BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2032

In the Matter of	)	JOINT RESPONSE OF THE OREGON
	)	CITIZENS' UTILITY BOARD AND
Public Utility Commission of Oregon,	)	THE ALLIANCE OF WESTERN
	)	ENERGY CONSUMERS TO THE
Investigation into the Treatment of Network	)	NORTWEST AND INTERMOUNTAIN
Upgrade Costs for Qualifying Facilities.	)	POWER PRODUCERS COALITION

I. INTRODUCTION

Pursuant to Administrative Law Judge (ALJ) Moser's January 6, 2020 Ruling and Section 6.2 of The Fourth Amended and Restated Intervenor Funding Agreement (Fourth IFA)[1], the Alliance of Western Energy Consumers (AWEC) and the Oregon Citizens' Utility Board (CUB) hereby file this Joint Response to the Northwest and Intermountain Power Producers Coalition's Notice of Intent to Seek Intervenor Funding and for Certification of Eligibility (hereafter NIPPC Application). The NIPPC Application contains a 1) Notice of Intent to Seek Intervenor Funding Through Issues Fund; a 2) Request to Certify Case as Eligible for Issue Fund Grants, and; a 3) Request to Be Case-Certified as Party Eligible to Receive Issue Fund Grants.[2] In this Joint Response, for the reasons addressed herein, AWEC and CUB oppose the NIPPC Application. Therefore, AWEC and CUB respectfully request that the Oregon Public Utility Commission (Commission) deny the NIPPC Application.

1 *In the matter of Public Utility Commission of Oregon, Approval of the Fourth Amended and Restated Intervenor Funding Agreement,* Order No. 18-017, Appendix A at 18 (Jan. 17, 2018) ("the Commission may request precertified intervenors to provide a response to the motion on whether the application meets the requirements set forth in Section 5.3.").

2 NIPPC Application at 1.

AWEC and CUB have contacted PacifiCorp and Portland General Electric (PGE)—the participating utilities at issue in the NIPPC Application. Both utilities have authorized AWEC and CUB to represent that they support this filing.

II. ARGUMENT

A. The Commission should deny NIPPC's request for case-certification as a party eligible to receive issue fund assistance.

CUB and AWEC urge the Commission to deny the NIPPC Application because it does not meet the criteria for case-certification under Section 5.3 of the Fourth IFA and the Commission's rules.[3]

As an initial matter, it is CUB and AWEC's understanding that NIPPC's likely position in this docket will be to argue that network upgrade costs should be socialized among the interconnecting utility's customers, rather than borne by the QF.[4] Thus, as an example of the way NIPPC has misappropriated the definition of "customer" under ORS 757.072 and the Fourth IFA, discussed more thoroughly in subsection 1 of this Response below, NIPPC's litigation position in this case would actually serve to *increase* costs for retail customers. CUB and AWEC's understanding of the basic purpose of intervenor funding in Oregon is to ensure customer classes have the means to adequately investigate and, if warranted, challenge the imposition of new substantial costs on such classes, not to provide organizations that represent narrow interests with the means themselves to impose such costs on retail customers.

3 NIPPC also failed to comply with the Fourth IFA's requirement that all Notices of Intent "must be served on … all precertified organizations …." Fourth IFA § 6.2.

4 *See*, Docket No. UM 2000, Responses of NIPPC, the Coalition, and CREA to Staff's Questions to Stakeholders at 24-25 (Mar. 29, 2018).

Section 5.3 of the IFA delineates clear criteria for determining whether an organization may be case-certified by the Commission to be eligible to receive an Issue Fund Grant. Importantly, **all** of the following criteria must be met in order for an organization to be eligible:

(a) The organization is (i) a not for profit organization; or (ii) demonstrates it is in the process of becoming a nonprofit corporation; or (iii) is comprised of multiple customers of one or more Participating Public Utilities and demonstrates that a primary purpose of the organization is to represent broad utility customer interests.

(b) The organization represents the interests of a broad group or class of customers and its participation in the proceeding will be primarily directed at public utility rates and terms and conditions of service affecting that broad group or class of customers, and not narrow interests or issues that are ancillary to the impact of the rates and terms and conditions of service to the customer group;

(c) The organization demonstrates that it is able to effectively represent the particular class of customers it seeks to represent;

(d) The organization's members who are customers of one or more of the Participating Public Utilities affected by the proceeding contribute a significant percentage of the overall support and funding of the organization;

(e) The organization demonstrates, or has demonstrated in past Commission proceedings, the ability to substantively contribute to the record on behalf of customer interests related to rates and the terms and conditions of service, including in any proceeding in which the organization was case-certified and received an Intervenor Funding Grant;

(f) The organization demonstrates that (1) no precertified intervenor participating in the proceeding adequately represents the specific interests of the class of customers

represented by the organization related to rates and terms and conditions of service; or (2) that the specific interests of a class of customers will benefit from the organization's participation; and

(g) The organization demonstrates that its request for case-certification will not unduly delay the schedule of the proceeding.[5]

As seen in these criteria, the Commission has reserved the ability to become case-certified to receive intervenor funding to those organizations that have demonstrated a consistent ability to represent customer interests with respect to utility rates and terms and conditions of service. This reflects the fact that customers pay the costs of intervenor funding, and the important role these organizations play in assisting the Commission with fulfilling its primary statutory responsibility of "represent[ing] the customers of any public utility … and the public generally in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction."[6] To that end, CUB and AWEC welcome the contributions to the Commission's process of a wide variety of stakeholders, including NIPPC, and particularly value the contributions of organizations that represent broad customer interests.

CUB and AWEC's concerns regarding the NIPPC request for case-certification are simply centered on the fact that it fails to meet the criteria delineated in Section 5.3 of the Fourth IFA. While NIPPC has contributed to the records of many Commission proceedings, it has largely done so as a representative of entities seeking to *sell* energy or other services to the utilities. NIPPC acknowledges that its "diverse membership includes independent power producers, electricity service suppliers, transmission companies, marketers, storage providers,

5 Fourth IFA at Attachment A, pages 14-15.
6 ORS 756.040(1) (emphasis added).

and others."[7] CUB and AWEC acknowledge that some of these entities may, at discrete times—such as the interconnection services at issue in this proceeding—purchase energy or other services from Portland General Electric (PGE) and PacifiCorp. However, the independent power producers that NIPPC claims "satisfy the criteria to obtain intervenor funding"[8] largely *sell* energy to PGE and PacifiCorp through market transactions, PURPA Qualifying Facilities contracts, and other means, and are not *retail* customers of these utilities.

In contrast, AWEC and CUB's members are precisely representative of the broad class of customers—industrial and residential, respectively—contemplated in the Fourth IFA. All customers represented by AWEC and CUB (including large industrial customers purchasing power through direct access) are exclusively retail customers of PacifiCorp and PGE with respect to the Commission-regulated services they receive. The difference between the retail customers represented by AWEC and CUB and the independent power producers that NIPPC represents is marked. Since independent power producers are not a "broad class of customers" contemplated in Section 5.3 of the IFA, their representation is not grounds for case-certification. This response will also demonstrate that NIPPC's application fails to meet other necessary criteria in Section 5.3 of the IFA. Therefore, AWEC and CUB respectfully request that the Commission deny the Application.

To be clear, the Joint Parties encourage robust stakeholder participation in all Commission proceedings, including NIPPC's participation in this proceeding. AWEC and CUB simply cannot support a petition for case-certification that does not comply with the Commission delineated guidelines in Section 5.3 of the IFA. However, the Joint Parties encourage continued

7 NIPPC Application at 7-8.
8 *Id.* at 8.

participation on the part of NIPPC. This response will now examine several of the case certification criteria with which AWEC and CUB do not believe NIPPC's Application complies.

1. ORS 757.072 and the Fourth IFA are limited to captive retail customers of a utility.

Citing to ORS 756.010(3), NIPPC asserts that it meets the requirements for case certification because it represents "customer" interests as defined by this statute. The definition of "customer," NIPPC argues, includes "users of the service and consumers of the product," and interconnection customers use the utilities' interconnection services.[9] NIPPC offers no evidence, however, that the legislature intended the definition of "customer" to include interconnection customers, or, even if it did, that the legislature's use of "customer" in ORS 757.027 was intended to include interconnection customers.

First, while it may be true that interconnection is a service provided by the utilities, NIPPC offers no example of a statute in which the legislature unambiguously refers to interconnection customers as "customers" of a utility for Commission regulation purposes. The state's PURPA-related statutes, codified at ORS 758.505 *et seq.*, for instance, do not use the term "customer" once (though they do use the term "consumer"), and certainly do not refer to QFs as "customers" of the utilities. Instead, QFs are referred to as "qualifying facilities", "cogeneration facilities", or "small power production facilities." If the legislature had contemplated that "customer" encompassed interconnection customers, presumably it would have used that term in these statutes.

Second, NIPPC's argument leads to absurd results. The necessary implication of NIPPC's position is that anytime the word "customer" is used in the Commission's statutes, it should be interpreted to mean all of the terms included in that definition. The legislature,

9 *Id.*

however, clearly meant to identify the universe of potential entities that could be considered a customer, not to define "customer" to mean all of these entities all of the time. That is why the definition is written to state that this term "includes" these entities. For example, the legislature has provided that a transportation electrification program "may include prudent investments in or *customer* rebates for electric vehicle charging and related infrastructure."[10] Providing rebates to interconnection customers in this context makes no sense. Similarly, ORS 757.516 allows natural gas utilities to "enter into a contract with any *customer* for the provision of natural gas commodity, rights to natural gas commodity, rights to pipeline capacity and natural gas transportation services" when such services are subject to competition (emphasis added). Again, the term "customer" in this statute obviously does not include customers seeking to interconnect to an electric utility. In short, the entities that are considered a "customer" in a particular statute is context-specific.

Thus, even if NIPPC is correct that "customer" might include interconnection customers in certain contexts, it offers no evidence that the legislature intended to include interconnection customers within the universe of customers eligible to receive intervenor funding. Indeed, the opposite appears to be true. The legislature's express reference to "broad customer interests" indicates that it contemplated that such interests were limited to *retail* utility customers. When the legislation creating the intervenor funding statute (SB 205) was being debated in the 2003 legislature, then-Commission Chair Lee Beyer testified to the purpose of the legislation:

> Essentially what this does is the agreement between the utilities and these groups is allows them to put some money on the table to allow these intervenors to represent customers better if you will. And I think they would tell you … that the

[10] ORS 757.357(3) (emphasis added).

> ratepayers pay for these rate cases presented by the utilities and this will allow the ratepayers to also pay for an opposing view or challenging view to be there.[11]

Commissioner Beyer's testimony in support of SB 205 was focused entirely on its benefits to captive retail customers. CUB and AWEC's review of the legislative history of this bill has not revealed a single instance in which a sponsor of this legislation understood its use of "customer" to extend to interconnection customers.

Commissioner Beyer's testimony hints at an important distinction in this case between captive retail customers and interconnection customers. The former are just that – they *must* pay the rates approved by this Commission for regulated services. Even direct access customers, who have the option to source their electric commodity, are captive customers of their incumbent utility with respect to their delivery rates. Captive retail customers, therefore, have a heightened need to advocate for the rates they must pay. Interconnection customers, by contrast, have a choice. While AWEC and CUB believe that PGE's and PacifiCorp's interconnection rates should be reasonable and cost-based, and support NIPPC's right to so argue, if a QF developer remains dissatisfied with these rates it can always develop projects elsewhere. The language and legislative history of ORS 757.072 indicates that intervenor funding was intended to be reserved for representatives of captive retail customers of the utilities, and CUB and AWEC urge the Commission to make this determination explicit.

2. NIPPC does not represent a "broad class of customers" as contemplated by the IFA Section 5.3(b).

NIPPC believes its members satisfy the criteria to obtain intervenor funding because a subset of its members "will need to purchase interconnection services from Oregon's utilities."[12]

11 Relating to financial assistance for organizations appearing before the Public Utility Commission in matters relating to public utilities that provide electricity or natural gas; and declaring an emergency, SB 205 Chapter 234, Hearing Before Senate Committee on Business and Labor, Hearing Room C Tapes 25-26, (Statement of Lee Beyer, at 3:25-3:42) (March 5, 2003).

12 NIPPC Application at 8.

As discussed, AWEC and CUB believe this narrow interest falls well short of meeting the bar to obtain intervenor funding, and that independent power producers are not the "broad class of customers" contemplated in the IFA. As noted above, NIPPC's unavailing argument relies on the definition of "customers" in Oregon's statutes and, from there, makes a misplaced claim that ORS 757.072 allows for '"financial assistance to organizations representing customers interests" and does not restrict the type of customers eligible for intervenor funding."[13]

Even if the Commission accepts NIPPC's argument that it represents "customers" of PGE and PacifiCorp, NIPPC's argument overlooks an important additional requirement for intervenor funding. ORS 757.072, the statute upon which it relies, states that "[f]inancial assistance . . . may be provided only to organizations that represent *broad customer interests* in regulatory proceedings before the commission."[14] NIPPC argues that it represents customers, but never explains how it represents a "broad group or class" of customers, as both the intervenor funding statute and IFA require.[15] It is well settled, and enshrined in state law, that statutes should be interpreted "so as to give each part meaning," and courts should not "omit what has been inserted."[16] By requiring representation of "broad" customer interests, the legislature necessarily made a distinction between, and intended to prevent the provision of intervenor funding to, organizations that represent "narrow" customer interests.

In the past, intervenor funding has been limited to organizations that represent a class of customers in the traditional sense. For example, AWEC and CUB broadly represent the industrial class and residential class of retail customers, respectively. Even though the Commission denied an application for case-certification from the Small Business Utility

13 *Id.*
14 ORS 757.072(2).
15 Fourth IFA § 5.3(b).
16 *Mitchell v. City of St. Paul*, 178 Ore. App. 312, 317-18 (2001); ORS 174.010.

Advocates on separate grounds, it found that its "members do represent a broad customer class, and not narrow individual interests"[17] (i.e., commercial customers). Further, in OPUC Docket No. UE 170, a PacifiCorp rate case, two groups representing irrigation customers—a broad class of retail customers—shared an intervenor funding award.[18] In OPUC Docket No. UM 1121, the proposed PGE and Texas Pacific merger, Associated Oregon Industries (AOI) was awarded intervenor funding to represent commercial customers. Also, in OPUC Docket No. UE 197, the League of Oregon Cities was granted case-certification to receive intervenor funding to represent PGE's municipal customer class in a rate case.[19] Neither CUB nor ICNU (AWEC's predecessor) opposed the intervenor funding awards in UE 170, UM 1121, or UE 197, since the entities truly represented a broad class of retail customers and not, as the Commission has articulated, a "narrow individual interest."

NIPPC's representation of interconnection customers in this case constitutes a "narrow" customer interest in two senses. First, unlike retail customer classes, whose interests encompass a broad range of issues impacting rates and service, including power costs, pension costs, employee benefits, distribution system investments, and many others, the interests of interconnection customers are, by definition, limited to a single aspect of utility service. Second, while retail customer classes include hundreds or even tens of thousands of individual customers, there are relatively few interconnection customers.

Moreover, NIPPC is not the only organization purporting to represent interconnection customer interests in this docket. Both the Community Renewable Energy Association ("CREA") and the Renewable Energy Coalition ("REC") have also intervened in this docket and

17 OPUC Order No 19-133 at 5.
18 The two groups were Klamath Water Users Association and Klamath Off-Project Water Users Inc.
19 OPUC Order No. 08-328.

both also claim to represent entities that would seek to interconnect with PGE and/or PacifiCorp. This indicates that interconnection customers have varied interests rather than broadly shared interests that can be represented by a single organization. At a minimum, it is unclear why NIPPC should be the organization designated to represent these "customers'" interests rather than REC or CREA or, alternatively, why REC and CREA should not also be eligible for case certification if NIPPC achieves this designation.

In short, NIPPC's application fails to demonstrate that its involvement in this proceeding is to represent a broad class of customers or broad customer interests. As demonstrated, the Commission has found representation of a broad class of customers in instances where industrial, commercial, residential, municipal, and irrigation customers have been represented. These are all large classes with customers who purchase retail energy services from PacifiCorp and PGE. Customers seeking to narrowly purchase interconnection services do not fall into the "broad class of customers" that was contemplated in the IFA and demonstrated in Commission practice. The Commission should deny NIPPC's application for case-certification, as it cannot demonstrate that it represents a broad class of customers.

3. NIPPC cannot demonstrate a history of an ability to substantively contribute to the record on behalf of customer interests related to rates and the terms and conditions of service.

AWEC and CUB do not dispute that NIPPC has appeared before the Commission for many years in efforts to promote its members' interests, as its application states.[20] However, as NIPPC notes, its members' interests are diverse, and those interests are mostly unrelated to the treatment of interconnection costs. As discussed, NIPPC's members are largely involved in the sale of energy or energy services to PGE and PacifiCorp. As such, NIPPC cannot demonstrate a

20 NIPPC Application at 9.

history of an ability to represent customer interests in Commission proceedings. Further, NIPPC has never received intervenor funding as a representative of customer interests in any of the proceedings it has appeared in.

B. If the Commission approves NIPPC's request for case certification, it should ensure that the costs of its participation are allocated to interconnection customers

Section 7.7 of the Fourth IFA allows the Commission to allocate the costs of intervenor funding to customer classes. Section 7.7(b) specifies that "Intervenor expenditures pursuant to an Intervenor Funding Grant made on behalf of a particular customer class will be charged to and paid for by that customer class." Issue fund grants apportioned to CUB, for instance, are deferred and recovered from the utilities' residential customers; issue fund grants apportioned to AWEC are deferred and recovered from the utilities' industrial customers. No equivalent option exists to recover NIPPC's issue fund grant because there is no rate schedule applicable to QFs.

Recognizing this, NIPPC offers three proposals for recovery of the issue fund grant it requests: (1) "establish a new interconnection fee which is directly charged to new interconnection customers;" (2) "spread the costs among all power customers of the electric utilities;" or (3) "directly charge interconnection customers themselves, through Schedule 75 for [PGE] and Schedule 247 for PacifiCorp."[21] Of these options, only the first appears even potentially viable as a means of ensuring the costs of NIPPC's participation are apportioned directly to interconnection customers, though CUB and AWEC believe more information is necessary on how such a new interconnection fee would be developed and whether measures would need to be established to ensure this fee is not passed through to retail customers.

21 *Id.* at 10.

NIPPC's proposal to "spread the costs among all power customers of the electric utilities" on the basis that QF power serves all customers is facially untenable because it directly contradicts the IFA's requirement that "an Intervenor Funding Grant made on behalf of a particular customer class will be charged to and paid for by that customer class."[22] If the Commission finds that NIPPC should be case-certified because it represents a broad class of customers, then the costs of its participation must be allocated to that class alone. CUB and AWEC routinely argue for adjustments to the utilities' costs and revenues that benefit not only the customer classes they represent, but all customer classes. If a utility requests a return on equity ("ROE") of 10% in a general rate case, and the Commission awards an ROE of 9.5% based in whole or in part on the evidence CUB and AWEC present, that reduces rates to all customers, but only residential and/or industrial customers pay for the intervenor funding that helped to develop that evidence. Indeed, the only difference between this scenario and NIPPC's likely litigation position in this case is that CUB and AWEC's advocacy reduces costs to retail customers whereas, as noted above, NIPPC's would increase costs to retail customers.

NIPPC's third alternative – to allocate the costs to PGE's Schedule 75 and PacifiCorp's Schedule 275 – is simply unclear. These schedules are partial requirements tariffs. Based on NIPPC's position, CUB and AWEC assume they are used as the basis to establish rates for backup power sold to QFs, but these tariffs are not so limited. They are also schedules that eligible retail customers may use. It would be even more inequitable to allocate the costs of NIPPC's issue fund grant to this limited subset of retail customers than it would be to allocate them to all retail customers.

22 Fourth IFA § 7.7(b).

In any event, while CUB and AWEC oppose NIPPC's request for an issue fund grant, if the Commission approves NIPPC's application, it should ensure that whatever method it selects to allocate the costs of NIPPC's issue fund grant prevents retail customers from bearing these costs, either directly or indirectly.

III. CONCLUSION

For the foregoing reasons, CUB and AWEC respectfully request that the Commission deny NIPPC's Application. NIPPC does not represent "customers" of PGE and PacifiCorp, as contemplated by ORS 757.072 and the Fourth IFA, and even if it does, NIPPC does not represent "broad customer interests" or a "broad class of customers," as ORS 757.072 and the Fourth IFA require.

Dated this 15th day of January, 2020.

Respectfully submitted,

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