of Washington.

(23)

Deleted: "Regional technical forum" or "RTF" means a voluntary advisory committee that reports to the executive director of the NWPCC and whose members are appointed by the NWPCC's chair.

(24) "Renewable energy credit" or "REC" means a tradable certificate of proof of at least one megawatt-hour of an eligible renewable resource where the generation facility is not powered by fresh water, the certificate includes all of the nonpower attributes associated with that megawatt-hour of electricity, and the certificate is verified by the Western Renewable Energy Generation Information System.

(25) "Renewable resource" means:

(a) Water;

(b) Wind;

(c) Solar energy;

(d) Geothermal energy;

(e) Landfill gas;

(f) Wave, ocean, or tidal power;

(g) Gas from sewage treatment facilities;

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(h) Biodiesel fuel as defined in RCW 82.29A.135 that is not derived from crops raised on land cleared from old growth or first-growth forests where the clearing occurred after December 7, 2006; and

(i) Biomass energy based on animal waste or solid organic fuels from wood, forest, or field residues, or dedicated energy crops that do not include:

(i) Wood pieces that have been treated with chemical preservatives such as creosote, pentachlorophenol;

(ii) Black liquor by-product from paper production;

(iii) Wood from old growth forests; or

(iv) Municipal solid waste.

(26) "Substitute resource" means reasonably available electricity or generating facilities, of the same contract length or facility life as the eligible renewable resource the utility invested in to comply with chapter 19.285 RCW requirements, that otherwise would have been used to serve a utility's retail load in the absence of chapter 19.285 RCW requirements to serve that retail load with eligible renewable resources.

(27) "Target year" means the specific year for which a renewable energy target must be met.

(28) "Ten-year potential" means the ten-year cost effective conservation resource potential.

(29) "Utility" means an electric consumer-owned electric utility, as the term consumer-owned utility is defined in RCW 19.29A.010, that serves more than twenty-five thousand retail customers in the state of Washington. The number of customers served shall be based on data reported by a utility in Form EIA - 861, "Annual Electric Power Industry Report," filed with the Energy Information Administration, United States Department of Energy.

A consumer-owned electric utility whose number of retail customers grows beyond twenty-five thousand over the course of a year shall be subject to the requirements of this chapter, or per chapter 19.285 RCW shall become a qualifying utility, starting January 1 of the following year. All applicable target dates, per chapter 19.285 RCW will be delayed by the same number of years as there are between January 1, 2007, and the year in which the utility becomes a qualifying utility.

(30) "Weather-adjusted load" means load calculated after variations in peak and average temperatures from year to year are taken into account.

(31) "WREGIS" means the Western Renewable Energy Generation Information System. WREGIS is an independent, renewable energy data base for the region covered by the Western Interconnection. WREGIS creates renewable energy certificates, WREGIS certificates, for verifiable renewable generation from units that register in the data base. The department

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selects WREGIS as the renewable energy credit tracking system to issue verified RECs per RCW 19.285.030(17).

(32) "Year" means the twelve-month period commencing January 1 and ending December 31.

NEW SECTION

WAC 194-37-050 Documentation and auditing timelines. Utilities will maintain all records necessary to document their compliance with the Energy Independence Act, as described in WAC 194-37-070, 194-37-080, 194-37-090, 194-37-100, 194-37-120, 194-37-130, 194-37-140, 194-37-150, 194-37-160, 194-37-170, 194-37-180, 194-37-190, and 194-37-200. Utilities that are not under the jurisdiction of the Washington state auditor must be audited for compliance with the Energy Independence Act by an independent auditor at least every twenty-four months.

NEW SECTION

WAC 194-37-060 Conservation reporting requirements. Each utility shall submit an annual conservation report to the department by June 1 beginning in 2012. The conservation report shall document the utility's progress in meeting the conservation targets established in RCW 19.285.040 and shall include the following:

(1) (2) If the utility counts towards its biennial target any electricity savings from local, regional, state, or federal market transformation programs, or local, state or federal codes or standards, the utility shall include copies of reports of the annual electricity savings for the utility's service territory as estimated and recorded by entities such as the department, the NWPCC, regional market transformation organizations, or the utility.

(3) A brief description of the methodology used to establish the utility's ten-year potential and biennial target to capture cost-effective conservation, including the share of this target to be captured by efficiency improvements in customer measures, and, if any, in distribution measures and production measures.

(4) The utility's total expenditures for conservation reported by customer conservation broken down by residential sector, commercial sector, industrial sector, and agricultural sector, and, if any, production efficiency and distribution efficiency.

(5) The most recent final audit report(s), if any, that evaluate(s) the utility's compliance with chapter 19.285 RCW and the information the utility reported per this chapter.

(6) In even years this report must include the following information categorized by customer conservation savings, and if any, total distribution efficiency savings, and total production efficiency savings:

Deleted: A summary of the data the utility reports to the "planning, tracking and reporting system." The summary shall include total electricity savings by customer sector - residential, commercial, industrial, and agricultural, by production efficiencies, and by distribution efficiencies. To create this summary report, each utility will report their annual conservation achievements using the NWPCC's regional technical forum "planning, tracking and reporting system," or an alternative reporting system approved, in advance of the reporting year, by the department. 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 194-37-080 (8) and (9).¶

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(a) The utility's achievement in meeting its preceding biennial target; and

(b) The utility's current ten-year potential and biennial target.

NEW SECTION

WAC 194-37-070 Documenting development of conservation targets. (1) Ten-year potential. By January 1, 2010, each utility shall identify its ten-year achievable, cost-effective conservation resource potential. In doing so, utilities must use methodologies that are consistent with those used by the Council in its Fifth power plan. A utility may, with full documentation of the rationale for the modification, alter the Council's methodologies to better fit the attributes and characteristics of it service territory. At least every two years thereafter, the public utility shall review and update this assessment for the subsequent ten-year period.

(2) Biennial target. In January 2010, and each two years thereafter, each utility shall establish and make public a biennial conservation target consistent with its identification of achievable opportunities pursuant to subsection (1), and meet that target during the subsequent two-year period. The utility's biennial target shall be no less than its pro rata share of its ten-year potential.

(b) If a portion of a utility's ten-year potential and biennial target includes calculations of efficiency gains from utility production and/or distribution efficiency measures, that portion of the ten-year potential or biennial target shall carry the stamp of a registered professional engineer licensed by the Washington department of licensing.

(c) If a utility includes production and/or distribution efficiencies in its target, then a utility's ten-year potential shall be the combined total of all cost effective achievable conservation in customer, distribution, and production efficiency measures available to that utility.

(d) A utility will hold a noticed public meeting, which provides an opportunity for public comment, regarding its assessment of conservation potential. The utility will adopt the ten-year potential and the two-year conservation targets by action of the utility's governing board in a public meeting. Such public meeting may be conducted separately, or as part of public meetings conducted for resource planning, budget setting, or other related processes. The public notice will indicate that the meeting agenda includes the establishment of the utility's ten-year and biennial targets.

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Deleted: (3) . To document that the utility has established its ten-year potential and biennial target using methodologies consistent with those in the fifth power plan, the utility shall choose one of the documentation procedures set forth in subsection (4), (5), or (6) of this section, subject to the following conditions:

Deleted: (a) . If a utility uses the conservation calculator, or the modified conservation calculator to determine its customer conservation ten-year potential, it must use the utility analysis option per subsection (6) of this section to compute any additional ten-year potential for production and distribution efficiencies.

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Deleted: (4) . Conservation calculator option.¶
(a) . A utility that chooses this option will document its calculation of its pro rata biennial conservation targets based on its share of regional annual megawatt-hour retail sales using the NWPCC's conservation calculator. If the NWPCC updates its conservation calculator within twelve months of an even-numbered year, a utility may choose to use the NWPCC's most recent conservation calculator or the immediately preceding version.¶
(b) . Any utility that publishes a ten-year potential and biennial target with the customer sector portion of its biennial target equal to or higher than its target calculated using the conservation calculator has effectively documented its biennial target setting requirement for customer conservation.¶
(c) . Starting in 2010, a utility that uses the conservation calculator to establish its ten-year potential and biennial target may deduct its biennial customer sector conservation achievement that meets the criteria in WAC 194-37-080(2) from its share of the NWPCC's conservation resource potential.

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NEW SECTION

WAC 194-37-080 Documentation of conservation savings. (1) The utility shall document:

(a) That it achieved its biennial conservation target;

(b) The total savings in customer efficiency measures; and

(c) If included in the target, the savings in the production and distribution sectors.

(2) A conservation measure or program counts towards a utility biennial target if it meets the following criteria:

(a) The conservation has a measure life of at least two years, or, if the measure life is less than two years the utility can verify that it has acquired the conservation for the entire biennium;

(b) It meets the definitions of conservation and cost effective as contained in WAC 194-37-040; and

(c) The NWPCC included the measure or program in its Fifth power plan, or the measure or program was not identified by the NWPCC but it meets the definitions in RCW 19.285.030.

(4) Each utility may count towards its biennial conservation targets the proportionate share of savings resulting in its service territory from the following conservation efforts during the one biennium in which either the measure or program was placed in service or the utility paid for the measure:

(a) End-use savings from region-wide conservation projects that are centrally funded by BPA and for which the utility shared in the funding through their BPA rates.

(b) Savings from regional market transformation efforts if the NWPCC included the program measures in its Fifth power plan's conservation resource potential, orfrom a newly emerging technology. Each utility will report a proportion of savings from these programs using established distribution methods, based on each utility's relative share of funding the regional market transformation effort through both direct funding and indirect funding through their BPA rates.

(c) Savings from improved federal minimum energy efficiency standards or Washington state building energy code improvements or improved state appliance codes and standards in the biennium in which they become effective, as proportionate to the utility's service territory. After that biennium, a utility may no longer include savings from those specific code and or standards in its next ten-year potential.

(5) Utilities may count savings from more stringent local building and/or local equipment codes and standards, including utility new service or connection standards, towards

Deleted: (5) . Modified conservation calculator option.¶
A utility that chooses this option will document consistency with the NWPCC's methodologies by modifying its ten-year potential and biennial target as identified through the use of the conservation calculator by making the following adjustments to the NWPCC's analysis in the NWPCC's most recently published power plan:¶
(a) . Deduct conservation measures in the NWPCC's list not applicable to the utility's service territory;¶
(b) . Add conservation measures, that are not included in the NWPCC's list, but are applicable to the utility's service territory;¶
(c) . Modify the number or ratio of applicable units, such as the ratio of electrically heated houses or square footage of commercial space, if the utility has data surveys indicating that their data on applicable units varies from the NWPCC's;¶

Deleted: (d) . Increase and/or reduce the per unit incremental resource savings for conservation measures, relative to the NWPCC's data for savings per unit;¶
(e) . Increase and/or reduce forecasted program costs;¶
(f) . Increase or decrease retail sales growth rates; and¶
(g) . Increase or decrease avoided distribution capacity cost savings.¶
(6) . Utility analysis option.¶
(a) . The NWPCC's analytical methodology for establishing the conservation resource potential and conservation targets for the Northwest power system is outlined in procedures (a)(i) through (xv) of this subsection. A utility that chooses this option will document that it established a ten- … [1]

Deleted: (ii) . Perform a life-cycle cost analysis of measures or programs, including the incremental savings and incremental costs of measures and replacement measures where resou … [2]

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meeting their biennial conservation target in the biennium in which they become effective and in each biennium the local standards continue to be enforced and achieve incremental savings above minimum state energy codes or minimum federal energy standards.

(6) A utility cannot count the loss of load due to curtailments or matters outside of the utility's control (such as a facility shut-down) as achievement towards its conservation targets However, such losses of load may change the level of current and future targets to the extent that they reduce the conservation potential available to the utility.

(7) The energy savings from an increase in distribution efficiencies are described, documented and counted under WAC 194-37-090. The energy savings from an increase in production efficiencies are described, documented and counted under WAC 194-37-100.

(10) A utility may count towards the utility's biennial end-use conservation target, twelve individual months' worth of conservation during the first twelve months of the high efficiency cogeneration facility's operations. The high efficiency cogeneration shall be owned and used by a retail electric consumer to meet that consumer's heat and power needs. In order to count this in its conservation target, the utility shall prepare the following documentation, certified by a registered professional engineer licensed by the Washington department of licensing:

(a) That the cogeneration system has a useful thermal energy output of no less than thirty-three percent of the total energy output; and

(b) An analysis that indicates the reduction in annual electricity consumption due to high efficiency cogeneration. This reduction is calculated as the net facility's annual electrical energy production times the ratio of the fuel chargeable to power heat rate of the cogeneration facility divided by the heat rate on a new and clean basis of a best-commercially available technology combined-cycle natural gas-fired combustion turbine.

Deleted: (8) . Conservation savings from utility programs beginning in 2010 for measures for which the NWPCC and the regional technical forum have established per unit energy savings values will be based on the per unit savings set by the NWPCC's regional technical forum "planning, tracking and reporting system," unless the utility documents its variations in electricity saving estimates from the regional technical forum.¶

Deleted: (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.¶

NEW SECTION

WAC 194-37-090 Additional documentation of efficiency from distribution system loss reduction improvements, including peak demand management and voltage regulation. (1) To the extent a utility can document a distribution system upgrade or management practice results in lower line losses and/or transformation losses, the avoided energy supply requirement to serve customers may be included in the utility's assessment of its ten-year resource potential and may count as conservation achievement towards the utility's biennial target.

(2) A utility that counts distribution system improvements in meeting its obligations under RCW 19.285.040 shall document these savings on either a component-performance basis or a system-analysis basis and shall indicate these savings distinctly from end-use and production efficiency savings.

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(a) Component-performance basis. A utility that implements the component-performance basis for documenting distribution system improvements shall identify the components of the distribution system that were replaced, and the savings from replacement. The calculation shall be prepared under the direction of, and carry the stamp of a registered professional electrical engineer licensed by the Washington department of licensing.

(b) System-analysis basis. A utility that implements the system analysis basis for documenting conservation savings from distribution system improvements shall provide the following:

(i) For distribution system upgrades, the utility will prepare a distribution flow analysis to compare the annual energy losses of the system being replaced or upgraded to the final system as installed.

(ii) For conservation voltage regulation, the utility will prepare a distribution flow analysis to compare the annual energy losses of the system before and after the implementation of a voltage regulation program. The difference in annual kilowatt-hour requirement at the utility point(s) of receipt (for distribution utilities) or net energy for load for generating utilities may be counted as conservation savings.

(iii) For peak demand management, the utility will prepare a distribution flow analysis to compare the annual energy losses of the system before and after implementation of the peak demand management program. The change in net energy losses may be counted as conservation savings. Any net reduction in energy sales (economic curtailment) shall not be included in conservation savings.

(iv) The distribution flow analysis conducted for (b)(i), (ii), or (iii) of this subsection shall be prepared under the direction of, and carry the stamp of a registered professional electrical engineer licensed by the Washington department of licensing.

NEW SECTION

WAC 194-37-100 Additional documentation of improved efficiency from production facilities. (1) A utility will measure production efficiency improvements as the fraction of fuel savings achieved by the utility. The percentage reduction in fuel use per kilowatt-hour will be applied to the annual generation to determine the amount that is to be reported as conservation.

(2) A utility that includes production efficiency improvements in its annual report pursuant to RCW 19.285.070 shall document the electricity savings for each generating unit with the following information certified by a registered professional engineer licensed by the Washington state department of licensing:

(a) The first twelve-month electricity savings that the utility is counting towards its biennial target;

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(b) A description of the efficiency improvements made to the generating unit;

(c) Annual fuel use for three preceding years, in quantity units and million British thermal units;

(d) Annual electrical output for three preceding years, in kilowatt-hours;

(e) The amount of capital investment and/or annual operating expenditure associated with the efficiency improvements;

(f) The cost-effectiveness analysis prepared by the utility in planning the efficiency improvement(s);

(g) Any post-retrofit analysis prepared by the utility in evaluating the performance and/or cost-effectiveness of the efficiency improvement(s);

(h) A simple calculation showing the fuel use per kilowatt-hour before the efficiency improvement, the fuel use per kilowatt-hour after the efficiency improvement, and the amount of energy conservation being reported as the product of the percentage improvement in fuel use per kilowatt-hour and the number of kilowatt-hours generated; and

(i) If efficiency improvements are installed at the same time as pollution control equipment that may itself affect efficiency, the utility may provide documentation of the effect of the efficiency improvements alone on the fuel consumption per kilowatt-hour of the production facility. In this situation, the utility shall provide a description of the changes made, the capital cost expended for both efficiency changes and pollution control equipment, and an analysis of the impact of each on the fuel use per kilowatt-hour of the production facility.

(3) A utility shall not count towards its biennial conservation target the results from efficiency improvements made to hydropower facilities that are qualified incremental hydropower efficiency improvements and are counted towards any utility's renewable energy targets under RCW 19.285.040 or 19.285.050.

NEW SECTION

WAC 194-37-110 Renewable resource energy reporting. Each utility shall submit a renewable resource energy report to the department by June 1 of each year, beginning in 2012. Reporting requirements vary, as follows, depending upon how the utility elects to comply with chapter 19.285 RCW.

(1) Universal renewable energy reporting requirements. The renewable resource energy report shall include the following information:

(a) The utility's annual load for the two years preceding each renewable energy target year and the average load for those two years.

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(b) The amount of megawatt-hours needed to meet the utility's annual renewable energy targets identified in RCW 19.285.040. These annual targets are established as a percentage of the utility's average retail load for the two years prior to the renewable energy target year: Three percent of each year 2012 through 2015; nine percent of each year 2016 through 2019; and fifteen percent for year 2020 and each year thereafter.

(c) The names of the eligible renewable resource facilities and/or the vintage (year in which associated power was generated) of renewable energy credits by generator that the utility owns or with which the utility has a contract dated no later than January 1 of the target year; and the estimated annual quantity (megawatt-hours) of eligible renewable resources or RECs that will be produced, or has been produced, through these resources or contracts to meet its annual targets.

(i) A utility may count any purchases of:

(A) Electricity from BPA that are generated by eligible renewable resources, for which no RECs have been created or, if RECs have been created, for which the RECs have been or will be retired by BPA on behalf of the utility; or

(B) RECs from the BPA generated by eligible renewable resources to meet all or any portion of its annual eligible renewable resource targets.

To document the annual amount of power supplied by BPA from eligible renewable resources, the utility may rely on BPA's determination of the portion of its power supply provided by eligible renewable resources during a calendar year for which no RECs have been created, or, if RECs have been created, that the RECs have been or will be retired by BPA on behalf of the utility.

(ii) The list of resources will identify any resource that both commenced operations after December 31, 2005, and meets the apprenticeship construction practice standards as adopted by the council per WAC 194-37-120(1), thereby earning a 1.2 multiplier credit on its electricity output.

(iii) The list of resources will identify any resource that meets the definition of distributed generation and that the utility owns or contracts for the associated REC, thereby earning a 2.0 multiplier credit on the electricity output.

(d) A utility that does not meet the renewable energy requirements in RCW 19.285.040(2), the financial requirements in RCW 19.285.050, or the financial requirements in RCW 19.285.040 (2)(d) shall include the following information in its June 1 report of each year beginning in 2014:

(i) The quantity of eligible renewable resources acquired by December 31 of the target year;

(ii) RECs from the target year, the year prior or the year subsequent to the target year; or

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(iii) The combination of (d)(i) and (ii) of this subsection.

(e) The most recent final audit report(s), if any, that evaluate(s) the utility's compliance with chapter 19.285 RCW and the information reported per this chapter.

(2) Renewable energy target reporting.

(a) A utility that meets the renewable energy requirements in RCW 19.285.040(2) shall include the following in its June 1 report of each year beginning in 2014.

(i) Demonstration that it acquired:

(A) Megawatt-hours of eligible renewable resources by December 31 of the target year;

(B) RECs produced during the target year, the year prior or the year subsequent to the target year; or

(C) Any combination of (a) (i)(A) and (B) of this subsection, in amounts sufficient to meet the percent of load target for the calendar year two years prior. The utility may demonstrate that it acquired RECs in the subsequent year to make up for any performance deficiency and for nonmaterial under-estimates in load projections.

(ii) Documentation of the amount of megawatt-hours purchased or generated, the amount of WREGIS-certified RECs purchased and the names of the respective eligible renewable facilities that produced the associated power, specified by the year it was generated.

(b) The utility may, in addition, submit a copy of its fuel mix report, per chapter 19.29A RCW, for each target year.

(3) Resource cost reporting.

Each year that a utility does not meet the renewable energy target requirements in RCW 19.285.040, but meets the financial requirements in RCW 19.285.050, the utility shall include the following information in its June 1 report of that year:

(a) Its annual revenue requirement for the target year;

(b) The annual levelized delivered cost of its eligible renewable resource(s) reported separately for each resource;

(c) The annual levelized delivered cost of its substitute resources and the eligible renewable resource with which it is being compared;

(d) The total cost of renewable energy credits to be applied in the reporting year;

(e) The percentage of its annual revenue requirement invested in the incremental cost of eligible renewable resources and the cost of RECs; and

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(f) The most current information required by WAC 194-37-160 used for this financial demonstration.

(4) Nonload growing utility reporting.

Each year that a utility does not meet the renewable energy target requirements in RCW 19.285.040 (2)(a), but meets the financial requirements in RCW 19.285.040 (2)(d), the utility shall report to the department each June 1 its:

(a) Annual revenue requirement for the target year;

(b) Weather-adjusted load for each of three years prior to the target year;

(c) Delivered cost of its eligible renewable resource(s), RECs or a combination of both for the target year to be applied to the one percent of annual revenue requirement, reported separately for each resource;

(d) Quantity of megawatt-hours for each target year for which the utility:

(i) Commenced or renewed ownership of nonrenewable resources after December 7, 2006; or

(ii) Made electricity purchases from nonrenewable energy resources, incremental to its annual electricity purchases made or contracted for prior to December 7, 2006 Sources of power for daily spot market purchases are not counted; and

(e) List of RECs that the utility acquired, in addition to any RECs purchased in (c) of this subsection, to offset nonrenewable purchases listed in (d) of this subsection.

(5) Reporting of uncontrollable events.

For any target year that a utility demonstrates to the auditor that it did not meet the annual renewable resource requirements in chapter 19.285 RCW due to events beyond the reasonable control of the utility per RCW 19.285.040 (2)(i), the utility shall summarize these events in its June 1 report to the department immediately following the target year.

NEW SECTION

WAC 194-37-120 Documentation of renewable energy achievement. Each utility shall provide the auditor access to contracts indicating purchases of or documentation indicating ownership of RECs and/or megawatt-hours from eligible renewable/ resources equal to or exceeding the annual percentage standard for the target year. The megawatt-hours from owned eligible renewable resources count towards the percentage annual renewable energy target as long as the associated nonpower attributes, or RECs, if any have been created, are not owned by a separate entity or have not been used in an optional pricing program. A utility's power purchase contract, for eligible renewable resources, provides documentation for this section if the

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contract specifies that the nonpower attributes, or RECs if any have been created, associated with the power from the eligible renewable resources have been acquired by the utility.

(1) Each utility that claims a 1.2 multiplier credit for the electricity output from an eligible renewable resource per RCW 19.285.040 (2)(h)(i) shall provide a copy of written documentation from the council that the facility met the apprenticeship labor standard of fifteen percent of the total labor hours used in its construction.

(2) A utility may provide a copy of documentation from the BPA indicating a quantity of power that BPA sold to the utility for the target year that was supplied by an eligible renewable resource.

(3) Each utility that claims a 2.0 multiplier credit for the electricity output from an eligible renewable resource per RCW 19.285.040 (2) (b) shall provide documentation that the REC applied in that year, associated with the distributed generation resource, is owned by the utility.

NEW SECTION

WAC 194-37-130 Documentation of incremental hydropower. (1) Utilities may count toward their annual renewable resource targets incremental power acquired from qualified incremental hydropower efficiency improvements made at the following facilities since 1999:

(a) Hydropower facilities in the Pacific Northwest owned by a qualifying utility where the new generation does not result in new water diversions or impoundments.

(b) Hydroelectric generation facilities in irrigation pipes and canals located in the Pacific Northwest, where the additional generation does not result in new water diversions or impoundments.

(2) The utility shall calculate renewable resource power from incremental hydropower as the increase in annual megawatt-hours of generation attributable to the qualified incremental hydropower efficiency improvements under average water generation.

(3) The increase in annual megawatt-hours of generation attributable to the qualified incremental hydropower efficiency improvements shall be documented by engineering studies or with before and after generation data. The documentation shall clearly explain:

(a) Where the facility is located;

(b) When the improvements were made;

(c) How the amount of generation in “average water generation” was calculated;

(d) What other factors may have caused an increase in electricity production and how the amount “attributable to the qualified improvements” was extracted from the total increase;

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(e) How and why the "qualified improvements" increased hydropower production; and

(f) How the utility came to acquire the incremental output associated with the qualified improvements.

NEW SECTION

WAC 194-37-140 Documentation of renewable resource financial path for no-load growth utilities. For each year that a utility meets the renewable energy financial cost cap, associated with no load growth, identified in RCW 19.285.040 (2)(d), the utility must document the following by January 1:

(1) That it used a consistent methodology from year to year to weather-adjust its retail load;

(2) That its weather-adjusted load for the most recent prior year is lower than the third year prior;

(3) That it invested at least one-percent of its total annual revenue requirement in each target year on eligible renewable resources, RECs, or a combination of both;

(4) That it executed contracts, dated no later than January 1 of the target year, for power purchases of eligible renewable resources and/or RECs;

(5) The quantity of megawatt-hours for each target year for which the utility:

(a) Commenced or renewed ownership of nonrenewable resources after December 7, 2006; or

(b) Made electricity purchases from nonrenewable energy resources, incremental to its annual electricity purchases made or contracted for before December 7, 2006.

Sources of power for daily spot market purchases are not included in this calculation;

(6) The RECs the utility acquired, in addition to any RECs acquired for subsection (3) of this section, to offset nonrenewable power purchases listed in subsection (5) of this section; and

(7) Annual revenue requirement for the target year.

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NEW SECTION

WAC 194-37-150 Financial documentation of annual revenue requirement. (1) For purposes of the report filed pursuant to RCW 19.285.070, a utility shall document its annual revenue requirement.

(2) A utility that uses a different basis for the determination of its annual revenue requirement for purposes of calculating what it expects to recover or actually recovers through retail electricity sales in the state of Washington in that year may use that number in the calculation of the cost cap and must provide documentation to support this alternative approach.

NEW SECTION

WAC 194-37-160 Documentation of financial cost cap--Current information and timeline. By January 1 of the first target year that a utility fulfills its renewable energy requirements under RCW 19.285.050, the utility shall select one of the following methodologies for calculating the incremental cost of all eligible renewable resources acquired thereafter by that utility:

(1) Annual update methodology. In each year that a utility fulfills its renewable energy requirements by complying with the cost cap identified in RCW 19.285.050 it must document its calculations no later than January 1 of the target year. The utility will use the most current information available to the utility within twelve months prior to the initial documentation of the cost cap pursuant to WAC 194-37-170 through 194-37-190. The utility will update this documentation in its June 1 report submitted pursuant to RCW 19.285.070. These annual updates of costs, based on the most current information available, apply to both the renewable resource and the substitute resource.

(2) Permanent one-time methodology. For each specific renewable resource investment, a utility shall perform a one-time calculation of the levelized incremental cost pursuant to WAC 194¬37-170 through 194-37-190. The levelized incremental cost may be a single annual value or a stream of annual values. However, the levelized incremental cost, identified through this one-time analysis, shall remain unchanged over the life of the renewable resource after the initial calculation. The utility will include a determination of incremental cost for each renewable resource investment in its June 1 report submitted pursuant to RCW 19.285.070, beginning in the year the utility complies with the cost cap identified in RCW 19.285.050.

NEW SECTION

WAC 194-37-170 Documentation for financial path--Levelization of costs. (1) Each utility must document its calculation of the levelized annual incremental cost of eligible renewable resources. Utilities are encouraged, but not obligated, to use the following methodology:

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Step 1: Calculate the net present value of the cost of the utility's eligible renewable resource and substitute resource over an equivalent contract length or facility life.

Step 2: Calculate equal nominal values over the appropriate contract length or facility life that have a net present value equal to those calculated in Step 1, using the same discount rate.

Step 3: Calculate the annual difference between the levelized delivered cost for the eligible renewable resource and the substitute resource to determine the levelized incremental cost of the eligible renewable resource.

A utility that uses the annual update methodology must document the basis for any change to the levelization methodology used in a prior June 1 report to levelize the costs of an eligible renewable resource and its associated substitute resource.

(2) Regardless of the methodology chosen to levelize costs, utilities must document the basis for their chosen method for levelizing costs.

(3) Utilities must document the basis for the discount rate used in its levelized cost calculations.

(4) Utilities must document how the discount rate used to perform the levelized cost calculations is consistent with the inflationary assumptions incorporated into the delivered cost projections for the eligible renewable resource and substitute resource.

(5) Utilities must document how the method and assumptions used to levelize delivered costs for the eligible renewable resource are consistent with those used to levelize the delivered cost of the associated substitute resource.

NEW SECTION

WAC 194-37-180 Documentation of financial path--Delivered cost. (1) The delivered cost of a resource includes all direct and indirect costs associated with that resource being delivered to the distribution system of a utility over the contract length or facility life of the delivered resource. Direct and indirect costs may include operating and capital expenses related to the delivered resource.

(2) Using the Uniform System of Accounts of the Federal Energy Regulatory Commission (FERC) as an illustration, the reported resource costs are expected to generally fall within, but not necessarily be limited to, the following cost accounts:

Operating Expenses

Accounts 500-557:	Production Expense
Account 565:	Wholesale Wheeling Expense

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Accounts 920-935: Administrative and General Expense

Account 408.1: Taxes Other than Federal Income Taxes

Capital Expenses

Accounts 403-407: Depreciation and Amortization Expense

Accounts 427-431: Interest-Related Expenses

(3) A utility may include actual costs in order to equitably compare the costs of eligible renewable resources and substitute resources. This may include the actual costs of transmission, firming, shaping, integration, and project specific development costs.

(4) Utilities are encouraged to use the FERC system of accounts to document the delivered cost of resources. Regardless of the accounting convention used, utilities must document the delivered cost estimates for eligible renewable resources and their associated substitute resources in a manner consistent with generally accepted accounting standards.

NEW SECTION

WAC 194-37-190 Documentation of financial path--Substitute resource and resource equivalence. (1) In support of its annual filings to the department under RCW 19.285.070, utilities must document the type, availability, and cost of the reasonably available substitute resource used to calculate the incremental cost of an eligible renewable resource.

(a) In documenting the incremental cost under RCW 19.285.050 (1)(b), a utility is encouraged to identify substitute resources using its integrated resource planning process, if one is available. If a utility elects to choose a substitute resource from a different source other than its most recently published integrated resource plan, it must document the basis for this decision. Documentation of the cost of a substitute resource may include, but is not limited to, formal offers for the sale of electricity, or published cost projections from reputable third-party sources.

(b) In its selection of a substitute resource, the utility shall develop documentation demonstrating that the substitute resource satisfies the requirements set forth in RCW 19.285.050. The requirements are:

(i) Equivalence between the eligible renewable resource and the substitute resource by demonstrating the equivalence in the amount of energy produced by each resource;

(ii) Equivalence between the eligible renewable resource and the substitute resource by demonstrating the same contract length or facility life of each resource;

(iii) The substitute resource is reasonably available to the utility; and

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(iv) The substitute resource does not qualify as an eligible renewable resource.

(c) Only supply-side substitute resources shall be used by utilities in the calculation of the incremental cost of eligible renewable resources.

(d) When the renewable requirements under RCW 19.285.040(2) result in a utility having resources in excess of its load, the utility may use that excess resource or a forecast of projected market prices as the substitute resource if the substitute resource requirements of (b) of this subsection are otherwise satisfied. The utility will document the resale revenues, net of transaction costs, received through the sale of excess resources or the purchase price for the sale of the excess facility sold as a result of the requirement to acquire eligible renewable resources. A utility that uses a value other than the documented resale revenue in the determination of the levelized delivered cost of the substitute resource must provide documentation to support this alternative approach.

(e) A utility may use foregone power purchases from BPA, plus any billing credit obtained for reducing its purchases from BPA, as the basis for the cost of the substitute resource if:

(i) The substitute resource requirements of (b) of this subsection are otherwise satisfied;

(ii) It is entitled under its BPA power sales contract to have the BPA meet its net power requirements for the expected life of an eligible renewable resource or eligible renewable resource purchase; and

(iii) As a result of meeting the renewable requirements under RCW 19.285.040(2), it foregoes part of its BPA entitlement in order to obtain that eligible renewable resource.

(2) For an eligible renewable resource acquired prior to the passage of chapter 19.285 RCW, November 7, 2006, a utility must support the selection of the related substitute resource used in the determination of the incremental cost under RCW 19.285.050 with documentation that was available at the time of the utility's decision to acquire the eligible renewable resource. If no such documentation is available, the incremental cost of an eligible renewable resource acquired prior to the passage of chapter 19.285 RCW will be assumed equal to zero.

NEW SECTION

WAC 194-37-200 Financial documentation path using renewable energy credits. A utility may elect to invest in RECs to meet any portion of, or the entirety of, each annual renewable resource target in RCW 19.285.040(2) or 19.285.050(1). If the cost of the RECs and the incremental cost of acquired renewable resources, as documented according to WAC 194-37-150 through 194-37-190, for any one year meets or exceeds four percent of the utility's annual revenue requirement, the utility shall document that the utility achieved the four percent cost cap alternative compliance path in RCW 19.285.050(1). The documentation must include copies of its WREGIS RECs, copies of purchase contracts, and its annual revenue requirement.

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(d) Increase and/or reduce the per unit incremental resource savings for conservation measures, relative to the NWPCC's data for savings per unit;
(e) Increase and/or reduce forecasted program costs;
(f) Increase or decrease retail sales growth rates; and
(g) Increase or decrease avoided distribution capacity cost savings.
(6) Utility analysis option.
(a) The NWPCC's analytical methodology for establishing the conservation resource potential and conservation targets for the Northwest power system is outlined in procedures (a)(i) through (xv) of this subsection. A utility that chooses this option will document that it established a ten-year potential using an analytical methodology consistent with these NWPCC procedures (a)(i) through (xv) of this subsection:
(i) Analyze a broad range of energy efficiency measures considered technically feasible;

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(ii) Perform a life-cycle cost analysis of measures or programs, including the incremental savings and incremental costs of measures and replacement measures where resources or measures have different measure lifetimes;
(iii) Set avoided costs equal to a forecast of market prices, which represents the cost of the next increment of available and reliable power supply available to the utility for the life of the energy efficiency measures to which it is compared;
(iv) Calculate the value of the energy saved based on when it is saved. In performing this calculation, use time differentiated avoided costs to conduct the analysis that determines the financial value of energy saved through conservation;
(v) Conduct a total resource cost analysis that assesses all costs and all benefits of conservation measures regardless of who pays the costs or receives the benefits. The NWPCC identifies conservation measures that pass the total resource cost test as economically achievable;
(vi) Identify conservation measures that pass the total resource cost test, by having a benefit/cost ratio of one or greater as economically achievable;
(vii) Include the increase or decrease in annual or periodic operations and maintenance costs due to conservation measures;
(viii) Include deferred capacity expansion benefits for transmission and distribution systems in its cost-effectiveness analysis;
(ix) Include all nonpower benefits that a resource or measure may provide that can be quantified and monetized;
(x) Include an estimate of program administrative costs;
(xi) Discount future costs and benefits at a discount rate based on a weighted, after-tax, cost of capital for utilities and their customers for the measure lifetime;
(xii) Include estimates of the achievable customer conservation penetration rates for retrofit measures and for lost-opportunity (long-lived) measures. The NWPCC's twenty-year achievable penetration rates are eighty-five percent for retrofit measures and sixty-five percent for lost opportunity measures achieved through a mix of utility programs and local, state and federal codes and standards. The NWPCC's ten-year achievable penetration rates are sixty-four percent for nonlost opportunity measures and twenty-three

percent for lost-opportunity measures; the weighted average of the two is a forty-six percent ten-year achievable penetration rate;

(xiii) Include a ten percent bonus for conservation measures as defined in 16 U.S.C. § 839a of the Pacific Northwest Electric Power Planning and Conservation Act;

(xiv) Analyze the results of multiple scenarios. This includes testing scenarios that accelerate the rate of conservation acquisition in the earlier years; and

(xv) Analyze the costs of estimated future environmental externalities in the multiple scenarios that estimate costs and risks.

(b) In addition to the requirements in subsection (6) of this section, the utility may document any variable listed in subsection (5) of this section to indicate that its conservation resource assessment methodology is consistent with the NWPCC's but results in unique conservation resource assessment outcomes.



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August 15, 2007

Liz Klumpp
Washington Department of Community,
Trade and Economic Development
PO Box 43173
Olympia, WA 98504-3173

Re: Chelan PUD's response and comments to CTED proposed rules for the Energy Independence Act dated July 17, 2007 (Draft)
E-filed to elizabethk@cted.wa.gov

Dear Liz:

Thank you for the opportunity to comment on Washington State Department of Community, Trade and Economic Development's (CTED) proposed rules for implementing the Energy Independence Act. We appreciate all of the efforts being made by CTED to solicit, collect and compile input from interested parties with many different viewpoints. Chelan PUD has reviewed the July 17 draft rule, focusing on potential discrepancies between it and the initiative, and we have suggested ways that the draft rule could be brought into conformance with the statute. Our primary purpose for doing so is to protect our customers from regulatory requirements and constraints that are not based upon the language of the initiative and either do not add value or restrict the flexibility afforded utilities by the initiative.

A redline of the July 17 proposed draft rules is enclosed. We appreciate your consideration of the comments in this letter as well as the edits made in the redline of the draft rules. Not all suggested edits to the draft rules are addressed in this letter.

As you know, the initiative is divided into two sections, requiring utilities to:

-- pursue all available conservation that is cost-effective, reliable, and feasible; and

-- meet annual targets for the use of eligible renewable resources.

Our comments cover each of these areas.

A. Conservation-Related Issues

1. CTED should clarify that a utility is only required to document that it has identified its conservation potential consistent with the methodology used by the NWPPC in its Fifth Power Plan. CTED should also remove all provisions requiring a specific methodology or result in a specific numeric outcome or target.

The initiative provides that it is the responsibility of each utility to identify its achievable, cost-effective conservation potential through 2019. The only limitation is that the utility must do so using methodologies consistent with those found in the Council's most recently published regional power plan. Specifically, the initiative provides that:

> 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. At least every two years thereafter, the qualifying utility shall review and update this assessment for the subsequent ten-year period. RCW 19.285.040(1)(a)(emphasis added).

The utility is then to establish and meet biennial targets for achieving that potential. RCW 19.285.040(1)(b).

CTED initially interpreted "most recently published" NWPPC plan to include plans adopted after enactment of the initiative. The District pointed out in its May 29, 2007 comments that inclusion of future power plans would violate the Washington State Constitution because it would effectively delegate legislative power to the NWPPC. Therefore, we suggested that "most recently published" be defined to mean the NWPPC's Fifth Power Plan, which was the most recently published plan before the initiative became law, and to not include the most recently published versions at any point in the future.

Our understanding is that CTED agrees that mandatory implementation of methodologies contained in future NWPPC power plans would violate the State constitution, but believes that this problem can be obviated by making the application of future power plans optional. Consequently, CTED revised WAC 194-37-050(1) to specify that a utility shall use methodologies consistent with the NWPPC's Fifth Power Plan. However, the draft goes on to provide three specific methodologies to be used by utilities, a "Conservation Calculator," a "Modified Conservation Calculator," and a "Utility Specific Analysis." WAC 194-37-050(2)(A).

The District has two concerns with these three methodologies. First, their overly-prescriptive nature contravenes the initiative. The initiative specifically avoids dictating specific targets/goals

regarding conservation; instead, it only requires the use of a consistent methodology. The initiative recognized that individual utility conservation targets/goals are best established through the integrated resource planning process, which can better reflect local conditions and situations. CTED's proposed rule greatly reduces this flexibility to make sound decisions based upon local conditions by mandating prescriptive methodologies. Several examples of the overly prescriptive nature of the three methodologies are described below.

As one example, the "Modified Conservation Calculator" has a fixed list of adjustments that can be made to it. WAC 194-37-050(2)F. Specifically, it provides that a utility can document consistency "by making the following adjustments" to the NWPPC analysis. Any adjustment not on the list is at least implicitly barred, even if a utility made such an adjustment as part of a methodology consistent with those used by the NWPPC.

As another example, the "Utility Specific Analysis" requires the utility to analyze multiple conservation scenarios, including a scenario under which the utility would accelerate conservation acquisition in the earlier years, and then select the scenario that "has the higher net present value or lower risk." WAC 194-37-050(2)G. Prescribing how a utility will select a certain conservation scenario exceeds CTED's authority under the initiative by dictating a particular outcome rather than a consistent methodology. Similarly, the "Utility Specific Analysis" requires that the utility use "NWPCC's twenty-year achievable conservation penetration rates of 85% for retrofit measures and 60% for new construction or long-lived product measures." WAC 194-37-050(2)Gi.h. This, too, exceeds CTED's authority.

Our second concern is that the proposed rule does not clearly provide that the application of these three methodologies by qualifying utilities is truly optional.

Therefore, the District recommends that CTED strike all references to "Conservation Calculator," a "Modified Conservation Calculator," and the "Utility Specific Analysis." It is worth noting the WUTC's pending draft rules avoids this problem by simply providing as follows: "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 rationale for any modification, alter the Council's methodologies to better fit the attributes and characteristics of its service territory." WAC 480-109-010(i). CTED should take this same approach.

2. CTED cannot amend the definition of "conservation" contained in the statute.

The initiative defines "conservation" to mean "any reduction in electric power consumption resulting from increases in the efficiency of energy use, production, or distribution." RCW 19.285.030 (4). However, CTED redefines "conservation" in the draft regulations:

> A measure or program can be reported as "conservation" if it demonstrates the following:
>
> The measure and the estimate of its savings, was included in the utility's ten-year resource potential and its biennial conservation target, and

> The conservation has a measure life of at least two years, or, if the measure life is less than two years the utility can verify that it has acquired the conservation twice over the biennium, and
>
> Meets the definitions of conservation and cost effective as contained in WAC 194-37-030, and
>
> The NWPPC includes the measure or program in its power plan, or the measure or program is not identified by the NWPPC, but it meets the definitions 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. WAC 194-37-060(2).

As noted above, an agency cannot simply rewrite a statutory definition in its regulations. In fact, the WUTC draft regulations simply repeat the statutory definition, adding no additional qualifications. CTED should do the same.

3. CTED is not authorized to change the plain English meaning of "feasible," and should defer to decisions made by utilities in determining what conservation measures are cost-effective, reliable and feasible.

RCW 19.285.040 requires that "**Each qualifying utility shall pursue all available conservation that is cost-effective, reliable, and feasible**." (Emphasis added.) The statute, however, does not define "feasible." Therefore, the plain English definition applies. Webster's defines "feasible" as "capable of being done or carried out." CTED is within its authority to include a definition in its regulations, but it must generally comport with the plain English definition.

The July 2 CTED draft contained the following definition: "'Feasible' means that a resource would be expected to be offered for acquisition by the entity able to make that offer in response to an offer by a qualifying utility to pay up to the utility's full avoided cost, minus program administration costs, for the savings over the life of the measure."

Stakeholders at the July 10 meeting with CTED suggested that this definition is very confusing, and does not comport with the dictionary definition of feasible. CTED indicated that it would be dropping this definition because it competes with the draft language in WAC 194-37-060, which now provides that:

> A public utility may document shortfalls in meeting its conservation target that result from any conservation measures that prove not to be feasible. For purposes of assessing achievement of conservation targets, a utility may retrospectively reduce its target by such documented shortfalls. Documentation that a conservation measure is not feasible should include, at a minimum, evidence that: (i) such conservation measure was offered

> for at least twenty-four months to customers likely to achieve savings from installing the conservation measure; (ii) that the offer(s) were made directly to the customers; (iii) that the utility made a good faith effort to persuade the customer(s) to install the conservation measure; and that the utility offered to pay the customer an incentive in an amount equal to the utility's full avoided cost minus administrative costs over the lifetime of the measure, up to one hundred percent of the incremental cost of the measure. The utility may deduct this conservation potential from the conservation target in any subsequent biennium during which such offer is repeated and outstanding. WAC 194-37-060(10).

This is another instance where the proposed rules reduce the flexibility provided for in the initiative. The initiative places on utilities the responsibility to "pursue all available conservation that is cost-effective, reliable, and feasible." It defines "cost-effective," but not "reliable" or "feasible." Presumably, that reflected a decision to leave the definition of the latter two terms to the discretion of each utility.

Instead, the proposed rules define "feasible" to mean that utilities must offer their customers a specific type of contract, one that offers them "an incentive in an amount equal to the utility's full avoided cost minus administrative costs over the lifetime of the measure, up to one hundred percent of the incremental cost of the measure." Moreover, the contract must be made available for two years, during which time the utility must make a "good faith effort to persuade the customer(s) to install the conservation measure." This level of specificity has no relationship to whether a conservation measure is feasible, i.e., "capable of being done or carried out." Except for the first two sentences, this section should be stricken.

Further, as noted in our prior comments and as addressed above, decisions related to cost effectiveness, reliability and feasibility are best assessed by each qualifying utility, based on its particular circumstances.

4. CTED cannot require that publicly-owned utilities hold a public hearing regarding their conservation measures.

The initiative requires that utilities make their conservation targets "publicly available." RCW 19.285.040(1)(b). It also requires that a utility's annual reports to CTED regarding its progress in meeting conservation targets be made "available to its customers." RCW 19.285.070(3).

However, CTED has included a provision requiring utilities to hold a public hearing:

> A utility will hold a properly noticed public hearing regarding their assessment of conservation potential, and adopt the ten-year conservation potential and the two-year conservation targets by action of the utility's governing board in a public meeting. Such public hearing may be conducted separately, or as part of public hearings conducted for resource planning, budget setting, or other related processes. The public notice will indicate that the hearing agenda includes the establishment of the utility's ten-year conservation resource potential and two-year conservation targets. 194-37-050(2)C.

If the drafters of the initiative had intended to require public hearings, they easily could have so provided. Having chosen instead to require only public availability, CTED has no authority to override that judgment. This provision should be stricken and replaced with the following: "A utility shall make its biennial acquisition target publicly available."

5. CTED has no authority to mandate that conservation targets be based on a utility's share of regional load.

As already noted, the initiative directs utilities to "pursue all available conservation that is cost-effective, reliable, and feasible." RCW 19.285.040(1). In doing so, utilities must use methodologies consistent with those of the NWPPC. RCW 19.285.040(1)(a).

Now, when using the NWPPC Conservation Calculator, CTED is requiring that the utility also calculate its conservation targets based on its pro rata share of regional load: "Per the conservation calculator, the public utility will document its calculation of its pro rata conservation targets for compliance based on its share of regional load using the NWPCC's conservation calculator." WAC 194-37-050(2)E.i. In addition to being circular, this provision mandates a specific methodology, in violation of the initiative's language providing simply for use of a consistent methodology. Also, nothing authorizes CTED to require a utility to calculate its pro rata conservation targets based on its pro rata share of regional load. This provision should be stricken.

6. CTED cannot amend the definition of conservation by limiting it to "discrete" distribution system upgrades.

As noted earlier, the initiative defines conservation to mean "any reduction in electric power consumption resulting from increases in the efficiency of energy use, production, or distribution." RCW 19.285.030(4). As to conservation resulting from efficiency achieved in the distribution system, CTED has amended this definition as follows: "To the extent that a utility can demonstrate that a **discrete** distribution system upgrade or management practice results in lower line losses and/or transformation losses, the avoided energy supply requirement to serve customers may be included in the utility's calculation of compliance with the requirements of RCW 19.285.040." WAC 194-37-070(1) (emphasis added).

There is no statutory basis upon which to limit distribution efficiencies to "discrete" distribution system upgrades. In fact, such a limitation is directly contrary to this provision's use of the broadest possible term, "any." Any reduction in power consumption resulting from distribution system upgrades, whether "discrete" or not, falls squarely within the definition of "conservation." CTED should delete this limitation.

7. CTED cannot bar a utility from counting conservation measures identified after the conservation targets were established.

The initiative requires utilities to establish a biennial acquisition target for cost-effective conservation, and then meet that target within the subsequent two-year period. RCW 19.285.040(1)(b). Nothing in the language suggests that a utility can only meet the target by

implementing measures that were identified at the time the biennial target was established. Nevertheless, CTED's draft attempts to add that limitation: "Only those programs and measures included in the utility's conservation target shall be included in measurement of conservation achievement." WAC 194-37-070(1). Not only does this limitation lack a statutory basis, but it frustrates the purposes of the statute by "freezing" the list of measures available to a utility to meet its target. This limitation should be stricken.

B. Renewables-Related Issues

1. When must utilities demonstrate compliance with the RPS percentage requirements?

We are aware that there has been considerable controversy regarding the interpretation of RCW 19.285.040(2)(a), particularly regarding the phrase "**by** January 1, 2012." (Emphasis added.) Renewable advocates have argued that this means that utilities must have signed contracts in place on January 1, 2012, sufficient to meet the three percent requirement for 2012. Some utilities have instead pointed to RCW 19.285.040(2)(e), which provides that a utility's requirements may be satisfied "for any given year with renewable energy credits produced during that year, the preceding year, **or the subsequent year,"** arguing that a utility has until December 31, 2013 to satisfy the three percent requirement for 2012, and need not have any contracts in place on January 1, 2012.

The District finds these interpretations neither workable nor compelled by the language of the statute. The first interpretation requires the utility to anticipate the number of credits it will need for 2012 on January 1 of that year. This is particularly problematic in the case of a utility, such as the District, that will be using incremental hydro to satisfy at least a portion of its renewable requirements. Obviously, it is impossible to foresee on January 1 what type of water year or weather patterns will unfold for the remainder of that year. Utilities should not be forced to guess regarding such an important matter, particularly when faced with potential liability for monetary penalties.

At the same time, the District appreciates the concern created by the prospect of a utility waiting until December 31, 2013 to satisfy its renewable requirement for 2012. Therefore, we propose a third, "middle ground" approach that may resolve this matter to the satisfaction of all involved. It would require that, as of January 1 of each year, each qualifying utility would be required to meet its renewable requirement for the preceding year, using credits produced during the preceding two years. In the event that enough credits were not produced during the preceding two years to meet the requirement of the preceding year, the utility would be required to make up the shortfall in the third year (either contractually or through its own generation).

For example, by January 1, 2012, a utility would be required to have produced enough credits in 2010 and 2011 to reach three percent for 2011. If an insufficient number of credits were produced, the utility would be required to be in a position to make up the shortfall in 2012. This would certainly meet both the letter and spirit of the requirement that the three percent level be reached "by" January 1, 2012. Equally important, it would establish a procedure for future years

that would allow utilities the flexibility to use credits produced over a historical two-year period, rather than only a one-year period.

This approach is completely consistent with the language of the initiative and allows utilities to know what will be needed to meet the renewable requirements. RCW 19.285.040(1)(e) provides that a renewables requirement "may" be met for any given year with renewable energy credits produced during that year, the preceding year, or the subsequent year. Because the initiative uses "may" instead of "must," CTED would certainly be within its authority to allow utilities to use credits accumulated over a historical two-year period.

Again, we appreciate your hard work on these regulations, and look forward to continuing to work closely with you on bringing them to a successful conclusion.

Sincerely,

Gregg Carrington
Director of External Affairs

Attachment: Redline version of proposed rules



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May 29, 2007

Liz Klumpp
Washington Department of Community,
Trade and Economic Development
PO Box 43173
Olympia, WA 98504-3173

Subject: Chelan PUD's response and comments to CTED proposed rules for the Energy Independence Act dated May 15, 2007 (rough-draft)
E-filed to elizabethk@cted.wa.gov

Dear Ms. Klumpp:

Public Utility District No. 1 of Chelan County (Chelan PUD) appreciates this opportunity to comment on the Washington Department of Community, Trade and Economic Development's (CTED's) proposed rule language (WAC 194-37) dated May 14, 2007 regarding the implementation of the Energy Independence Act (RCW 19.285).

I. Introduction

Using the format suggested by CTED, Chelan PUD has attached a copy of a marked-up version of the proposed language. Our specific areas of concern and the corresponding description are contained herein. Although we have provided language changes in many sections to the proposed WAC, our comments focus on five primary areas:

1) Documenting Development of Conservation Targets (WAC 194-37-040).
2) Documentation of Conservation Savings (WAC 194-37-050)
3) Conservation Reporting Requirements (WAC 194-37-100)
4) Documentation of Incremental Hydropower (WAC 194-37-120)
5) Documentation of Financial Path – Substitute Resource and Resource Equivalence (WAC 194-37-190)

As you will see, Chelan PUD's main concerns lie with the references in the draft regulation to the Pacific Northwest Electric Power and Conservation Planning Council (Council). Our comments regarding the renewables provisions of the draft largely relate to the need for clarification.

II. Specific Areas of Concern

1. Documenting Development of Conservation Targets (WAC 194-37-040)

Description of Concern

The draft regulation is based on a misinterpretation of RCW 19.285, which states that: "By January 1, 2010, using methodologies consistent with those used by the Pacific Northwest electric power and conservation planning council in its recently published regional power plan, each qualifying utility shall identify its achievable cost-effective conservation potential through 2019. At least every two years thereafter, the qualifying utility shall review and update this assessment for the subsequent ten-year period." (Emphasis added.) This provision makes clear each utility shall identify its own conservation potential consistent with the Council's methodologies. There is no indication that the utility is required to use the actual conservation targets established by the Council.

Any other construction of the new statute might well be an unconstitutional delegation of legislative power. *State v. Dougall*, 89 Wn.2d 118, 122-23 (1977) ("While the legislature may enact statutes which adopt existing federal rules, regulations, or statutes, legislation which attempts to adopt or acquiesce in future federal rules, regulations, or statutes is an unconstitutional delegation of legislative power and thus void.") (Emphasis added); *Diversified Investment Partnership v. Department of Social and Health Services*, 113 Wn.2d 19, 24-25 (1989) ("A statute must be complete in itself when it leaves the hands of the Legislature. It is well settled in Washington that the Legislature may not constitutionally attempt to adopt future federal law by statute. If it were to do so, the substance of the law would be incomplete when it passed the Legislature, thus transferring the power to render judgment on an issue to the federal government.") (Citations omitted).

Here, handing responsibility to the Council to set conservation targets for consumer-owned utilities would be an extraordinary delegation of authority to an entity created by federal law, and that is beyond the control of the Washington State Legislature. That presumably explains why the drafters of the Initiative limited this provision to requiring utilities to use methodologies consistent with the Council's plan, not the actual conservation targets established by the Council.

Furthermore, the Council has no regulatory authority with respect to the qualifying utilities. In fact, some of the utilities, such as Chelan PUD, have no affiliation with the Council and, consequently, have no real input to the development of the council's existing or future power plans or the assumptions used to develop those plans. In addition, Washington State has a limited role in the overall management and oversight of the Council. For these reasons, CTED

should revise the rule language to make clear that qualifying utilities need only be consistent with the conservation methodologies adopted by the Council.

2. Documentation of Conservation Savings (WAC 194-37-050)

Description of Concern

In addition to requiring utilities to identify its cost-effective conservation potential consistent with the Council's methodologies, the new law requires qualifying utilities to "pursue all available conservation that is cost-effective, reliable and feasible." RCW 19.285.040(1) The real-world application of each of these terms – cost-effective, reliable, and feasible – depends on the particular physical and fiscal circumstances of each qualifying utility. In pursuing conservation measures, each qualifying utility must therefore have the flexibility to consider the totality of its circumstances. As such, Chelan PUD has inserted the following language into the proposed rule: "Each qualifying utility shall assess in writing whether prospective conservation measures are cost-effective, reliable, and feasible, using methodologies adopted by such utility, and such assessments shall be submitted to CTED biennially."

We assume that CTED is not proposing that all conservation savings be approved by the Council's Regional Technical Forum (RTF). Chelan PUD often uses empirical data to support conservation savings rather than using the Council's more complicated and time-consuming approach. We often estimate savings in large commercial and industrial projects, then use monitoring and evaluation techniques to confirm actual savings. We believe that flexibility is imperative in any cost-effective efficiency program.

3. Conservation Reporting Requirements (WAC 194-37-100)

Description of Concern

Based on discussions with CTED and our interpretation of the law, any reduction in the "electric power consumption resulting from increases in the efficiency of energy use, production or distribution" will count towards the qualifying utilities conservation targets so long as those programs have been identified in the 10-year plan. [WAC 194-37-030 (5)]

The term "conservation" is key because the law requires each qualifying utility to engage in a three-step process: (a) identify its achievable cost-effective conservation potential through 2019, using methodologies consistent with those used by the Council, then (b) set a biennial acquisition target for cost-effective conservation, and then (c) meet that target. The Council currently analyzes the cost-effectiveness of conserving energy use in order to avoid the need to expand the transmission system, but does not include conservation resulting from improvements in energy production or distribution. For example, distribution upgrades can reduce line loss, thereby conserving energy. Consequently, as to production and distribution, it should be made clear in the regulations that qualifying utilities need not seek consistency with the Council's methodology for identifying cost-effective conservation, and that production and distribution conservation need not be additive. This could be done by revising –040(2)C to read as follows: "Each qualifying utility may use its own methodology to evaluate production and distribution

conservation potential, and count that conservation potential toward meeting its conservation 10-year plan."

4. Documentation of Incremental Hydropower (WAC 194-37-120)

Description of Concern

CTED has added a provision to the draft regulations stating that "incremental hydropower shall count towards the utilities renewable energy target only when all non-power attributes of the incremental power remain bundled with the power." [WAC 194-37-030 (22)] This limitation does not appear in the statute. We are only aware of incremental hydropower being excluded from being considered a Renewable Energy Credit (REC) and that all non-power attributes remain with the REC's. We therefore request that this language be stricken.

5. Documentation of Financial Path – Substitute Resource and Resource Equivalence (WAC 194-37-190)

Description of Concern

RCW 19.285.050(1)(a) provides that a qualifying utility is in compliance with the new law "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…." RCW 19.285.050(1)(b) then provides that the incremental cost is "the difference between the levelized delivered cost of the eligible renewable resource, regardless of ownership, compared to the levelized delivered cost of an equivalent amount of reasonably available substitute resources that do not qualify as eligible renewable resources, where the resources being compared have the same contract length or facility life." The purpose of these provisions is to create a four-percent cap on the incremental cost that the utility incurs for eligible renewable resources.

In cases where the qualifying utility has surplus power, the reasonably available substitute resources that do not qualify as eligible renewable resources may be the utility's own generation resources. In those cases, the utilities' own resources are the less expensive "reasonably available substitute resource," and should be used as the benchmark for determining when the four-percent cap has been reached. Otherwise, these utilities would involuntarily incur more than a four-percent cost increase due to the acquisition of eligible renewable resources, an outcome barred by RCW 19.285.050(1)(a).

III. Conclusion

Again, Chelan PUD appreciates this opportunity to provide input as CTED prepares draft regulations for the implementation of the Energy Independence Act. We will continue to

actively participate as this rulemaking goes forward. Please do not hesitate to contact me with questions about this submission.

Sincerely,

Gregg Carrington
Director of External Affairs

Attachment: Reline version of proposed rules



PUBLIC UTILITY DISTRICT NO. 1 *of* CHELAN COUNTY
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March 20, 2007

Liz Klumpp
Washington Department of Community,
Trade and Economic Development
PO Box 43173
Olympia, WA 98504-3173
e-filed to ~~carolees@cted.wa.gov~~

Dear Ms. Klumpp:

Public Utility District No. 1 of Chelan County (Chelan PUD) appreciates this opportunity to comment on the Washington Department of Community, Trade and Economic Development's (CTED's) notice of opportunity to file written comments regarding the implementation of the Energy Independence Act (RCW 19.285), commonly known as Initiative No. 937 ("Initiative").

I. Introduction

Using the format suggested by CTED, Chelan PUD's comments focus on four critical issues:

a) Definition of incremental hydropower. *RCW 19.285.030(10)(b)*
b) Consideration of production and distribution conservation measures. *RCW 19.285.030(4)* and *19.285.040(1)(a)*.
c) Consideration of "reliable and feasible" in identifying cost-effective conservation targets. *19.285.040(1).*
d) Evaluation of the cost of incremental eligible resources. *19.285.050(1)(b)*.

One general comment applies to each of these four issues. Under Section 8 of the Initiative, CTED's rulemaking authority regarding consumer-owned utilities is more limited than the authority of the Utilities and Transportation Commission (Commission) regarding investor-owned utilities in two important respects. First, CTED's authority regarding consumer-owned utilities is limited to "rules concerning only process, timelines, and documentation…," a constraint that does not apply to the Commission's authority. Second, CTED's authority is limited to "implementation of this chapter…," while the Commission's rulemaking authority extends to "implementation **and enforcement** of this chapter…."

These differences clearly require that consumer-owned utilities be given substantially more deference in decisions made and in implementation of the Initiative. Accordingly, the proposed rule language that follows is crafted for application to consumer-owned utilities.

II. Specific Comments

(a) Incremental Hydropower

1. Statutory Citation

- *19.285.030(10)(b) Incremental electricity produced as a result of efficiency improvements completed after March 31, 1999, to hydroelectric generation projects owned by a qualifying utility and located in the Pacific Northwest or to hydroelectric generation in irrigation pipes and canals located in the Pacific Northwest, where the additional generation in either case does not result in new water diversions or impoundments.*

2. Issue Statement

The Initiative does not define the phrase "Incremental electricity produced as a result of efficiency improvements," as used in RCW 19.285.030(10)(b). In order to implement this provision, the regulations need to define "incremental electricity" and "efficiency improvements." In particular, "efficiency improvements" should be defined to include "equipment or operational efficiency improvements."

3. Proposed Rule Language

1. "'Efficiency improvements' means efficiencies at a hydroelectric generating project resulting from equipment or operational improvements."

2. "'Incremental electricity' means the amount of electricity generated by a hydroelectric generating project as a result of efficiency improvements completed after March 31, 1999, minus the amount of electricity generated at the same facility prior to March 31, 1999 without such efficiency improvements."

3. "Where eligible renewable resources are produced by incremental electricity resulting from efficiency improvements, a qualifying consumer-owned utility shall submit documentation to the Department: (a) stating the amount of incremental electricity produced; (b) describing the efficiency improvements that produced the incremental electricity; (c) stating that the efficiency improvements were completed after March 31, 1999; (d) stating that the efficiency improvements were made to a hydroelectric project owned by the qualifying utility and located in the Pacific Northwest, or to hydroelectric generation in irrigation pipes and canals located in the Pacific Northwest; and (e) stating the additional generation does not result in new water diversions or impoundments."

4. Explanation of the Proposed Rule Language

The proposed rule language clarifies two key points that will be essential to the effective administration of this provision: the scope of efficiency improvements, and the manner in which their benefits are to be documented. As to scope, it is important to understand that efficiency improvements in hydropower production can be achieved in various ways. For example, upgraded turbines and rewound generators can result in more electricity production from the same amount of water. Similarly, improved operational protocols, such as more efficient dispatching of generating units, can have the same effect.

To assist in the verification of the benefits, the proposed language requires the consumer-owned utility to provide certain documentation to CTED. This documentation will create a record as to the amount of incremental electricity produced, and the means by which it was produced. Finally, the proposed language requires documentation that the other requirements of the statutory definition are met.

(b) Production and Distribution Conservation Measures

1. Statutory Citation(s)

- *RCW 19.285.030(4): "Conservation" means any reduction in electric power consumption resulting from increases in the efficiency of energy use, production, or distribution.*

- *RCW 19.285.040(1)(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…*

2. Issue Statement

The term "conservation" is key to Initiative 937 because the Initiative requires each qualifying utility to engage in a three-step process: (a) identify its achievable cost-effective conservation potential through 2019, using methodologies consistent with those used by the Northwest Power Planning Council (Council), then (b) set a biennial acquisition target for cost-effective conservation, and then (c) meet that target. "Conservation" is defined in RCW 19.285.030(4) to mean any reduction in electric power consumption resulting from increases in the efficiency of: (1) energy use; (2) production; or (3) distribution.

The Council currently analyzes the cost-effectiveness of conserving energy use, thereby avoiding the expansion of the transmission system, but not of conservation resulting from improvements in energy production or distribution. For example, distribution upgrades can reduce line loss, thereby conserving energy. Consequently, as to production and distribution, consumer-owned utilities need not seek consistency with the Council's

methodology for identifying cost-effective conservation. Further, Chelan PUD must also comply with other statutory and constitutional provisions in determining how public funds can be expended on conservation measures.

3. Proposed Rule Language

"In identifying its achievable cost-effective conservation potential through 2019 with respect to production and distribution, each qualifying utility shall make a written assessment based on economic and engineering practices adopted by such utility, and such assessment shall be submitted to CTED biennially. As to energy use, each such utility shall include in its assessment a description of how such utility's assessment is consistent with the methodologies used by the council."

4. Explanation of the Proposed Rule Language

The proposed language provides clear guidance regarding the identification and assessment of cost-effective conservation potential regarding energy use, production, and distribution.

(c) Consideration of "Reliable and "Feasible"

1. Statutory Citation(s)

- *Sec. 4(1) Each qualifying utility shall pursue all available conservation that is cost-effective, reliable and feasible.*

- *RCW 19.285.040(1)(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…*

2. Issue Statement

Section 4(1) clearly requires qualifying utilities to pursue all available conservation that is cost-effective, reliable, and feasible, and Chelan PUD is committed to doing so. However, the real-world application of each of these terms – cost-effective, reliable, and feasible – depends on the particular physical and fiscal circumstances of each qualifying utility. In pursuing conservation measures, each qualifying utility must therefore have the flexibility to consider the totality of its circumstances. This flexibility is further supported by the substantial deference to consumer-owned utilities discussed in the introduction.

3. Proposed Rule Language

"Each qualifying utility that is not an investor-owned utility shall assess in writing whether prospective conservation measures are cost-effective, reliable, and feasible,

using methodologies adopted by such utility, and such assessments shall be submitted to CTED biennially."

4. Explanation of the Proposed Rule Language

Based on Section 8(2) of the Initiative, substantial deference should be given to consumer-owned utilities considering the cost-effectiveness, reliability, and feasibility of potential conservation measures. As discussed above, the Council's methodology is a useful starting point for determining the cost-effectiveness of a conservation measure relating to energy use, but the cost-effectiveness of improvements in production and distribution, as well as factors relating to reliability and feasibility, are best assessed by each qualifying utility, based on its particular circumstances. For example, a utility may need to consider its financial policies (such as payback periods and internal rate of return), other laws regarding the expenditure of public funds and how its role as a purchaser or seller or electric energy impacts the prioritization of different conservation options.

(d) Incremental Eligible Resources

1. Statutory Citation

- *RCW 19.285.050(1)(b) The incremental cost of an eligible renewable resource is calculated as the difference between the levelized delivered cost of the eligible renewable resource, regardless of ownership, compared to the levelized delivered cost of an equivalent amount of reasonably available substitute resources that do not qualify as eligible renewable resources, where the resources being compared have the same contract length or facility life.*

2. Issue Statement

The meaning of "reasonably available substitute resources" should be clarified to ensure that a consumer-owned utility can compare the incremental cost of eligible renewable resources against the levelized delivered cost of an equivalent amount of its own generation resources, if available.

3. Proposed Rule Language

"Reasonably available substitute resources" may include an equivalent amount of resources owned by the qualified utility that do not qualify as eligible renewable resources, where the resources being compared have the same facility life."

4. Explanation of the Proposed Rule Language

RCW 19.285.050(1)(a) provides that a qualifying utility is in compliance with the new law "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…." RCW 19.285.050(1)(b) then provides that the incremental cost is "the difference between the levelized delivered cost of the eligible renewable resource, regardless of ownership, compared to the levelized delivered cost of an equivalent amount of reasonably available substitute resources that do not qualify as eligible renewable resources, where the resources being compared have the same contract length or facility life." The purpose of these provisions is to create a four-percent cap on the incremental cost that the utility incurs for eligible renewable resources.

In cases where the qualifying utility has surplus power, the reasonably available substitute resources that do not qualify as eligible renewable resources may be the utility's own generation resources. In those cases, the utilities' own resources are the less expensive "reasonably available substitute resource" and should be used as the benchmark for determining when the four-percent cap has been reached. Otherwise, these utilities would involuntarily incur more than a four-percent cost increase due to the acquisition of eligible renewable resources, an outcome barred by RCW 19.285.050(1)(a).

III. Conclusion

Again, Chelan PUD appreciates this opportunity to provide input as CTED prepares draft regulations for the implementation of I-937. We intend to actively participate as this rulemaking goes forward. Please do not hesitate to contact me with questions about this submission.

Sincerely,

Gregg Carrington
Director of Hydro Services

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