

# Energy Independence Act Criteria Analysis

## Pro-Rata Definition

CA No. 2011-03

The purpose of this criteria analysis is to interpret certain requirements of the Energy Independence Act (the Act) based on information available at the time of the analysis. This interpretation is for use by the State Auditor's Office. It is not legally binding and the conclusions in this document could change if the law, rules, court opinions, or facts surrounding the conclusion change. An assistant attorney general assigned to advise the State Auditor has reviewed this document and believes state law supports the Auditor's Office conclusions; however, the opinions are the individual attorney's, and are not official opinions of the Attorney General.

The analysis sought to answer the following questions:

How should the term pro-rata be defined for purposes of the Energy Independence Act?

After reviewing the requirements of the Act, the related Voters' Pamphlet explanation of its intent, selections from the Northwest Electric Power Conservation Planning Council's 6<sup>th</sup> Power Plan, documents submitted to the Department of during the original rule making, and comments from utilities and the Attorney General's Office, we believe the answer is:

The term pro-rata can be defined as equal portions but it can also be defined as a proportion of an "exactly calculable factor". For purposes of the Energy Independence Act, a pro-rata share could be interpreted as an even 20 percent of a utility's 10 year assessment but state law does not require an even 20 percent. The Auditor's Office expects utilities to have analysis or documentation to support targets that are more or less than 20 percent of the ten year assessments.

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### **Background:**

State law requires utilities to establish 10 year conservation assessments that are consistent with Council methodology. The biennial target is required to be consistent with the 10 year assessment and be no less than its pro-rata share of the ten-year potential.

### **What does it mean to be consistent with Council methodology?**

WAC 194-37-070 (4)(5)(6) provides three options for utilities to demonstrate their assessment is consistent with Council methodology.

Council methodology factors in “ramp rates” for certain conservation measures. This recognizes that conservation may not immediately begin once a utility initiates a conservation program (summary of pg 4-23 in the [Sixth Power Plan](#)).

**Utility perspective:<sup>1</sup>**

1. A definition that does not account for “ramp rates” is NOT consistent with Council methodology. The Council itself recognizes this in its Sixth Power Plan at Chapter 4, page 22.
2. This definition of pro-rata is unrealistic as it does not consider “ramp rates” for new conservation measures that were projected to catch on later in the 10-year period and diminishing savings related to conservation technologies that were no longer considered cost-effective or were no longer being considered available due to market saturation.
3. A 20 percent portion of the 10-year conservation savings assessment that does not take “ramp rates” and other factors into consideration also contradicts the intent of the Energy Independence Act to achieve “cost effective” conservation by artificially increasing the biennial target in the early years thus forcing the utility to achieve conservation above the levels that would be cost-effective.

Some utilities are not as concerned about the possibility of pro-rata being defined as 20 percent because RCW 19.285.040(1)(a) requires “at least every two years” a qualifying utility to “review and update this [its 10-year conservation savings] assessment for the subsequent ten-year period.” Utilities see this “review and update” as an opportunity to adjust their ten-year conservation savings potential for ramp rates and obsolescence of technologies each time a biennial target is established.

**Rule making discussions of pro-rata:**

Although Commerce received comments from utilities and other constituents, it provided no responses regarding the term pro-rata.<sup>2</sup> We do not list these comments separately as they mirrored those already noted in this paper.

It should be noted that the UTC responded by defining the term pro-rata to be a range. It did not believe a strict interpretation of pro-rata as being “equal portions” was realistic. See WAC language at the end of this document. Also see UTC Docket UE-061895 / General Order R-546, paragraph 25 for the concern and the UTC response.

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<sup>1</sup> Bullets 1 – 3 were copied from utilities’ feedback received on December 5, 2011.

<sup>2</sup> Department of Commerce website - I-937 Rulemaking: “Concise Explanatory Statement”; “Comments Received on Revised CR102”; November 2007 Public Hearing “Transcripts” and “Comments”. At the time of this analysis, all were located at:

<http://web.archive.org/web/20090716003024/http://www.commerce.wa.gov/site/1001/default.aspx>

**State Auditor's Office perspective:**

Our Office is simply looking for the appropriate definition of pro-rata to audit to, based on legal interpretation of the term.

The Voter's Pamphlet does not define or explain "pro-rata". It states "each utility would be required to set an annual target consisting of a *certain* share of this ... conservation potential..." (emphasis added).

Because the Voter's Pamphlet is not helpful, and "pro-rata" is not defined in RCW 19.285, we used the dictionary definitions. Merriam-Webster's online dictionary defines "pro-rata" as "proportionately according to an exactly calculable factor (as share or liability)". It is therefore necessary to consult the definition of "proportion". There are five alternative definitions of "proportion". NEEC cited, in part, one of these definitions in the 2007 rulemaking process: "equality between two ratios"; however, when the entire definition is considered, it is clear that this definition refers to an equation. No such equation is present in RCW 19.285.

Another definition is "proper or equal share", which infers that proportionate need not refer to equal shares. We found no published dictionary that defined "pro-rata" as "equal". Moreover, in certain circumstances, the Washington courts have recognized that a "pro-rata share" is not necessarily an equal division. See *e.g. O'Neal v. Legg*, 52 Wash. App. 756, 764 P. 2d 246 (1988) (27 percent was a "pro-rata share" of a jury verdict).

Because "pro-rata" may mean "proper", there may be circumstances in which a utility could set targets for different two year periods above or below 20 percent of the 10 year target, and so long as the two year targets are "proper" they would meet the definition of "pro-rata". We expect such a utility would have analysis or documentation to support as "proper" a target that is more or less than 20 percent of a 10 year assessment.

**Selected Statutes and Rules:**

[RCW 19.285.040](#) (1)(a): "...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)(b): "...shall establish ...a biennial acquisition *target...consistent with its identification of achievable opportunities* in (a) of this subsection and meet that target during the subsequent two-year period. At a minimum, each biennial target must be no lower than the qualifying utility's *pro-rata share for that two-year period of its cost-effective conservation potential for the subsequent ten-year period.* "

**Consumer Owned Utility WACs**

[WAC 194-37-070](#)(2): "...The utility's biennial target shall be no less than its pro-rata share of its ten-year potential."

[WAC 194-37-070](#)(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...”

### **Investor Owned Utility WACs**

WAC 480-109-007(14): “Pro-rata” means the calculation used to establish a minimum level for a conservation target based on a utility’s projected ten year conservation potential

WAC 480-109-010(2)(b): The biennial conservation target must be no lower than a pro-rata share of the utility’s ten year cumulative achievable conservation potential. Each utility must fully document how it prorated its ten-year cumulative conservation potential to determine the minimum level for its biennial conservation target.

WAC 480-109-010(2)(c): The biennial conservation target may be a range rather than a point target.

### **Sixth Power Plan, Chapter 4, pg 22:**

One of the more delicate issues in the relationship between I-937 and the Council’s conservation planning methodology concerns the matter of “ramping.” On the one hand, I-937 instructs utilities, as we have seen, to develop conservation plans using methodologies consistent with those used by the Council. An important element in the Council’s methodology is the principle that it takes time to develop certain conservation measures to their full potential, while other measures are available right away. Conservation potential ramps up and on occasion ramps down. The end result is that the five- or ten-year total of achievable conservation potential under the Council’s planning assumptions will not be evenly available across each year in the period. The trouble is that I-937 separately instructs the utilities to identify not just cost-effective potential over the ten-year life of the utility’s conservation plan for I-937, but also to identify and meet biennial conservation acquisition targets that must be “no lower than the qualifying utility’s pro-rata share for that two-year period of its cost-effective potential for the subsequent ten-year period.” In contrast, the Council uses its ramp rate assumptions along with other pacing information and the results of its regional portfolio model to establish five-year cumulative conservation targets for the region. The five-year target recognizes, in part, the inevitable ups and downs of year-to-year acquisitions. **Having to acquire 20 percent of any ten-year target in any two-year period under I-937 may produce different two-year targets than would result using ramp rates consistent with the Council’s methodology.**

Because the provisions of I-937 are a matter of state law, this apparent conflict is an issue the Council cannot resolve in its plan. The utilities, regulators and auditors of I-937 must be attentive to this issue, and develop logical ways to adapt the Council’s methodology so that utilities do not violate I-937’s biennial target requirement yet preserve the key ramping principle in the Council’s methodology so that utilities have realistic achievable targets in any two-year period. One suggestion may be to use the requirement in I-937 to update the ten-year plans every two years to layer or build in the ramp rates as the plans evolve. The Council can imagine other ways to address this issue and resolve the conflict, but it is enough for us to point out that the state agencies, the utilities, and the conservation community in Washington need to work this out.