

To: Board of Commissioners
From: Carol Wardell
Cc: Rich Riazzi
Executive Managers
John Stoll
Date: August 18, 2008
Re: Questions asked by Commissioner Janssen at August 11, 2008, meeting regarding funding potentials for customer-owned solar installations and I-937 (SNAP)

This memo only addresses the legal aspects related to the questions raised by Commission Janssen. There are also a number of management, financial, administrative, and other considerations impacting any potential actions related to these options.

I. Funding for solar or wind installations by customers

A. Loans

The Washington State Constitution is the "supreme" law of the State of Washington. Chelan PUD is prohibited from giving money or property or loaning its money or credit to or in the aid of any individual or corporation except as necessary support for the poor and infirm. Washington State Constitution Article 8, Section 7.

In 1979, the State Constitution was amended to add a specific section to provide for "energy, water or stormwater or sewer service conservation assistance." Article 8, Section 10. That provision authorizes a PUD to "use public moneys or credit" to "assist the owners of structures or equipment in financing the acquisition and installation of materials and equipment for the conservation or more efficient use of water, energy ... in such structures or equipment." The constitution requires that an "appropriate charge back [interest rate] shall be made and the same shall be a lien against the structure benefited or a security interest in the equipment benefited." Finally, the provision prohibits the use of moneys for "any purpose which results in a conversion from one energy source to another."

The statute which implements the authority for a PUD to offer energy conservation loans is RCW 54.16.280. That legislation also specifies limitations and parameters for the loans and other assistance that a PUD may provide. For example, the loans cannot exceed 10 years in length and must be paid back in incremental payments. Other forms of assistance the statute authorizes include:

- (a) Inspection of structures and inform the owners of the estimated cost to purchase and install conservation measures;
- (b) Provide a list of business who sell and install such materials;
- (c) Arrange to have approved conservation materials installed by a private contractors whose bid is acceptable to the owners of the structure; and

(d) Arrange for or provide financing for the purchase and installation of approved conservation materials and equipments. The materials and equipment "shall be purchased from a private business and shall be installed by a private business or the owner."

In 2001, the attorney general opined that public utility districts could not finance projects that involved the installation or operation of solar power systems, wind turbines, geothermal energy systems or mini-hydro systems on private property, as such projects would involve a "conversion" from one energy source to another, a violation of the constitutional prohibition.

In 2002, the legislature responded to the attorney general opinion by adding to the statute a provision that "overruled" the attorney general in the interpretation of the constitution. The statute now provides:

"For purposes of this section, "conservation purposes in existing structures" may include projects to allow a district's customers to generate all or a portion of their own electricity through the on-site installation of distributed electricity generation system that uses as its fuel solar, wind, geothermal or hydropower, or other renewable resource that is available on site and not from a commercial source. Such projects shall not be considered "a conversion from one energy source to another" which is limited to the change or substitution of one commercial energy supplier for another commercial energy supplier."

Thus, a PUD could offer loans to its customers for the installation of solar or wind generation systems located on site and not from a commercial source. The loans would be subject to the requirements of the constitution and statute, including: (1) the loan must be to the owner of the structure (not a tenant); (2) the loan must have an appropriate charge back [interest rate]; (3) the loans must be for no longer than 10 years; and (4) the loans must be a lien against the property until paid. The District could also offer the other assistance described in the statute (a) – (d) above.

The same requirements apply whether the customer is low income or not. The "appropriate" charge back could be lowered if doing so is deemed to be "necessary support of the poor and infirm." In the same vein, the only way to offer "no interest" loans is if it is "necessary support of the poor and infirm." That is the only exception in the constitution to the gifting of public funds. The cases regarding this "poor and infirm" provision generally relate to public assistance programs. As stated by one court in considering this provision, "[t]he principle underlying this rule is that public funds are trust funds, and the public agents who handle and pay the funds out do not have authority to pay them to anyone when the law forbids such payment." State v. Guaranty Trust Co., 20 Wn.2d 588 (striking down a program to reimburse persons for the burial expense of deceased public assistance recipients on the grounds that the persons receiving the reimbursements were not themselves in "financial distress").

The District's residential weatherization loan program was authorized and then modified by Resolutions Nos. 84-7056 and 96-10453. Both of these resolutions were adopted prior to the legislature's addition of the solar/wind language quoted above.

I do note that the weatherization loans have no special priority as to payment if a borrower encounters financial difficulty. The priority of the lien is based upon the date of recording compared to other liens. The weatherization liens are usually in line for payment after a mortgage. Thus, if a bank forecloses on its mortgage, the District's lien is wiped out. As noted above, this memo does not address the administrative, financial or other impacts of a loan program but I do note that tracking and crediting of accounts and other actions are required to ensure compliance with legal requirements, including customer privacy laws and other issues.

B. Incentives

There are current incentive programs in place available to producers of renewable energy through the District and I wanted to summarize those before addressing the question about other options for incentives. First, there is the SNAP program. This program has been in place since 2001 (Resolution No. 01-11874)¹. The amount paid to producers is dependent upon the voluntary contributions to the program. Currently, the District receives from customers and PUD employees \$25,000 to \$30,000 per year to support this program. The total amount is then divided by the kilowatt hours produced. This resulted in a \$.25 per kWh payment to producers in the 2007-2008 timeframe. Second, the District pays the producers for the energy produced based upon the "wholesale off peak" market prices.² Third, producers receive from the District a payment based upon a state incentive program authorized under RCW 82.16.³ The District currently pays \$0.15 per kWh produced and then receives a credit against the District's utility tax obligation. There are various conditions and caps imposed by the statute on these payments. The state authorized incentive (and corresponding tax credit) will rise from \$0.15 per kWh to \$0.54 per kWh later this year when solar modules manufactured in Washington become available. The District's Board approved these incentive payments by Resolution No. 06-12962

The District's payment of other "incentives" for customers to install solar or the District's making "matching contributions" to the SNAP program is subject to the constitutional prohibition against the use of public monies to aid individuals. The analysis of whether a payment for energy produced or energy saved is legally permissible is governed by a different "exception" to the constitutional prohibition. The basis for payment is found in a case decided by the Washington State Supreme Court. It's the same analysis the District has relied upon for its commercial and industrial conservation program, ResourceSmart. The analysis is based upon the City of Tacoma v. Taxpayers,

¹ The resolution establishing SNAP does have a provision that the program will expire in 2012 if not renewed.

² There are a couple of solar producers that do not receive this payment because their energy production is actually "netted" against their power usage prior to being billed. Most producers have their production separately metered from their consumption.

³ The State incentive/tax credit program is set to expire in 2014 unless renewed.

108 Wn.2d 679 (1987) case. The District is authorized to "buyback" energy from customers. In order for there not to be an unlawful gifting of public funds, there must be a reasonable payback in terms of energy to the District. In the Tacoma case, the court specifically found that a conservation program that resulted in a one-year payback of the money expended on a measure was appropriate. The District's ResourceSmart program is based upon a three-year payback based upon the delta between the retail price of the power and the market prices. Any program for incentives would have to meet the test developed in the Tacoma case which is a "legal sufficiency" test.

II. LOW INCOME ASSISTANCE FOR CONSERVATION MEASURES

The District has a program for assisting low-income individuals with conservation measures. The Board by Resolution No. 02-12098 approved an agreement with the Chelan-Douglas Community Action Council to provide support for installation of conservation measures for residential dwellings occupied by income-eligible electric customers. This program is specifically authorized by RCW 70.164.040 which provides that a PUD may be a "sponsor" and may use its own moneys, including ratepayer moneys to pay matching funds for a conservation program. The State CTED (Community Trade and Economic Development) administers the state-wide program. There are some specific requirements of this statute, including a definition of low income persons and how the money may be used. The current level of the District's funding for this program is \$65,000 per year. CTED matches the \$65,000 through their Energy matchmaker Program for a total of \$130,000 per year for the local Community Action Center to use in its energy conservation program for low income citizens.

III. SNAP PROGRAM AND I-937

The District's SNAP program was adopted pursuant to RCW 19.29A.090 which **required** utilities with more than 25,000 meters to establish a program for accepting voluntary purchases from customers that wished to purchase power from qualified alternative energy resources. The Board adopted the parameters and requirements of that program in Resolution No. 01-11874 (revised by Resolution No. 06-12966). RCW 19.29A.090 was effective January 1, 2002. The SNAP program was actually adopted by the District prior to the effective date of the statute but it is the program used by the District to meet the requirements of RCW 19.29A.090.

RCW 19.285.040(2) (I-937, Section 4) provides:

(b) A qualifying utility may count distributed generation at double the facility's electrical output if the utility: (i) Owns or has contracted for the distributed generation and the associated renewable energy credits; or (ii) has contracted to purchase the associated renewable energy credits.

...

(f) In complying with the targets established in (a) of this subsection, a qualifying utility may **not** count:

- (i) Eligible renewable resources or distributed generation where the associated renewable energy credits are owned by a separate entity; or
- (ii) Eligible renewable resources or renewable energy credits obtained for and used in an optional pricing program such as **the program established in RCW 19.29.A.090.** (emphasis added)

As discussed above, the District's SNAP program was developed pursuant to RCW 19.29A.090. Commissioner Janssen's question related to the District's ability to "contract with the SNAP producers" for the renewable energy credits and thus use those credits to meet the I-937 requirements.⁴ Even though that might seem somewhat implied from the language of subsection (2)(b), that implication does not survive the analysis when considering the statute in its entirety. In particular, subsection section (2) (f) (ii) specifically excludes the production of renewable resources/credits resulting from the District's SNAP program. The specific always trumps the implied when interpreting the provisions of a statute. Based upon the reading of the statute as a whole, the energy produced by our SNAP producers would be excluded pursuant to section (2)(f)(ii).⁵ This exclusion was undoubtedly based upon the fact that the SNAP program or something like it is required by statute (RCW 19.29A) and thus shouldn't be used to also meet the requirements of another statute (I-937). The only way to change this exclusion is a legislative action to amend the statute.

As a side note, I-937 does require that a "renewable energy credit" meet a specific definition in order to be used to meet a utility's target. The definition is:

"a tradable certificate of proof of at least one megawatt-hour of eligible renewable resource where the generation facility is not powered by fresh water, the certificate includes all of the nonpower attributes associated with that one megawatt-hour of electricity, and the certificate is verified by a renewable energy credit tracking system selected by the department."

The tracking system selected by CTED is the WREGIS.

⁴ As noted in the IRP discussion, the District does not need to "count" the SNAP production in order to meet the I-937 requirements.

⁵ I would note that my opinion on this particular subject is shared by others involved in these issues, including John Stoll, Melissa Lyons, Mark Wiser, Suzanne Grassell and Jim White. I haven't had a chance to discuss with Gregg Carrington due to being out of the office when I drafted this memo.