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November 27, 2023

**VIA E-MAIL TO**

Public Utility Commission of Oregon
Filing Center
201 High Street SE, Suite 100
Salem, Oregon 97301-3398

**Re: Docket UE 416 - In the Matter of PORTLAND GENERAL ELECTRIC COMPANY, Request for a General Rate Revision; and 2024 Annual Power Cost Update.**

Attached for filing in the above-referenced case, please find Portland General Electric Company's Response to Application for Reconsideration of Order Adopting The Fourth Partial Stipulation Of Small Business Utility Advocates.

Please contact this office with any questions.

Sincerely,

*/s/ Cole Albee*

Cole Albee
Paralegal
McDowell Rackner Gibson PC

**BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON**

**UE 416**

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| In the Matter of<br><br>PORTLAND GENERAL ELECTRIC COMPANY,<br><br>Request for a General Rate Revision and 2024 Annual Power Cost Update | **PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE TO APPLICATION FOR RECONSIDERATION OF ORDER ADOPTING THE FOURTH PARTIAL STIPULATION OF SMALL BUSINESS UTILITY ADVOCATES** |

## I. INTRODUCTION

Pursuant to OAR 860-001-0720(4), Portland General Electric Company (PGE) respectfully requests that the Public Utility Commission of Commission (Commission) deny the Small Business Utility Advocates' (SBUA) Application for Reconsideration. SBUA seeks reconsideration of Order No. 23-386, which adopted the Fourth Partial Stipulation (Stipulation) that SBUA signed, and asks the Commission to revise a term of the Stipulation that SBUA no longer supports.[1]

SBUA argues that it misunderstood the effect of the Stipulation's term regarding changes to Schedule 32 rates and that its mistake constitutes new evidence that supports reconsidering Order No. 23-386 and reforming the Stipulation. However, SBUA has not articulated a valid legal basis for granting its request, and SBUA's effort to revise the Stipulation is untimely, procedurally improper, and a violation of the Stipulation's terms. Even if changing the Stipulation were

[1] Application for Reconsideration of Order Adopting the Fourth Partial Stipulation of Small Business Utility Advocates (Nov. 8, 2023) [hereinafter, "SBUA's Application for Reconsideration"].



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justified, SBUA's requested revision is vague, and implementing it would require further discussions with all parties to the Stipulation and process that cannot reasonably be completed during the time remaining before the rate-effective date of this case. For all of these reasons, the Commission should deny SBUA's Application for Reconsideration.

PGE has conferred with the other parties to the Fourth Partial Stipulation, and the Citizens' Utility Board (CUB) and the Alliance of Western Energy Consumers (AWEC) join PGE's request that the Commission deny reconsideration. PGE respectfully requests that the Commission resolve SBUA's reconsideration request by December 18 so that PGE can ensure the rates that take effect on January 1, 2024 are consistent with the Commission's orders and avoid the potential for customers to experience multiple rate changes.

## II. BACKGROUND AND PROCEDURAL HISTORY

Parties to this general rate case entered several partial stipulations to resolve the issues in the case. The Fourth Partial Stipulation, at issue here, was entered on October 6, 2023 between seven parties: PGE, SBUA, Commission Staff, CUB, AWEC, Fred Meyer Stores and Quality Food Centers, Division of the Kroger Co., and Walmart, Inc. (collectively, the Stipulating Parties).[2] The Stipulation addressed two revenue requirement issues as well as issues regarding the marginal cost study, rate design, and tariff changes.[3] The Stipulating Parties agreed that the Stipulation represents a reasonable resolution of the issues, is in the public interest, and will result in fair, just, and reasonable rates.[4]

On October 26, 2023, in response to the Administrative Law Judge's (ALJ) ruling admitting the stipulations, testimony, and exhibits in this case, SBUA requested that the record

[2] Fourth Partial Stipulation at 1 (Oct. 6, 2023).

[3] Fourth Partial Stipulation at 2-6.

[4] Fourth Partial Stipulation at 6.



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remain open to allow SBUA's efforts to "correct" the Fourth Partial Stipulation.[5] The attached declaration of SBUA's expert, Danny Kermode, indicated that Mr. Kermode withdrew his testimony in support of the Fourth Partial Stipulation.[6] On October 27, the Chief ALJ issued a Ruling construing SBUA's request as an untimely objection to the Fourth Partial Stipulation and denying the request.[7] The Ruling also explained that a request to amend the Fourth Partial Stipulation should be made in the form of a motion after conferring with other parties.[8] On October 30, the Commission adopted the Fourth Partial Stipulation in its entirety in Order No. 23-386.[9] In doing so, the Commission found that the Stipulation—taken together with the other partial stipulations in the case—was supported by sufficient evidence, appropriately resolved the issues, and resulted in fair, just, and reasonable rates.[10]

SBUA then filed the instant Application for Reconsideration concerning only Paragraph 19 of the Stipulation, which states, "Parties agree to remove the distribution blocking differential for distribution charges for Schedules 32 and 532."[11] As background, PGE originally proposed in this case to continue its current practice of blocked pricing for Schedule 32—with the first 5,000 kilowatt-hours (kWh) per month at a higher price and any kWhs over 5,000 per month at a lower price.[12] SBUA did not file testimony responding to this proposal and instead submitted a public comment expressing general concern about the proposed rate increase and about the blocking

[5] Response of Small Business Utility Advocates to ALJ October 24, 2023 Ruling at 3-4 (Oct. 26, 2023).

[6] Declaration of Danny P. Kermode at 1, Paragraph 3, attached to Response of Small Business Utility Advocates to ALJ October 24, 2023 Ruling.

[7] Ruling Denying Small Business Utility Advocates Requests at 3-4 (Oct. 27, 2023).

[8] Ruling Denying Small Business Utility Advocates Requests at 3-4.

[9] Docket UE 416, Order No. 23-386 at 14 (Oct. 30, 2023).

[10] *Id.* (adopting the first, second, third, fourth, and sixth partial stipulations in their entirety).

[11] Fourth Partial Stipulation at 6, Paragraph 19.

[12] PGE/1301, Macfarlane-Pleasant/68.


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approach to Schedule 32 but not offering a proposal to address the concerns.[13] SBUA engaged in the settlement discussions regarding Schedule 32 rate design, which resulted in the language of Paragraph 19, in which the Stipulating Parties agreed to "remove the distribution blocking" such that all kWhs under Schedule 32 are priced the same.[14] SBUA's Application for Reconsideration explains that this result was not, in fact, what SBUA sought and now argues that it will not result in fair and reasonable rates.[15] SBUA asks the Commission to reconsider Order No. 23-386 and revise the language of Paragraph 19.[16]

## III. LEGAL STANDARD

By statute, the Commission may grant reconsideration if sufficient reason therefor is made to appear.[17] Under the Commission's rules, the Commission may grant reconsideration if the applicant shows that there is: (a) new evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order; (b) a change in the law or policy since the date the order was issued relating to an issue essential to the decision; (c) an error of law or fact in the order that is essential to the decision; or (d) good cause for further examination of an issue essential to the decision.[18]

[13] Staff/413, Muldoon/194-95, Public Comment of Danny Kermode (submitted May 4, 2023, filed June 26, 2023).

[14] Fourth Partial Stipulation at 6, Paragraph 19; PGE's Response to SBUA Data Request 006, Exhibit C to Exhibit 1 to SBUA's Application for Reconsideration.

[15] SBUA's Application for Reconsideration at 9.

[16] *Id.*

[17] ORS 756.561(1).

[18] OAR 860-001-0720(3).



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## IV. ARGUMENT

### A. The effect of Paragraph 19 of the Stipulation was known or reasonably knowable before SBUA signed the Stipulation and well before the Commission issued Order No. 23-386.

SBUA argues that reconsideration is appropriate because "newly discovered evidence" demonstrates the result of the Stipulation is not what SBUA agreed to and that the Stipulation will not result in fair and reasonable rates.[19] Specifically, SBUA argues that PGE's responses to SBUA's data requests and PGE's and SBUA's subsequent discussions constitute new evidence "confirming" that the parties were mistaken in understanding that they had the same resolution in mind when they agreed upon Paragraph 19.[20] SBUA explains that its expert Mr. Kermode thought the Stipulation language was unclear but relied on SBUA's interpretation that Paragraph 19 reflected SBUA's position when he filed testimony supporting the Stipulation,[21] that SBUA supported the Stipulation based on its expert's opinion,[22] and that Mr. Kermode subsequently realized the Stipulation did not clearly reflect SBUA's position "after reviewing the stipulation wording."[23]

SBUA's own filing demonstrates that its Application is inconsistent with the plain language of the rule on which SBUA relies. OAR 860-001-0720(3)(a) provides that the

[19] SBUA's Application for Reconsideration at 8.

[20] *Id.* at 10.

[21] Declaration of Danny P. Kermode at 2, Paragraph 7, Exhibit 1 to SBUA's Application for Reconsideration ("At the time that I provided supporting testimony, I felt that greater clarity in the wording would be beneficial, I relied on SBUA's interpretation of what the impact of the provided language in the stipulation would have on rates.").

[22] SBUA's Application for Reconsideration at 12 ("SBUA reasonably relies on it's [*sic*] expert's opinion in a highly technical contested case proceeding like this general rate case." . . . . If SBUA's expert will not and cannot testify that the terms of a stipulation will produce results that are fair, just, and reasonable then SBUA cannot continue to support those terms." (internal citations omitted)).

[23] SBUA's Application for Reconsideration at 11 ("SBUA's expert, after reviewing the stipulation wording, expressed concern that the language did not clearly describe the position of SBUA as provided in SBUA's expert's public comment."); Declaration of Danny P. Kermode at 2, Paragraph 7, Exhibit 1 to SBUA's Application for Reconsideration ("[L]ater, in reviewing the wording I became more concerned with the clarity of the meaning of the provided language. I immediately expressed concern to counsel that I felt the language did not clearly describe the position of SBUA as provided in my public comment and, for the record, we should request clarification.").



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Commission may grant reconsideration if the applicant shows the existence of "new evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order."

SBUA's mistaken understanding of the Stipulation is not new evidence because it was readily available and reasonably discoverable before issuance of the Order—and indeed before SBUA signed the Stipulation. SBUA clearly states that Mr. Kermode realized SBUA was mistaken regarding the Stipulation after reviewing its language.[24] The Stipulation's language was available to SBUA before SBUA signed the Stipulation, and therefore SBUA could have identified and raised its concerns well before the Commission issued Order No. 23-386. In fact, Mr. Kermode's declaration confirms that he had a concern when SBUA signed the Stipulation, stating that "[at] the time that [he] provided supporting testimony" regarding the Stipulation, he felt that the language would benefit from greater clarity.[25] Further, Mr. Kermode crafted SBUA data requests 005 and 006 in an effort to better understand the impact of the Stipulation's wording, and SBUA served data request 005 on September 19, 2023—more than two weeks before SBUA signed the Stipulation and over a month before the Commission issued Order No. 23-386.[26] Thus, SBUA's own filing fails to support its claim that its misunderstanding of the Stipulation constitutes new evidence that was previously unavailable and undiscoverable.

Moreover, SBUA has not demonstrated as required by OAR 860-001-0720(3)(a) that SBUA's mistaken understanding regarding the impact of Paragraph 19 is evidence essential to the Commission's decision. The Commission reviews stipulations holistically to determine whether

[24] *Id.*

[25] Declaration of Danny P. Kermode at 2, Paragraph 7, Exhibit 1 to SBUA's Application for Reconsideration.

[26] Declaration of Danny P. Kermode at 2, Paragraph 8, Exhibit 1 to SBUA's Application for Reconsideration; PGE's Response to SBUA Data Request 005, Exhibit B to Exhibit 1 to SBUA's Application for Reconsideration; Declaration of Diane Henkels at 2, Paragraph 7, Exhibit 2 to SBUA's Application for Reconsideration;


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the stipulation as a whole produces a fair and reasonable outcome and does not judge the outcome based on the theories, methodologies, or individual decisions reflected therein.[27] Further, the Commission has previously rejected the mere fact that there was no "meeting of the minds" among stipulating parties as a basis for granting reconsideration.[28] Here, where the Stipulation involved seven parties and addressed myriad issues, it is not clear that SBUA's support for the Stipulation (or lack thereof) was essential to the Commission's approval of the Stipulation—nor does the absence of a meeting of the minds, without more, justify reconsidering the Commission's decision. SBUA has failed to establish a valid basis for reconsideration under OAR 860-001-0720(3)(a).

**B. General principles of contract law do not justify reforming the Stipulation that SBUA signed.**

SBUA also relies upon general principles of contract law, arguing that the Fourth Partial Stipulation should be reformed due to either SBUA's unilateral mistake or PGE's and SBUA's mutual mistake.[29] As SBUA sets forth in its Application, parties seeking reformation of a written contract must establish: (1) that there was an antecedent agreement to which the contract can be reformed; (2) that there was a mutual mistake or a unilateral mistake on the part of the party seeking reformation and inequitable conduct on the part of the other party; and (3) that the party seeking reformation was not guilty of gross negligence.[30] SBUA has not met these requirements.

First, there is no preexisting agreement to which the Stipulation can be reformed. SBUA

[27] Order No. 23-386 at 13-14; *In re PacifiCorp Request for a General Rate Increase in the Company's Oregon Annual Revenues*, Docket UE 210, Order No. 10-022 at 6 (Jan. 26, 2010).

[28] *In re PacifiCorp, Application for Approval of Revised Tariffs to Reflect New Net Power Costs (UE 134) and In re PacifiCorp, Application for an Accounting Order Regarding Deferral of Trail Mountain Mine Unrecovered Costs (UM 1047)*, Dockets UE 134 & UM 1047, Order No. 02-543 at 3 (Aug. 8, 2002) (rejecting a "meeting of the minds" argument but granting reconsideration on other grounds).

[29] SBUA's Application for Reconsideration at 12-13.

[30] *Jensen v. Miller*, 280 Or 225, 228-29 (1977).


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asserts that "the existing distribution rates" create such an agreement,[31] but it is not clear whether SBUA means the rates in effect before PGE filed this general rate case, those proposed in PGE's initial docket UE 416 filing, the new rates approved by the Commission in Order No. 23-386, or something else. PGE understands that SBUA sought some change to the Schedule 32 rate or rate structure proposed in PGE's initial filing and that SBUA did not simply agree to PGE's proposal—hence SBUA's participation in the settlement discussions and the Stipulating Parties' inclusion in the Stipulation of a change to Schedule 32. However, Paragraph 19 represents the only change to Schedule 32 agreed upon between PGE, SBUA, and the other Stipulating Parties, and thus there is no antecedent agreement to which the Stipulation can be reformed.

Second, PGE did not engage in inequitable conduct that justifies reformation as a result of SBUA's unilateral mistake regarding the effect of Paragraph 19. SBUA has not—and cannot—claim that PGE engaged in fraud or undue influence,[32] or that PGE knew that SBUA was mistaken about the effect of Paragraph 19 but remained silent in order to take advantage of SBUA.[33] In fact, SBUA acknowledges that the Company was "responsive" to SBUA's questions.[34] SBUA's mistake alone cannot justify reformation of the Stipulation. In the absence of inequitable conduct by PGE and an antecedent agreement to which the Stipulation could be reformed, the requirements for reformation have not been met.

Finally, although the Commission need not reach this issue because the other prongs are

[31] SBUA's Application for Reconsideration at 13.

[32] *See, e.g.*, *Fleenor v. Williamson (In re Estate of Fleenor)*, 171 Or App 599, 601-03, 607-10 (2000) (finding that petitioner's decision to disclaim his interest in a decedent's estate in reliance on an attorney's incorrect advice that the disclaimer would transfer the interest to his disabled brother could not be rescinded based on the petitioner's unilateral mistake about its legal effect in the absence of fraud or undue influence).

[33] *Kish v. Kustura*, 190 Or App 458, 463-64 (2003) (upholding reformation where one party to a contract took advantage of the other's inability to read or speak English and told the counterparty that the contract reflected their prior agreement when she knew it did not).

[34] SBUA's Application for Reconsideration at 6.


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not satisfied, it is worth noting that reformation of a bilateral contract is permitted only if the party seeking reformation proves that it was not grossly negligent. For conduct to amount to gross negligence, it "must go beyond mere oversight, inadvertence, or mistake and, instead, must amount to a degree of inattention that is inexcusable under the circumstances."[35] While a party's failure to read a contract, standing alone, generally is insufficient to constitute gross negligence,[36] at least one case has found a party's and its counsel's failure to review a two-page document to be an inexcusable degree of inattention that barred reformation.[37] In that case, the court explained that "the pertinent information was at [the party's] fingertips," and "all information necessary to avoid the mistake was readily available . . . with no need for an independent investigation."[38] Here, the Commission could find that the failure by SBUA's counsel and its expert to carefully read and understand the effect of the single sentence in the Stipulation that addressed SBUA's concerns prior to signing the Stipulation was an inexcusable level of inattention under the circumstances. Such a finding would further support the conclusion that reformation of the Stipulation is not available.

### C. SBUA's requested revision to the Stipulation is unclear and cannot be readily implemented.

As SBUA acknowledges, PGE has devoted significant time to working with SBUA since the Stipulation was signed to explain the impact of the agreed-upon language and attempt to understand SBUA's concerns.[39] PGE remains willing to continue engaging with SBUA in future

[35] *Kish v. Kustura*, 190 Or App at 464 (quoting *Foster v. Gibbons*, 177 Or App 45, 54 (2001)).

[36] *Id.* (citing *Wolfgang v. Henry Thiele Catering Co.*, 128 Or 433, 445-47 (1929)).

[37] *Murray v. Laugsand*, 179 Or App 291, 306-07 (2002).

[38] *Id.*

[39] *See* SBUA's Application for Reconsideration at 6; Declaration of Danny Kermode at 3, Paragraph 11, Exhibit 1 to SBUA's Application for Reconsideration; Declaration of Diane Henkels at 2, Paragraphs 7 & 8, Exhibit 2 to SBUA's Application for Reconsideration.


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proceedings, including potentially restoring the blocking approach to Schedule 32 in a future proceeding if that is now SBUA's preference. However, the limited information provided by SBUA in this case—through one public comment and in the Application for Reconsideration—does not clearly convey SBUA's desired outcome for Schedule 32. And after reviewing SBUA's reconsideration request, PGE remains unclear what specific change SBUA *does* want to make to Schedule 32 if it is not the change reflected in the Stipulation.

SBUA requests that the Commission revise the Stipulation to state that parties agree "that the distribution blocking differential . . . remain unchanged from rates existing at the time the Stipulation is adopted,"[40] but SBUA makes several inconsistent statements regarding its request. SBUA's Application for Reconsideration and the attached Kermode Declaration explain that "SBUA had advocated that the distribution charge not increase," and that Mr. Kermode understood that the Stipulation was to reflect this.[41] SBUA also claims that revising the Stipulation to address its mistake is "revenue neutral" and does not impact other classes of ratepayers.[42] However, revising the Schedule 32 rates adopted in Order No. 23-386 to reflect currently effective Schedule 32 rates *is not* revenue neutral. On the other hand, if SBUA in fact wants no change to Schedule 32 as proposed in PGE's initial filing, then the Stipulation need not address Schedule 32 at all, or it could simply state that PGE's proposed Schedule 32 rate design is adopted. Thus, it appears from SBUA's proposed language that SBUA seeks some change to PGE's proposed Schedule 32 rates, but PGE is unclear what specific change SBUA is requesting or what rates and/or rate design

[40] SBUA's Application for Reconsideration at 9.

[41] *Id.* at 14; Declaration of Danny Kermode at 3, Paragraph 10, Exhibit 1 to SBUA's Application for Reconsideration.

[42] SBUA's Application for Reconsideration at 14 ("resolution of the mistake is revenue neutral"); *id.* ("allocation among the Schedule 32 ratepayers is revenue neutral and would not impact other ratepayer classes"); *id.* at15 ("this change requested is revenue neutral and may be rectified without impacting other parts of the Stipulation").


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SBUA would like to see in Schedule 32 going forward.

Given the lack of clarity regarding SBUA's proposal and the limited time remaining until the rate-effective date, it is neither advisable nor practical to attempt to clarify SBUA's desired changes and implement them at this time. The rate-effective date for this case is January 1, 2024, and PGE needs to have all rates and rate-design issues resolved by no later than December 18 in order to ensure that PGE's updated tariffs appropriately implement the changes. At this stage in the case, there is insufficient time to engage in the discussions and process that would be necessary to determine whether the parties can agree upon changes to the Stipulation regarding Schedule 32 and seek necessary Commission approval if so, or a Commission decision if there is no agreement.

### D. SBUA's Application should be rejected as an untimely and improper challenge to the Stipulation and a violation of the Stipulation.

SBUA's effort to revise the Stipulation through a request for reconsideration is inconsistent with the Commission's rules and the Stipulation's terms. When it signed the Stipulation, SBUA agreed to support the Stipulation "throughout this proceeding," to provide witness support for the Stipulation, and to recommend that the Commission adopt the Stipulation's terms.[43] Yet now SBUA argues that *PGE* failed to meet its burden of proof to show that the Stipulation provision—that addressed SBUA's concern and that SBUA agreed to support—results in fair, just, and reasonable rates.[44] By challenging the Stipulation, SBUA has failed to uphold its obligations under the Stipulation.

The proper time for SBUA to have raised its concern was before signing the Stipulation. And if SBUA was unclear about the Stipulation or sought to oppose the Stipulation, SBUA should

[43] Fourth Partial Stipulation at 7-8.

[44] SBUA's Application for Reconsideration at 4 ("In October SBUA perceived a mistake or misunderstanding regarding the Stipulation language as it pertained explicitly to the focused concern of SBUA regarding distribution rates for Schedule 32 customers"); *id.* at 14 ("The Company does not meet its burden here to show that removing the blocking in the distribution rates is just and reasonable.").


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not have signed it and then could avail itself of the procedures for objecting to a Stipulation. Pursuant to the Commission's rules, objections to stipulations must be filed with the Commission within 15 days,[45] which means that any objection to the Fourth Partial Stipulation was due by October 23.[46]

Despite being aware that it had concerns regarding the Stipulation, SBUA did not raise those concerns until October 26 and failed to do so in accordance with the Commission's procedures.[47] Moreover, when SBUA raised its concerns in October, the Chief ALJ deemed the effort untimely and procedurally inappropriate, yet SBUA's Application for Reconsideration again seeks to raise the same issue, belatedly and in an improper way, with no new or different evidence. SBUA's failure to comply with the Commission's rules and the Stipulation's terms prejudices the other Stipulating Parties and has made it challenging to effectively address SBUA's concerns.

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[45] OAR 860-001-0350(8) ("Within 15 days of the filing of a stipulation, a party may file written objections to the stipulation or request a hearing. Upon request or its own motion, the Commission or ALJ may set another time period for objections and request for hearing. Objections may be on the merits or based upon failure of Staff or a party to comply with this rule.").

[46] The Stipulation was filed on October 6, but October 21 was a Saturday, so the objection due date was the next business day.

[47] Ruling Denying Small Business Utility Advocates Requests at 3-4.


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## V. CONCLUSION

PGE respectfully requests that the Commission deny SBUA's request for reconsideration. SBUA's belated realization that it failed to conduct basic due diligence before executing the Stipulation does not justify revising the Stipulation at this late point in the case, and in any event, it remains unclear what specific change SBUA desires.

Respectfully submitted November 27, 2023

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