

Concise Explanatory Statement
Chapter 194-37 WAC (Energy Independence Act, RCW 19.285)

Part I: Draft Response to legal issues applicable to Chapter 194-37 WAC as a whole

Rule-making authority.

Several stakeholders have provided general comments that the rules exceed the scope of the CTED's authority to adopt rules "concerning only process, timelines, and documentation" under RCW 19.285.080(2). CTED disagrees. RCW 19.285.080(2) provides, in part:

The department shall adopt rules concerning only process, timelines, and documentation to ensure the proper implementation of this chapter as it applies to qualifying utilities that are not investor-owned utilities. Those rules include, but are not limited to, rules associated with the qualifying utilities development of conservation targets under RCW 19.284.040(1); a qualifying utility's decision to pursue alternative compliance in RCW 19.285.040(2)(d) or (i) or 19.285.050(1); and the format and content of reports required in RCW 19.285.070.

CTED believes the rules pertain to the general topics of timelines, process, and documentation, including the development of conservation targets, a utilities decision to pursue alternative compliance, and the format and content of reports, as described in RCW 19.285.080(2).

CTED acknowledges that it is not responsible for determining compliance with the Act. The Washington State Auditor is responsible for auditing for compliance of the utilities under its jurisdiction that are not investor-owned, such as the public utilities. Cooperatives and electric mutual associations or corporations fall outside the State Auditor's jurisdiction and are audited for compliance by independent auditors. Unlike the Utilities and Transportation Commission, which is responsible for compliance of investor-owned utilities, the State Auditor and independent auditors are unlikely to have expertise in the economic analyses and methodologies utilities will use to comply with the Act. For this reason, the draft rules contain detailed documentation provisions designed to give the auditors the information they will need to evaluate a utility's compliance. The rules do not impose substantive requirements that are not already mandated by the Act.

To the extent the rules interpret the Act's substantive requirements for the purpose of documenting information the auditors will need to evaluate a utility's compliance, CTED understands such interpretations will not be binding on the auditors when auditing a utility for compliance, or on the Attorney General when exercising enforcement authority. The rules do not, and are not intended to, overstep the independent authority of the auditors or the Attorney General to determine a utility's compliance with the substantive requirements of the Act.

Conflict of Interest.

Cowlitz County PUD raised concerns about CTED's decision to retain a certain consultant to assist in rule development where the consultant has articulated views this person finds objectionable. CTED used a number of consultants to assist in the drafting of these rules. All of the consultants were retained through a competitive selection process and the personal views of any or all of the consultants did not compromise CTED's rule-making process.

The same PUD raised a concern that a Department employee involved in the rule-making process may have violated state laws by accepting employment with the Bonneville Power Administration. CTED has looked into this allegation and finds it to be without merit.

Unlawful Delegation.

Chelan County PUD contends that the requirement in RCW 19.285.040 (1) (a) that utilities use methodologies consistent with the Pacific Northwest Electric Power and Planning Council's "most recently published regional plan" should be interpreted in the rules to mean the Council's Fifth Power Plan, which existed when the initiative passed. Chelan PUD argues that to rely on methodologies contained in the Council's subsequent regional power plans would result in an unconstitutional delegation of legislative authority. CTED believes this potential issue has been addressed by WAC 194-37-070 (3), which refers to the documentation necessary to show a utility established its ten-year potential and biennial target consistent with those in the fifth power plan. CTED will consider updating the rules if the Council adopts a new power plan.

Part II: Draft Response to issues raised regarding specific sections of Chapter 194-37 WAC

Proposed WAC - NEW SECTION - WAC 194-37-040 - (Definitions)

Comments Received From: Hydropower Reform Coalition, Clark PUD, NW Energy Coalition, Inland Power, and Northwest CHP Application Center - WSU Extension Energy Program

Summary of Comments: All of the commenter's suggested changes to definitions in the WAC

CTED Response: All of the requested changes were to definitions that were copied directly from RCW 19.285.030 and, therefore, cannot be changed by rule.

In some cases, such as the request by WSU for other environmental attributes of bio-digesters to be assessed when RECs are created, there may be other administrative procedures, other than in these rules, for dealing with the issue.

Comments Received From: Chelan PUD

Summary of Comments: Delete definitions of, and further references to, Conservation Calculator, RTF and Fifth Power Plan because their use implies an unconstitutional delegation of authority to a future action of non-state entity.

CTED Response: We have dealt with the broad question of delegation of authority in Part I, above. . In the specific instances mentioned by Chelan PUD, the definitions (and associated rules) refer to optional paths for utilities to follow in developing conservation targets and thus impose no requirements beyond those already imposed by RCW 19.235 itself. Because these compliance paths are optional there is no delegation of authority. CTED is specifically granted the authority to develop reporting requirements and formats.

Proposed WAC: NEW SECTION - WAC 194-37-050

Comments Received From: NW Energy Coalition

Summary of Comments: Add language regarding retention and availability of reports.

CTED Response: Agree. Suggested language has been added.

Proposed WAC: NEW SECTION - WAC 194-37-060

Comments Received From: Clark PUD, Northwest Energy Efficiency Council

Summary of Comments: Clark supports language 060 (5) now that reference to auditor opining on accuracy of utility reports is gone. NEEC objects to the treatment of efficiency improvements in production and distribution systems.

CTED Response: The question of how efficiency from production and distribution improvements is treated is addressed under 070 (3) (a), below.

Comments Received From: Chelan PUD

Summary of Comments: Objects to reporting requirements (See full discussion under 194-37-080, below)

CTED Response: See response under 194-37-080, below

Proposed WAC: NEW SECTION - WAC 194-37-070

Comments Received From: Clark PUD

Summary of Comments: 10% Bonus should not apply

CTED Response: Is part of Council methodology so it needs to be included

Comments Received From: Benton PUD, WPUA, Chelan PUD, Industrial Customers of NW Utilities, NW Energy Coalition, and NW Energy Efficiency Council

Summary of Comments: The concerns of the PUD's and ICNU can be grouped under four categories:

1. Major concerns about what they consider to be overly detailed and prescriptive language in the options about how to develop conservation targets.
2. Questions about why the CTED rules are longer and seem more complex than the UTC rules.
3. Suggestions to allow utilities to "alter" or "modify" the Council methodology.
4. Questions about differing interpretations of "cost-effective." The statutory citations for cost-effectiveness in I-937 are at odds with the way the Council uses "cost-effective" in its methodology.

NWEC and NEEC generally took a position supporting CTEDs authority, but expressed some concern that the rules allowed loopholes that would make it less likely that all cost-effective conservation would be pursued.

CTED Response:

1. The language is not prescriptive. It provides guidance to the utilities about what the Council methodology is. Utilities, when developing their conservation targets, must use methodologies consistent with those used by the Council. By setting forth a summary of the Council's methodology in Section 070 (6), the rule provides a benchmark against which utilities, the auditor, stakeholders and the public can measure how consistent with the Council's methodology an individual utility has been when it develops its own specific conservation target. The options in Sections 070 (5) to modify inputs into the Conservation Calculator, and the Utility Specific Option itself (Section 070 (6)) provide opportunities to customize the inputs to the Council methodology in order to reflect the circumstances of individual utilities.

2. First, The relationship of the non-IOUs to CTED under I-937 is different than the relationship between the IOUs and the UTC. The IOUs have an ongoing regulatory relationship with the UTC which includes many standards and procedures that are documented elsewhere than in the UTC's I-937 rules. I-937 specifically states (RCW 19.285.040 (1) (e) that "The Commission may rely on its standard practice for review and approval of investor-owned utility conservation targets." Aside from rules for developing conservation targets and for alternative compliance with renewables targets, the only other authority CTED has regarding non-IOUs is a responsibility to gather data from them. There is no ongoing regulatory relationship so the entire I-937 relationship has to be spelled out in the rules.

Second, under the Commission's rules, the regulatory process starts when a utility files its conservation target. Once the target is filed the Commission begins a potentially long and potentially contested review of the target. With CTED, on the other hand, when the target is filed with CTED, CTED's job is done. The

responsibility to evaluate the target passes to the Auditor (and possibly to the Attorney General). It is the Auditor and Attorney General that need some guidance as to what the Council methodology is.

3. CTED does not believe it has the legal authority to allow utilities to “alter” or “modify” the Council’s methodology. That said, CTED understands that a utility may believe that if it modifies the Council’s methodology but remains consistent with the principles that underlie the Council’s methodology it should be considered to have used a methodology consistent with the Council’s. We believe that this is a compliance and enforcement question that will need to be addressed by the auditor and possibly the Attorney General. We understand that the auditor will look first to the CTED rules for guidance but may also take other factors into consideration when evaluating compliance with the statute.

4. Ultimately, the definitions in the RCW and in the Council methodology all track back to the definition in the NW Power Act of 1980. The difference is that the Council takes a regional perspective while commenter’s think that a utility perspective is more appropriate. Since the Energy Independence Act says to use the Council methodology, we believe we have no alternative but to use the regional perspective as well. What this means is that utilities that displace generation with conservation can sell the displaced energy to recoup their conservation expenses. Therefore, the regional avoided cost is also their avoided cost. If there are unique circumstances not covered by the law, a utility can document them and let the auditor decide if they are in compliance.

If, at some future date, the Council revises its definition of “avoided cost,” these Rules can be amended to reflect those changes.

Comments Received From: Chelan PUD

Summary of Comments: Consumer-owned utilities must be careful to ensure that money expended in helping their customers conserve energy does not constitute an unconstitutional gift of public funds prohibited by article 8, section 7 of the Washington State Constitution. The PUD argues that consumer-owned utilities should therefore be accorded flexibility to enable them to exercise their own judgments as to how they may comply with the Act consistent with the limitations of the article 8, section 7. The PUD argues that to provide this flexibility CTED should adopt the following language contained in WAC 480-109-010 (1) (b) (i) adopted by the Washington Utilities and Transportation Commission: “A utility may, with full documentation, alter the Council’s methodologies to better fit the attributes and characteristics of its service territory.”

CTED Response: The rules are consistent with the language in RCW 19.285.040 (1) (a), which provides that each utility shall identify its achievable cost-effective conservation potential “using methodologies consistent with those used by the Pacific Northwest electric power and conservation planning council[.]” CTED believes the language in WAC 194-37-070 will give the consumer-owned utilities sufficient flexibility to allow them to implement conservation measures consistent with article 8, section 7 of

the Washington State Constitution. Reasons for not adopting the WUTC language are given in the previous response, above.

Comments Received From: Mason County PUD #3, Email from Tom Eckman, Northwest Power and Conservation Council, NW Energy Coalition

Summary of Comments: 070 (3) (a) Mason County PUD argues that production and distribution efficiencies should not be additive (to the end use targets) but should be included with them as one target that can be arrived using the conservation calculator. Tom Eckman notes that the Council's regional goal includes an estimate of potential savings from production and distribution efficiencies and therefore, a percentage of the regional goal, which is what the Calculator calculates would automatically include some amount of production and distribution efficiencies.

The Coalition, writing before Mr. Eckman's e-mail became available, would prefer to keep the current language.

CTED Response: In the light of the comments by Tom Eckman, the Conservation Manager for the NWPCC, CTED sees no alternative but to defer to Council staff in matters regarding Council methodology. Therefore the rules have been amended to reflect that when using the conservation calculator, the target shall be assumed to include some amount of production and distribution efficiencies. The exact amount should be documented by the utility.

The rule language has been changed to reflect this new information

Proposed WAC: NEW SECTION - WAC 194-37-080

Comments Received From: Clark PUD

Summary of Comments: CTED needs to restore some language to deal with what happens when utility makes good faith attempt to get customers (especially large industrials) to conserve, but they don't cooperate.

CTED Response: We agree that this is a gap in the rules that ought to be addressed. We have modified the language that was in an earlier draft –and found to be unsatisfactory by most stakeholders—by noting that utilities may document lack of customer participation in utility conservation programs. It is then up to the auditor to evaluate the utility's efforts to reach out to its customers when it assesses compliance with the statute.

This new language is now Section 194-37-080 (11).

Comments Received From: Northwest Energy Efficiency Council, NW Energy Coalition

Summary of Comments: Tighten up Co-gen accounting.

CTED Response: Agree. We have added the suggested language.

Comments Received From: Chelan PUD

Summary of Comments:

1. Council's methodologies should have no role in the reporting of conservation achievements.
2. Shouldn't have to use BPA/RTF reporting system.

CTED Response:

1. RCW 19.285.080 explicitly gives CTED authority to adopt rules regarding documentation and the "format and content of reports..." CTED chose to use the regional methodologies that are already available and used by almost all Washington utilities.
2. CTED acknowledges that Chelan County PUD is in a unique position as the only qualifying non-IOU that is not a customer of BPA and thus not already using the BPA/RTF reporting format. Although the rule states that a utility may develop an alternative reporting format, Chelan doubts whether it would be approved. CTED will try to accommodate Chelan's needs but Chelan must understand that for data collection and report writing purposes and for the auditor some degree of consistency across the state is necessary.

Proposed WAC: NEW SECTION - WAC 194-37-100

Comments Received From: Inland Power

Summary of Comments: Efficiency improvements to the Federal Columbia River Power System should be eligible to be counted by Washington utilities to the extent they share in paying for them.

CTED Response: The law simply does not allow this.

Proposed WAC: NEW SECTION - WAC 194-37-110

Comments Received From: Clark PUD, Renewable NW, WPUA, NW Energy Coalition, Inland Power, Industrial Customers of NW Utilities, Chelan PUD

Summary of Comments: Clarify dates for meeting renewable energy targets.

CTED Response: There has been some confusion about when utilities must meet the target for renewable energy and the fact that they can use RECs from the prior, current and next year to meet that target.

It has always been CTED's understanding that a utility must have in hand by January 1 of the target year contracts or other proof that demonstrate that it met the renewable energy targets for that year if it is to be considered to be in compliance with the law. To be sure, circumstances may occur such that a utility does not complete its acquisitions of qualifying resources until later in the target year or the resources it does acquire fail to perform as expected. It is the utility's responsibility to document these occurrences.

Determinations of compliance in such circumstances are to be made, as in all cases, by the Auditor and Attorney General.

RECs are created and registered based on the annual output of a specific generation unit. Utilities purchase RECs of specific vintages—i.e. - from specific years and generators. They can thus purchase RECs from future years in advance and from past years if they are still available. Thus, the rule, following the law, notes that in order to be in compliance with the law, RECs must be owned by January 1 of the target year, but may be of a vintage of the target year, the previous year or the next year.

We have edited the rules to provide greater clarity about these issues.

Comments Received From: Benton PUD, Snohomish PUD

Summary of Comments: Objections to WREGIS contracts especially regarding liability issues.

CTED Response: We acknowledge that several utilities have concerns about liability issues associated with WREGIS's contract provisions. CTED will continue to press WREGIS for a resolution of these issues. CTED believes that WREGIS, since it was designed by the WECC members to be the single renewable tracking system for the Western Interconnection, remains the best, if not the only, option for a tracking system. However, if it turns out that WREGIS does have problems that can't be fixed, CTED will need to consider the designation of another tracking system if one is available.

A new section, WAC 194-37-210 has been added to address this situation:

“the department selects WREGIS as the renewable energy credit tracking system. If WREGIS proves to be unworkable and if there are alternative tracking systems, the department may re-open these rules and solicit, through an open process, proposals from other tracking systems to allow it to verify renewable energy credits for compliance with RCW 19.285.”

Proposed WAC: NEW SECTION - WAC 194-37-130

Comments Received From: Renewable NW, NW Energy Coalition

Summary of Comments: RNP and NWECA continue to object that there is not statutory authority to allow qualified utilities that generate incremental hydropower to sell that power to other utilities as an eligible renewable resource.

CTED Response: CTED holds that although the statute is clear that RECs cannot be created from incremental hydropower, the statute is silent about selling incremental hydropower when no RECs are created or registered. Therefore, we believe that incremental hydropower, when sold with its environmental attributes, should be treated in exactly the same manner as when one utility sells another utility wind power when no RECs are created or registered. In both cases, eligible energy is generated and sold without RECs entering the picture at all. Finally, we believe that the overall intent of I-

937 is to encourage the squeezing of more power out of the existing hydropower system. The rule, as written, does that.

Proposed WAC: NEW SECTION - WAC 194-37-140

Comments Received From: Inland Power and Light

Summary of Comments: This rule is neither needed nor required and that there are other ways of demonstrating no load growth consistent with the statute. The plain language of the statute regarding “average” should suffice.

CTED Response: What is at issue is Sub-section (2), the calculation of “no load growth.” The reason that this current rule language is included is that at the meeting where this was discussed, all of the stakeholders agreed that the statutory language was defective because the “average” did not refer back to any base year for comparison. There was agreement that the current language seemed to best fit the intent of RCW 19.285.040 (2) (d) even though it does not average anything.

Proposed WAC: NEW SECTION - WAC 194-37-160

Comments Received From: Renewable NW, WPUDA, Industrial Customers of NW Utilities

Summary of Comments: Renewable NW likes the language as is.

WPUDA would like to change the point in time at which a utility exercises its choice of methodology. It also suggests some changes in the calculation of the levelized cost of the alternative resources when the one-time only election is made.

ICNU wants to delete the one-time choice and allow utilities to use either method as they please.

CTED Response: The overwhelming consensus of stakeholders was to allow the choice between the two methods. This reduced the possibility of “gaming” while allowing utilities to use a method they felt most comfortable with. We have kept the language mostly as is but agree with WPUDA that some clarification of the calculation in the “permanent one-time only methodology” is needed and have made the appropriate changes in the rule.

Proposed WAC: NEW SECTION - WAC 194-37-190

Comments Received From: Renewable NW, Tacoma Power, Chelan PUD, Inland Power

Summary of Comments: Renewables Northwest objects to section 194-37-190 (1)(d) that allows a utility that would have surplus resources as a result of its acquisitions of renewable resources required by I-937 to use a “forward price curve” as the reference alternative resource when computing the price cap. They argue that there is a risk of such utilities not meeting their renewable targets because the cost cap will be set too low. Utilities that are in surplus can always buy RECs to meet their renewable targets.

Tacoma Power and Chelan PUD vigorously defend this section saying that it complies with the law and makes sense for utilities in their situation.

Inland Power argues that demand-side resources should be included as a possible alternative resource when computing the cost cap. In effect, they argue, a utility should be able to substitute conservation for renewables when it is cost-effective.

CTED Response: There are good arguments on both sides of the this dispute, but in trying to make sense of the “Energy Independence Act” as whole, CTED believes that for utilities that are in surplus because of an abundance of hydropower, it makes no sense to unnecessarily forgo one source of renewable energy for another. By allowing those few utilities to use a forward price curve (which is no less fuzzy than a ten or fifteen year “strip purchase”) they will have a price for an alternative supply side resource that makes sense for their circumstance. In addition, the rule as written, will add further incentive to make their existing hydro generation more efficient and productive.

In response to Inland, CTED believes that while they make an interesting policy case for allowing conservation to be used as a substitute resource in calculating the cost cap, the intent of the law seems quite clear in requiring that a supply-side resource be the “reasonably available substitute resource” specified in RCW 19.285.050 (1)(b).