

**To: Howard Schwartz, Community Trade and Economic Development**

**From: Nancy Hirsh and Danielle Dixon, NW Energy Coalition**

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The Coalition appreciates this final opportunity to submit comments in the rulemaking process to implement I-937. During the past nine months our organization has submitted detailed comments on previous draft rules and we have participated in all stakeholder meetings held by the Department during this rulemaking. We applaud the staff for all the diligent work in developing these rules and thoughtfully engaging stakeholders in the process.

The proposed rules provide the necessary detail for utilities to document their compliance with the law. They ensure that utilities and other stakeholders have a common understanding of the documentation, process and timelines required to implement and comply with the law. The rules adopted by the Utilities and Transportation Commission may be shorter than CTED's proposed rules, but they are supported by many volumes of rules and regulations governing the actions of the investor-owned utilities. The qualifying utilities covered by the Department's proposed rule do not have the same type of consistent process and guidance documentation that would support less detailed rules. For the State Auditor and any private auditor to evaluate utility documents and determine accountability, they must have access to standard documentation and presentation of information to ensure consistent implementation across all the utilities.

These comments focus primarily on the conservation sections of the rule and we support in full the final comments submitted by the Renewable Northwest Project on the rule sections that apply to implementation of the renewable resource requirements. The Coalition also supports the final comments submitted by the Northwest Energy Efficiency Council.

In general, the Coalition supports the proposed rules but must register a significant concern that CTED offers utilities too much flexibility in how they calculate their conservation savings. The intent of I-937's conservation standard is to end decades of "roller coaster" investments in energy efficiency. The Department has jeopardized that goal by giving utilities broad discretion in how they calculate their available cost-effective conservation. The proposed rules may result in cost-effective energy efficiency measures being overlooked and uncaptured, even though the law clearly states that utilities must acquire all available conservation that is cost-effective, reliable and feasible. Such an outcome means low cost energy resources are ignored in favor of higher cost generation resources, to the detriment of Washington's energy consumers.

### **Critical Conservation Compliance Issues**

#### **I WAC 194-37-070 (3) – Using the Most Recent Council Plan**

The law states that utilities must use methodologies consistent with those used by the Power Council in "its most recently published regional power plan." We understand certain utility interests believe it would be unlawful for CTED to automatically update its rules to ensure that

utilities are identifying their “achievable cost-effective conservation potential” under “methodologies consistent with” future publications of the Council’s regional power plans. We even have heard argument that CTED is banned from conducting future rulemaking proceedings to update these provisions of the administrative rules after the Council publishes its 6<sup>th</sup>, 7<sup>th</sup>, and later plans. These allegations miss the fundamental workings of RCW 19.285.040.<sup>1</sup>

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

First, RCW 19.285.040 does not automatically incorporate any future federal statutes, rules, or other requirements at all. It is true that “*adoption of future* federal rules, regulations or statutes would be an unconstitutional delegation of legislative power.” *State v. Readers Digest Association, Inc.*, 81 Wash.2d 259, 275 (1972) (emphasis in original). But the Energy Independence Act does no such thing. The statute instead uses the Council’s regional power plans as a technical guide and benchmark for determining conservation potential for qualifying utilities in Washington. The Act allows utilities to *use a range of methodologies* to identify their 10-year conservation potential, so long as those methodologies are “consistent” with methodologies used in the most recently published Council regional power plan. Thus, RCW 19.285.040 is more akin to the statute comfortably upheld in *State v. Readers Digest Association, Inc.*, which provided that Washington’s courts are to be guided by federal precedents in implementing the state’s consumer protection laws, but left the ultimate decision up to the state courts.

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

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

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

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

CTED’s proposed implementation of RCW 19.285.040 provides procedural safeguards for utilities. The draft rules are clear that the methodologies in the Council’s 5<sup>th</sup> Plan are the current guideposts for identifying conservation potential. In proposed WAC 194-37-070 (3) the Department refers specifically to the methodologies in the “fifth power plan” rather than to the most recently published regional power plan, as stated in the statute. CTED has the plain authority to update its rules to ensure the most recent Council plans are used to identify 10-year conservation potential and 2-year conservation targets.<sup>2</sup>

## **II WAC 194-37-070 (6)(a)(iii) – The Council’s Avoided Cost Calculation**

The Department worked with stakeholders over the summer to develop a clear understanding of how the Council calculates avoided cost and what resources are considered when forecasting market prices. The Coalition wants the rules to be very clear that avoided cost is a market price that does not include either a utility’s own embedded resources or Bonneville Power Administration rates. The proposed rule at WAC 194-37-070(6)(a)(iii) does not make this point specifically.

Avoided cost is a critical component in determining cost-effectiveness, as is the term “incremental.” WAC 194-37-040 (8)(b) defines “cost-effective”: “Cost effective means that a project or resource is forecast: . . . (b) To meet or reduce the electric power demand of the intended customers at an estimated incremental system cost no greater than that of the least cost [similar alternative resource].” That term, by its dictionary definition (Webster’s defines “incremental” as “of, relating to, constituting, or resulting from increments, increase, or growth”) and common usage in the energy industry (such as through estimation of avoided costs under the federal Public Utilities Regulatory Policy Act) seeks to identify the cost of the marginal resource that is procured to serve load growth, not the embedded costs of serving existing load.

The Council must follow the provisions of the Pacific Northwest Electric Power Planning and Conservation Act of 1980 when developing its regional plan. Thus, the analysis in the Fifth

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<sup>2</sup> Further, RCW 19.285.080(4) specifically provides CTED with authority to revise its rules as needed to carry out the intent and purposes of the Energy Independence Act.

Power Plan must be consistent with the definition of cost-effective in that Act – and therefore its methodology to equate avoided cost with market price is consistent with that Act. The definition of cost-effective in I-937 refers to the definition in Washington’s Energy Financing Voter Approval Act, which is virtually identical to the definition in the 1980 Power Act. The Council does not include utility embedded resources or BPA federal hydropower resources in its market price, and utilities should be specifically restricted from doing so as well in meeting the provisions of I-937. Indeed, if the Council had used embedded resources or BPA federal hydropower resources to calculate avoided cost, it would have identified **significantly less** conservation potential in the region. We submit that if a proposed methodology to identify conservation potential leads to such a radically different result from the Council, it simply cannot be deemed to be “consistent with” Council’s methodology. Using such inconsistent methodologies would violate both the intent and the plain language of the Energy Independence Act.

**The Coalition proposes this modification to WAC 194-37-070 (6)(a)(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. Avoided cost shall not be based upon the cost of a utility’s own embedded resources or a Bonneville Power Administration rate of general application that includes the hydroelectric resources of the federal base system as defined by 16 USC 839a.

### **III WAC 194-37-070 (3)(c) Distribution and Production Efficiency Must Be Additive**

The Department has provided very detailed and appropriate documentation requirements for the showing of efficiency improvements from distribution systems and production facilities in 37-090 and 37-100. Utilities that choose to include production and distribution efficiency improvements in their 10 year and biennial target must ensure that this assessment is additive to their estimates of end-use improvements. The Council’s Fifth Plan focused on end-user conservation potential, and did not evaluate production and distribution efficiency improvements at all. Using the Council’s methodology establishes end use conservation potential and as such any calculation of production and distribution efficiency must be additive to the customer conservation target. The proposed rules must not allow production and distribution efficiency improvements to dilute or reduce end-use conservation potential.

**The Coalition proposes this modification to WAC 194-37-070 (3)(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. Conservation savings in the production and distribution measures beyond those forecasted in the biennial target cannot be used to meet the full biennial target if they result in the failure of capture of all cost effective savings in the end use customer measures.

## **Additional Comments**

**IV WAC 194-37-040 (21)** – The definition of incremental hydropower provides some specific examples of what would increase efficiency. It should make clear that increases in efficiency should not be at the expense of other obligations. We suggest the following addition – “Qualified incremental hydropower efficiency improvements” means....They do not include additions to capacity by increasing pondage or elevation head, or diverting additional water into the project, or any action that has a detrimental impact on statutory fish and wildlife protection obligations.

**V WAC 194-37-050** – The “Reporting and Public Disclosure” section of the statute calls on each utility to make its reports available to its customers. The Department rule should reference this RCW section with the following language which should be inserted into WAC 194-37-050: All current and historical reports required in WAC 194-37-060 and 110 shall be available to a utility’s customers and may be provided in conjunction with the utility’s requirements under RCW 19.29A.050.

**VI WAC 194-37-080 (10)** – A clarification is needed in the cogeneration section to ensure that a utility is not claiming extra power sold to the market by the cogeneration facility as part of the utility’s conservation target. The proposed rule language captures the concept that the cogeneration facility reduces load on the utility’s system but does not ensure that any excess power that may be sold into the market as output from the facility is not counted toward the conservation target. We recommend a slight addition to further clarify.

**The Coalition proposes this modification to WAC 194-37-080(10)** – A utility may...The high efficiency cogeneration facility shall be owned and used by a retail electric consumer to meet that consumer’s heat and power needs, where only that output used by that customer to meet its own needs can count toward the utility’s conservation target.

**VII WAC 194-37-110** – In this section the rules rightly and clearly require the utilities to demonstrate they have met the renewable energy standard for a specified year no later than January 1 of that year, beginning in 2012. This is an accurate reflection of the law and should remain in the rule.

**VIII WAC 194-37-130** – The law clearly states that incremental electricity produced as a result of certain efficiency improvements at hydropower projects *owned by* a qualifying utility is considered an eligible renewable resource. The proposed rules make a significant modification to this section of the law. In section 130 (3)(f) the Department allows a utility to state how it acquired the incremental output. This implies that the owner of the qualifying project can sell the incremental output. This interpretation is not consistent with the statute and should be deleted. Delete 130(3)(f).