

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UE 352

In the Matter of)
)
) APPLICATION FOR
) RECONSIDERATION
 PACIFICORP, d.b.a. PACIFIC POWER) OF SMALL BUSINESS UTILITY
) ADVOCATES
 2019 Renewable Adjustment Clause)
 _____)

I. INTRODUCTION

Pursuant to ORS 756.561 and OAR 860-001-0720, Small Business Utility Advocates (“SBUA”) files this Application for Reconsideration and Rehearing (“Application”) of the Public Utility Commission’s (“Commission”) Order 19-133 entered April 16, 2019 (“Order”) in the above-referenced docket. This Application is filed within 60 days from the date of service of the Order. OAR 860-001-0720(1).

SBUA requests reconsideration of the Commission’s decision to deny the Petition of SBUA for Case Certification in this docket. SBUA filed the Petition pursuant to Commission rules and the applicable Commission agreement for funding intervention of those intervenors representing broad classes of ratepayers.¹ The portion of the challenged Order that is erroneous or incomplete is the Commission’s interpretation of SBUA’s funding and its interpretation of the

¹ See OAR 860-001-0120 and Order 18-017 in UM 1929 Approval of the Fourth Amended and Restated Intervenor Funding Agreement, 1/18/18.

organizational funding structure and requirements to qualify for intervenor funding under the intervenor funding framework.²

Reconsideration should be granted based on 1) new evidence regarding SBUA finances,³ 2) errors of fact and law in the Order that are essential to the decision by the Commission in its denial,⁴ and/or 3) good cause for further examination of issues essential to the decision.⁵

Denying SBUA's case certification in this docket effectively prevents small nonresidential customers from taking part in ratemaking, thus treating them differently from and prejudicially compared to other ratepayers, such as residential and industrial ratepayers. The legislature expressly provided a mechanism to enable funded participation by classes of customers in Commission proceedings including this contested case.⁶ The small nonresidential ratepayers are the second most numerous class of ratepayers and they deserve consideration and funding consistent with the legislative intent of the intervenor funding program. Their participation through SBUA's representation adds value to the docket and the ratemaking process. As the Commission has found, SBUA represents this broad class of customer interests effectively⁷, and the Commission has found that SBUA has represented this class of customers in previous dockets before the Commission.

² See ORS 757.072, OAR 860-001-0720(2)(a); Amended and Restated Intervenor Funding Agreements in UM 1357 and UM 1929.

³ OAR 860-001-0720(a)

⁴ OAR 860-001-0720(b)

⁵ OAR 860-001-0720(3)(a)-(d)

⁶ ORS 757.072.

⁷ Order 19-133.

SBUA submits herein new evidence of SBUA Oregon's member contributions that was not available at the time of the Response of SBUA to the ALJ Bench Request.⁸ The Commission has interpreted the statute inconsistent with the delegation of its authority. The legislative history of the statute does not support the Commission's decision requiring a higher level of proof regarding funding stability than what SBUA has already shown in order to obtain case certification for intervenor funding in this proceeding. The decision allows the utility to discriminate against small nonresidential ratepayers. These errors are essential to the decision because this requirement is the only one that creates a bar to SBUA receiving case certification to obtain intervenor funding in this docket. The requirement of additional evidence of funding has not been raised by the Commission in any other proceeding to date. In other cases SBUA has provided its funding reports and received intervenor funding without such a requirement.⁹ There is good cause for further examination of these issues where SBUA represents a significant ratepayer class and the Commission's decision prevents SBUA from accessing appropriate ratemaking expertise necessary to effectively represent small nonresidential ratepayers.¹⁰ Therefore, the Commission should reconsider its Order, and its denial of SBUA's petition, and grant the Petition of SBUA for Case Certification allowing SBUA to submit its budget for approval.

⁸ UE 352 Application of SBUA for Reconsideration—Exhibit 1 Declaration of Counsel

⁹ UE 352 Petition of SBUA for Case Certification.

¹⁰ OAR 860-001-0720(d); Petition for Case Certification page 6 referring to the expert SBUA was going to engage if case certification had been granted and the budget approved.

II. BACKGROUND

The intervenor funding statute, ORS 757.072,¹¹ is a product of Oregon legislative activity starting with enactment in 1999 of House Bill 3615 which created an HB 3615 Interim Task Force (“HB 3615 Task Force”) to study the structure of the Commission.¹² The 3615 Task Force concluded that the Commission should be more visible and interactive and that the Commission should modify its procedures to improve the perception of fairness of its decision making

11 757.072 Agreements for financial assistance to organizations representing customer interests; rules. (1) A public utility providing electricity or natural gas may enter into a written agreement with an organization that represents broad customer interests in regulatory proceedings conducted by the Public Utility Commission relating to public utilities that provide electricity or natural gas. The agreement shall govern the manner in which financial assistance may be provided to the organization. The agreement may provide for financial assistance to other organizations found by the commission to be qualified under subsection (2) of this section. More than one public utility or organization may join in a single agreement. Any agreement entered into under this section must be approved by the commission before any financial assistance is provided under the agreement.

(2) Financial assistance under an agreement entered into under this section may be provided only to organizations that represent broad customer interests in regulatory proceedings before the commission relating to public utilities that provide electricity or natural gas. The commission by rule shall establish such qualifications as the commission deems appropriate for determining which organizations are eligible for financial assistance under an agreement entered into under this section.

(3) In administering an agreement entered into under this section, the commission by rule or order may determine:

- (a) The amount of financial assistance that may be provided to any organization;
- (b) The manner in which the financial assistance will be distributed;
- (c) The manner in which the financial assistance will be recovered in the rates of the public utility under subsection (4) of this section; and
- (d) Other matters necessary to administer the agreement.

(4) The commission shall allow a public utility that provides financial assistance under this section to recover the amounts so provided in rates. The commission shall allow a public utility to defer inclusion of those amounts in rates as provided in ORS 757.259 if the public utility so elects. An agreement under this section may not provide for payment of any amounts to the commission. [2003 c.234 §2]

¹² See HB 3615 Task Force Report; Staff Report, Public Utility Commission of Oregon, September 11, 2001 found at <https://www.puc.state.or.us/meetings/pmemos/2001/091101/reg7.pdf> (last accessed May 26, 2019)

process.¹³ The 3615 Task Force included residential and industrial ratepayer representatives but did not include any entity representing exclusively small nonresidential customers.¹⁴ The 3615 Task Force's recommendations led to enactment of SB 205 (2003) which established a mechanism according to which an organizations may represent a broad class of ratepayers in public utility regulatory proceedings including contested cases such as this one. SB 205, which became ORS 757.072 enabled creation of an Intervenor Funding Agreement ("IFA") and rules governing intervenor funding payments to allow stakeholders representing a general class of customers to receive funding pursuant to a Commission process to enable them to intervene and participate in certain Commission proceedings. The IFAs are products of extensive discussions between Commissioners, the electric and natural gas utilities, and the intervenor groups Citizens Utility Board and Industrial Customers of Northwest Utilities and also the Northwest and Intermountain Gas Users.¹⁵ These measures respond to the HB 3615 Task Force Report which recommended, "A program of broad intervenor funding should be created to ensure that essential resources are available to those who advocate on behalf of consumer interests in PUC proceedings."¹⁶ Tempo-

¹³ "Report to the Oregon State Legislature From The HB 3615 Interim Task Force" January 2001 ("HB 3616 Task Force Report")("We therefore strongly recommend that, for contested cases, the PUC document, in administrative rules, these long-standing internal policies and procedures. In response to the Task Force's findings, the PUC has undertaken to document those internal policies and procedures. We recommend that, as part of that documentation, the PUC adopt certain policies with regard to its decision meetings in contested cases to ensure actual and apparent fairness to all parties.") pp. 2-3. SBUA requested this Report by bill number and year from the Oregon Archives in late May 2019 and never received it, and then from the Commission in mid-June 2019. The Commission produced the Report on 6/13/19. Given the late date of receipt of the HB 3615 Task Force Report and the deadline for this Application coinciding some references in the Application to this Task Force content is cited to the related rulemaking AR 462.

¹⁴ HB 3615 Task Force Report p 20 (Individual names noted in the report are from the utility industry, Commission staff.)

¹⁵ Public Utility Commission Order 03-388 entered July 2, 2003 in AR 462, Appendix A p 2 available at <https://apps.puc.state.or.us/orders/2003ords/03-388.pdf> (last accessed May 26, 2019).

¹⁶ Id., p 3.

rary Rules and the First Intervenor Funding Agreement were adopted by the Commission in 2003; permanent rules were adopted on January 6, 2004.¹⁷ The Intervenor Funding Agreement has since been updated, first in 2007 in UM 1357 with the First Amended and Restated Intervention Funding Agreement,¹⁸ and most recently with the Fourth Amended and Restated Intervenor Funding Agreement in a new docket UM 1929.¹⁹

SBUA succeeded in meeting criteria set forth in the IFA and rules in four Commission dockets,²⁰ yet SBUA was not allowed to participate as a party in these proceedings regarding the Intervenor Funding Agreement, based on an email reply that the proceeding was not a contested case.²¹ However, Oregon law permits those meeting the criteria of the intervention statutes and rules to be parties in any Commission proceedings, not just contested cases.²²

Legislative history indicates that the intervenor funding was not locked into the traditional three groups, and that its purpose was to put money on the table to represent customers better.²³ The legislative and rulemaking history made no mention of what resources constituted significant support of an organization for purposes of seeking intervenor funding.

¹⁷ Public Utility Commission of Oregon Order 04-007 entered January 6, 2004 in AR 465, accessible at <https://apps.puc.state.or.us/orders/2004ords/04-007.pdf> (last accessed on May 26, 2019).

¹⁸ Public Utility Commission Docket Order 07-564 in UM 1357, <https://apps.puc.state.or.us/orders/2017ords/17-117.pdf> (last accessed May 26, 2019).

¹⁹ Public Utility Commission of Oregon Order 18-017 in Docket UM 1929, <https://edocs.puc.state.or.us/efdocs/HAH/um1929%28item%201.pdf%29hah13105.pdf>

²⁰ UE 352 Petition of SBUA for Case Certification.

²¹ Exhibit 2 Email of April 17, 2017 from Commission Administrative Law Judge (“ALJ”) to SBUA counsel.

²² ORS 756.525; OAR 860-001-0300(2)

²³ Oregon Legislature Senate Business and Labor Committee Public Hearing and Work Session Meeting Minutes March 5, 2003.

Rulemaking followed the enactment of SB 205 / ORS 757.072 in dockets AR 462 and 465 and participants included industrial and residential ratepayer advocates, and the agency. No one represented small nonresidential customers.²⁴ At the time of that 2004 rulemaking small nonresidential Schedule 23 class, also known at the time as “General Service < 31 kW” Pacific Corp d.b.a. Pacific Power customers numbered approximately 67,500 customers, second only to the residential ratepayers which numbered approximately 439,000.²⁵

When comment was requested in the rulemaking it was determined that criteria for comment was that an organization have “10 or more members” and no mention was made of how an organization was funded.²⁶

SBUA has represented the small nonresidential customers class, also known as Schedule 23, in previous proceedings before the Commission and has received case certifications and intervenor funding.²⁷ Receipt of such funding in each case required SBUA to submit budgets, request for budgets pursuant to the IFA of 20% of matching funds from in-house resources or outside funding.²⁸ SBUA has supplied such budget documentation each of the applicable dockets. SBUA has also filed the reports required of intervenors in the IFA receiving such funding re-

²⁴ HB 3615 Task Force Report, p 20.

²⁵ Order No. 03-528, UE 147 Pacific Power & Light (d.b.a. PacifiCorp) Application for Approval of Revised Tariffs; Advice No. 03-003, Appendix p 15 of 22. Pacific Power & Light Company Estimated Effect of Proposed Price Change on Revenues from Electric Sales to Ultimate Consumers Distributed by Rate Schedules in Oregon Forecast 12 Months Ended March 31, 2004. Comparatively, small nonresidential ratepayers are today the second most numerous class of ratepayers with Schedule 23 customers numbering 81,000 of the 614,000 customers. UE 352 Exhibit PAC/503 Ridenour/2.

²⁶ Staff Report, AR 462.

²⁷ Commission dockets UM 1751, UM 1754, UM 1790, and UM 1773.

²⁸ See Fourth IFA Section 6.3.

ferred to herein as “Intervenor Report.”²⁹ The Intervenor Report requirement provides that to ensure that the organization’s respective members contribute a significant portion of the organization’s funding of activities before the Commission for which the organization seeks intervenor funding, any intervenor who received an Intervenor Funding Grant shall also include in its report filed pursuant to subsection (a) of this Section: (1) a statement showing the total expenditures the intervenor incurred participating in all proceedings affecting the Participating Public Utilities before the Commission in each of the five prior calendar years; and (2) a statement showing the amount of expenditures the intervenor incurred in participating in each proceeding affecting the Participating Public Utilities before the Commission before which it requested payment of a grant from an Issue Fund.³⁰

In this proceeding, SBUA filed its petition for case certification and Joint Intervenors filed a Response to the Petition in opposition to SBUA’s petition.³¹ The Chief Administrative Law Judge issued a Bench Request to SBUA to provide certain information including a current membership list and most recent year audited or board-attested financials SBUA provided its response, regarding SBUA members and finances in Oregon only, *in camera* on March 27, 2019.³² SBUA’s Response to Bench Request (“Response”) incorporated by reference SBUA’s Intervenor Reports. The submission which is confidential includes a Financial Statement of SBUA in Ore-

²⁹ See Fourth IFA Section 6.8 (c) and (d).

³⁰ *Id.*

³¹ UM 352 Joint Parties Response to SBUA Petition for Case Certification,

³² UM 352 Response of SBUA to Bench Request.

gon dated March 27, 2019.³³ As of that date contributions, in-kind assistance, prepaid expenses and fixed assets provided all provided by members were well over 20% of the organization's operating expenses with or without case certification and approved budget in this case.

The Order denying case certification on two grounds focused on SBUA's financial status.³⁴ The Order states that SBUA does not meet the requirements of Article 5.3(d) of the intervenor funding agreement.³⁵ The Order states as the first ground that SBUA's submitted financial information did not demonstrate significant capacity from members to contribute to its efforts to participate in Commission proceedings. The Commission's Order states that "It is essential that members of an organization qualifying for funding find the organization of enough independent value that members are willing to continue to support its operations significantly through financial donations, membership fees, fees or in-kind support,". The Order also provides that "[t]his contribution should reach a level so that a qualifying organization is capable of some level of action and advocacy apart from intervenor funding."³⁶ The second ground for the Commission's denial of SBUA's Petition for Case Certification is SBUA's explicit communication that it has no plans to meaningfully participate in this docket without intervenor funding.³⁷

SBUA had identified in its filings and subsequently, in detail in discovery to the utility, the cre-

³³ UE 352 Response of SBUA to Bench Request for Information, Confidential Exhibit B.

³⁴ Public Utility Commission of Oregon, Order No. 19-133, at 4-5 (April 16, 2019) ("Order 19-133"). The Commission found that SBUA did demonstrate effective representation of the small business customer class and that SBUA members do represent a broad customer class and not individual member interests.

³⁵ IFA 5.3(d) provides in entirety: "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;"

³⁶ Order 19-133, p 5.

³⁷ the Order p. 5

dentials of its expert who is very well qualified to assist SBUA with appropriate technical expertise in the docket. Unfortunately, without funding to pay for such expertise in the proceedings, SBUA's technical ability to represent small nonresidential customers in a full resolution of issues in this docket is limited. The Commission stated that "Intervenor funding is premised on the concept that an organization has and will continue to demonstrate value to its customer class members, and demonstrate an ability to support a full resolution of issues in dockets through effective representation, independent of intervenor funding."³⁸

III. ARGUMENT

A. Standard of Review

Under Oregon law, "[a]fter an order has been made by the [Commission] in any proceeding, any party thereto may apply for rehearing or reconsideration thereof within 60 days from the date of service of such order."³⁹ The Commission may grant ... reconsideration if sufficient reason therefore is made to appear."⁴⁰ Commission rules identify the "sufficient reason[s]" for which the Commission may grant an application for reconsideration.⁴¹ These include if new evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order,⁴² or if there is "[a]n error of law or fact in the order that is essential to the

³⁸ Order 19-133, p 5.

³⁹ ORS 756.561(1)

⁴⁰ Id.

⁴¹ OAR 860-001-0720(3)

⁴² OAR 860-001-0720(3)(a)

decision.”⁴³ This latter rule requires the applicant for reconsideration to make two showings. First, it must show that the order includes an error of law or fact, and second, it must show that this error of law or fact was essential to the decision.⁴⁴ In this case, both elements are met with regard to five errors of law. Also there is good cause to examine the issue essential to the decision.⁴⁵

For statutory terms which impart relatively precise meaning, judicial review of an administrative order applying such a term would normally be for substantial evidence under ORS 183.482(8)(c).⁴⁶ The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record.⁴⁷ The correct standard of proof applicable in agency proceedings, under the Oregon Administrative Procedures Act governing contested case proceedings is substantial evidence which is synonymous with preponderance of the evidence standard.⁴⁸ In this case, as the discussion below demonstrates the Commission’s decision is not supported by substantial evidence.

B. This Application is complete for reconsideration.

Commission rules require the Application to specify certain information. “The application for reconsideration must specify: (a) the portion of the challenged order that the applicant contends is erroneous or incomplete; (b) the portion of the record, laws, rules, or policy relied

⁴³ OAR 860-001-0720(c)

⁴⁴ OAR 860-001-0720(3)(c)

⁴⁵ OAR 860-001-0720(d)

⁴⁶ *Springfield Ed Ass’n v Springfield*, 290 Or 217 (1980).

⁴⁷ *Id.*

⁴⁸ *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018).

upon to support the application; (c) the change in the order that the Commission is requested to make; (d) how the applicant's requested change in the order will alter the outcome; (e) one or more of the grounds for rehearing or reconsideration in section (3) of this rule.”⁴⁹

SBUA’s Application is complete for the following reasons:

(a) The portion of the challenged order that the applicant contends is erroneous or incomplete

OAR 860-001-0720(2)(a)

The portion of the Commission’s Order 19-133 that SBUA maintains is erroneous or incomplete is the finding that denial is appropriate on two grounds. First, that SBUA’s submitted financial information, at this time, does not demonstrate a significant capacity from members to contribute to its operations or participate in our proceedings. And presumably the second ground is that SBUA’s communication that it has no plans to meaningfully participate in the docket without intervenor funding.

(b) The portion of the record, laws, rules, or policy relied upon to support the application

OAR 860-001-0720(2)(b)

SBUA relies on the following portion of the record, laws, rules, and policies to support this application as follows:

1. The entire record of SBUA case certification in Commission proceedings as identified in the UE 352 Petition of SBUA for Case Certification, including responses and orders;
2. The SBUA case certification in this docket including the Petition to Intervene of SBUA, the Petition of SBUA for Case Certification, Joint Parties Response in opposition and the ALJ

⁴⁹ OAR 860-001-0720(2).

Bench Request and Response of SBUA to Bench Request, with *in camera* protections continued of SBUA's Response to Bench Request;

3. ORS 752.072;
4. First and Fourth Intervenor Funding Agreements and any in between;
5. Report to the Oregon State Legislature From The HB 3615 Interim Task Force, January 2001;
6. SB 205 (2003) and accompanying Legislative history;
7. AR 462 and AR 465 and Administrative Law Judge and Commission Orders from those dockets;
8. UM 1356 including SBUA's Petition to Intervene;
9. E-mail from Administrative Law Judge, dated April 17, 2017;
10. SBUA's Intervenor Reports.
11. Curriculum vitae of SBUA proposed expert in UE 352, discovered to the utility.

(c) The change in the order that the Commission is requested to make;

OAR 860-001-0720(2)(c)

SBUA requests that the Commission amend the finding that SBUA has met the requirements of 5.3(d) for this docket and grant SBUA case certification.

(d) How the applicant's requested change in the order will alter the outcome

OAR 860-001-0720(2)(d)

The requested changes will enable SBUA to propose a reasonable budget which if granted would enable access to expert analysis and expert testimony that would provide expert analysis to the Commission of the impact of the PacifiCorp request on small nonresidential (Schedule 23), customers in this proceeding, and enable this customer class to participate meaningfully in

the proceedings, to continue offering as in previous dockets the small nonresidential perspective on the PacifiCorp RPS implementation plan.

(e) One or more of the grounds for rehearing or reconsideration in section (3) of this rule.

OAR 860-001-0720(2)(e)

The following Section C identifies the grounds for reconsideration.

C. Grounds for Reconsideration

The Commission may grant an application for rehearing or 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; (d) good cause for further examination of an issue essential to the decision.⁵⁰

1) SBUA offers new evidence more clearly demonstrating consistent and substantial member support of SBUA

OAR 860-001-0720(3)(a)

New evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order demonstrates SBUA membership providing significant support for the organization. SBUA membership provides equipment space, contributions, donated cash and in-kind, prepaid expenses and non-current assets.⁵¹

⁵⁰ OAR 860-001-0720(3).

⁵¹ Exhibit 1 Declaration of Counsel

2) The Order contains errors of law or fact that are essential to the decision;

OAR 860-001-0720(3)(c)

In the Order the Commission stated:

“SBUA’s submitted financial information, at this time, does not demonstrate a significant capacity from members to contribute to its operations to participate in our proceedings.”

“It is essential that members of an organization qualifying for funding find the organization of enough independent value that members are willing to contribute to its operations significantly through financial donations, membership fees, or in-kind support.”

“This contribution should reach a level so that a qualifying organization is capable of some level of action and advocacy apart from intervenor funding.”

“Intervenor funding is premised on the concept that an organization has and will continue to demonstrate value to its customer class members, and demonstrate an ability to support a full resolution of issues in dockets through effective representation, independent of intervenor funding.”⁵²

a) The Commission’s Order contains an error of law the Commission erred in exercising authority inconsistent with that delegated by the legislature in the intervenor funding statute.

The Commission exercises wide discretion to fulfill its obligation to provide just and reasonable rates.⁵³ The statute provides that the Commission may establish, by rule the qualifications, as the Commission deems appropriate for determining which organizations are eligible for

⁵² Order 19-133 at 5.

⁵³ ORS 757.210; *Springfield Education Assoc. v. Springfield School District*, 290 Or 217, 229 (1980)(Dicta describing discretion of the Public Utility Commission)

financial assistance.⁵⁴ The decisional relationship of agency and courts in contested cases is set forth in statute: "The court shall remand the order to the agency if it finds the agency's exercise of discretion to be: "(A) Outside the range of discretion delegated to the agency by law; (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or (C) Otherwise in violation of a constitutional or statutory provision."⁵⁵ As stated above, SBUA has fulfilled financial criteria in the past, but even if it had not the Commission's interpretation is outside of its delegated authority under *Springfield Ed. Ass'n v. Springfield*.⁵⁶

The Legislature expresses a general legislative policy and delegates to the agency the authority and responsibility to complete the legislation by rule.⁵⁷ The *Springfield* decision refers to the Public Utility Commission as an example of an agency which is "required to regulate public utilities so as to allow them rates that are 'just and reasonable,' ORS 757.210, and to 'protect such customers, and the public generally, from unjust and unreasonable extractions and practices and to obtain for them adequate service at fair and reasonable rates,' ORS 756.040(1)".⁵⁸ However, the Commission's authority is limited by the scope granted to it by the Legislature and by the state and federal constitutions, and as a result, the Commission cannot take actions or require the utilities to take measures which are outside the scope of its statutory authority.⁵⁹ The Com-

⁵⁴ ORS 757.072(2)

⁵⁵ ORS 183.482(8)(b)

⁵⁶ 290 Or 217 (1980)

⁵⁷ *Id.* at 230

⁵⁸ *Id.*

⁵⁹ Commission Report SB 978, p 29.

mission's statutory authority requires "just and reasonable rates" and obligates utilities to provide nondiscriminatory service.⁶⁰

The Commission's denial of SBUA's petition based on SBUA financial status is outside the Commission's delegation where it prevents SBUA from contributing on behalf of a broad class of customers in the very process the statute regarding intervenor funding was intended to redress, that is, protecting customers classes from unjust and unreasonable extractions and practices and to obtain for them adequate service at fair and reasonable rates. Further, as demonstrated in the following section, unlike in *Springfield*,⁶¹ there is legislative history supporting SBUA's interpretation of the statute in this matter regarding intervenor funding.

b) The Order contains an error of law where the Commission's requirement is not supported by the legislative history of SB 205.

Though SBUA has provided proof of sustainable funding, the legislative history of the intervenor funding agreement statute does not support the Commission's requiring this of SBUA to do so: where there is no reference to this requirement and it is exactly the lack of funding the statute is designed to redress.

In 2001 the Oregon Legislature enacted ORS 174.020 requiring a court to "pursue the intention of the legislature if possible".⁶² To assist a court in its construction of a statute a party may offer the legislative history of the statute.⁶³ SBUA offers the full legislative history to the

⁶⁰ Commission SB 978 Report, p 57, Appendix G: Commission Summary Memo of Stakeholder Perspectives.

⁶¹ Id. at 231.

⁶² ORS 174.020(1)(a), *State v. Gaines*, 346 Or 160, 171 (2009).

⁶³ Id.

Commission so that the Commission may give it the appropriate weight in considering this Application.⁶⁴ As explained previously in this Application, SB 205 (2003) which became ORS 757.072 drew from and relied on information contained in the HB 3615 Task Force Report. This Report recommended that the intervenor funding program be created to ensure that essential resources are available to consumer advocates in the proceedings and to design the program in such a way to be fair, effective and cost-efficient in achieving results for all classes of customers. Examples were presented of provisions to consider including charging intervention costs to the class and limiting the costs to the intervenor's actual costs. The Senate Business and Labor Committee indicates that the that the bill SB 205 was needed and "improves the process to ensure that all sides are represented" and that the bill "puts money on the table to represent the customers better."⁶⁵ The testimony includes the statement that "It is not locked to the three traditional groups."⁶⁶ Nothing in the legislative history of the bill authorizes the Commission to consider an organization's financial status as a basis on which a determination of intervenor funding decision would turn.

SBUA submits the Commission's denial of case certification based on a sheet of current finances is inconsistent with the legislative intent of intervenor funding bill. As noted above, parties involved in the task force underlying the bill and the rulemaking process did not include small business representation, and were primarily concerned with the size or number of persons an entity submitting comment.

⁶⁴ ORS 174.020(3); Oregon Legislature Senate Business and Labor Committee Public Hearing and Work Session Meeting Minutes March 5, 2003.

⁶⁵ Id.

⁶⁶ Id.

The Commission referenced a statement by SBUA that it cannot participate meaningfully in UE 352 proceedings with its expert in the proceedings if it is not able to access intervenor funding.⁶⁷ SBUA has fulfilled other criteria, and has an expert well equipped to assist with helpful analysis. The customer class SBUA represents is large and lacks representation otherwise and may therefore be subject to discriminatory ratemaking. The Commission decision prevents SBUA from submitting a budget for the Commission's approval to represent this customer class and ensure that PacifiCorp's Renewable Energy Adjustment Mechanism is just and reasonable for this customer class. The Commission's requirements and decision are not supported by the legislative history of SB 205.

c) The Commission's conclusion that SBUA does not have sufficient financial support for case certification in this docket is not supported by substantial evidence.

The rule requires that the organization demonstrate that its members provide a significant percentage of the overall support of the organization. What constitutes "significant percentage of the overall support of the organization" is not explicitly defined by the rules or statute and nothing in the Legislative history of SB 205, or the rulemaking in AR 462 and 465, indicate what is meant by those terms. SBUA has provided budgets including its 20% support in each docket where it has submitted budgets, and has filed annual intervenor reports in applicable years documenting a 20% match. SBUA provided a current financial statement demonstrating a net positive with the cost of a small nonresidential ratemaking expert as an outstanding cost and herein

⁶⁷ Order 19-133. No one contests the expertise of SBUA's preferred expert who has three decades in electric utility economics in a public utility commission and trains many of the kinds of professionals working this or similar dockets. The SBUA expert's qualifications were submitted as a response to discovery request from the utility and made available to all the parties in the docket.

supplements this with a Declaration documenting that all SBUA resources come members. The Commission has not found SBUA lacking in funding in any previous dockets. SBUA has demonstrated that it has met the funding requirement of providing at least 20% match in dockets where SBUA was case certified and SBUA budget was approved. Though a different proceeding, the Commission did not find that a similar funding requirement applied to a recent process.⁶⁸

Public record shows that SBUA has met the 20% criteria.⁶⁹ The ALJ had found that SBUA has demonstrated the required funding in at least four dockets. SBUA has also filed with the Commission the required annual reports for years when intervenor funding was received showing that SBUA met the 20%. In light of these facts, the Commission's Order denying case certification based on SBUA financial status is not supported by substantial evidence.

By a preponderance of the evidence SBUA has demonstrated that it meets the requirements in the rule⁷⁰ and the Commission commits an error of law in effectively deciding SBUA does not meet the requirements.

d) The Commission did not articulate the findings supporting its conclusion that SBUA members did not meet the financial requirement.

A final order must be supported by substantial reason, which requires that the order articulate "the reasoning that leads the agency from the facts that it has found to the conclusions that it draws from those facts."⁷¹ The Commission requested most recent year audited and board at-

⁶⁸ SB 978 Report, p 20 ("During the SB 978 process, stakeholders worked with utilities to develop a limited intervenor funding agreement to provide funds for the participation of Community Based Organizations as part of the SB 978 process, which the Commission approved on September 11, 2018.")

⁶⁹ SBUA Intervenor Reports 2016 and 2017 on file with the Commission.

⁷⁰ OAR 860-001-0120(4(d)).

⁷¹ *Dubray v. SAIF Corp.*, 246 Or.App. 270 (2011).

tested financials and received a Response that was “detailed, responsive, and complete.”⁷² As identified above, SBUA provided various information to support a determination that it has the financial support required by the rule. The Commission finding is based on its interpretation that the required financial support should be enough that the organization does not need the intervenor funding. Yet even in that case SBUA had provided in its Petition for Case Certification and its Response to Intervenors that SBUA has demonstrated capable advocacy without the funding.

e) The Commission’s order effectively approves discrimination by the utility against small nonresidential ratepayers in favor of other ratepayers; this is contrary to Oregon statute and an error of law.

The Commission’s Order was issued following a Response by the utility, PacifiCorp, and two other ratepayer classes or groups of classes, residential and industrial respectively, original parties to the intervention funding agreement statute. PacifiCorp is prohibited from making or giving undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.⁷³ Small nonresidential ratepayers are the second most numerous class of ratepayers, have been previously successfully represented and unopposed by the utility in previous proceeding.⁷⁴ That issue fund grant agreement was recommended for approval by the same ALJ who approved SBUA eligibility for four previous issue funds but then disallowed SBUA

⁷² Order at 4.

⁷³ ORS 757.325

⁷⁴ Order 18-339 Approving Senate Bill 978 Issue Fund Grants Agreement, p

participation as an intervenor in the proceedings in UM 1357 to participate in the intervenor unding agreement negotiation process.⁷⁵ Far from requiring proof of funding from members, the SB 978 IFA required the organization to lack funding.⁷⁶

C. Good cause for further examination of an issue essential to the decision.

(d) good cause for further examination of an issue essential to the decision.

OAR 860-001-0720(3)(c)

Granting this Application for Reconsideration and also granting SBUA's Petition would render substantial justice between small nonresidential customers and the utility in this docket.⁷⁷ The Commission's intervening funding structure is a product of years of extensive discussions between Commissioners, the electric and natural gas utilities, and the intervenor groups mentioned above. These measures respond to the HB 3615 Task Force which recommended, "A program of broad intervenor funding should be created to ensure that essential resources are available to those who advocate on behalf of consumer interests in PUC proceedings. The intervenor funding program should be designed, funded and administered in a way that is fair, effective and cost-efficient in achieving results for all classes of customers"⁷⁸ Under this original program among other required showings, the organization had to show that "its members contribute a sig-

⁷⁵ Exhibit 2 Email of April 17, 2017 of ALJ to SBUA counsel

⁷⁶ Among the criteria required for an organization is that the organization "...lacks the resources or staff time to regularly participate in Commission proceedings," SB 978 IFA, Article V, 5.2(b)(4) ("The organization lacks the resources or staff time to regularly participate in Commission proceedings;"). None of the other six criteria deal with the organization's funding. SBUA supports participation of those receiving such funding, but perceives a discrimination against small nonresidential ratepayers in the Commission's approval of such agreement, which included no requirement for proof of any funding, let alone sustainable funding, or contribution of any kind on the part of the participants.

⁷⁷ ORS 756.062(2)

⁷⁸ Task Force Report, p 15. The second sentence was not included in the language in AR 462 p 3.

nificant percent of the support and funding of the organization”. In its 2001 recommendation regarding the IFA the ALJ noted:

Under these original rules, “The Commission considers numerous factors, including the breadth and complexity of the issues, the significance of any policy issues, the procedural schedule, the dollar magnitude of the issues at stake, the participation of other parties that adequately represent the interests of the customers, and the qualifications of the party requesting the funds.”⁷⁹

SBUA also offers the testimony of PacifiCorp in UE 352 that rate spread and rate schedules will change assuming direct access customers are removed from load forecast and rate spread calculations.⁸⁰ This broad and large customer class that is small nonresidential customers in Oregon has been unrepresented in many dockets and it now has acquired expertise to achieve fair representation in reviewing what the Commission identifies as important policy interests at stake in UE 352. In order to fulfill the Commission requirements to ensure rates are fair and reasonable is essential that the Commission examine its interpretation of SBUA funding and the funding requirement that prevents the Commission from case certifying SBUA so it can provide a budget for essential resources to advocate the consumer interests of this broad class of ratepayers.

⁷⁹ Id., p 8.

⁸⁰ PacifiCorp Reply Testimony of Judith Ridenour, (PAC 1000/Ridenour 3) p 3 filed May 20, 2019. The proposed change increases rates for all rate schedules by a very small amount from the rates presented in the company’s corrected RAC filing submitted on March 7, 2019. For example, the proposed residential RAC adjustment for October 1 increases 0.002 cents per kilowatt-hour from 0.111 to 0.113 cents per kilowatt-hour. Schedule 23 energy charge is adjusted to add .108 cents per kWh. Of approximately 25 schedules, only 8 are higher than Schedule 23. PAC Reply Testimony 1001; Ridenour p 1.

IV. CONCLUSION

For the foregoing reasons the Commission should grant this Application to Reconsider, find that SBUA has met requirements of Article 5.3(d), and grant SBUA case certification.

RESPECTFULLY SUBMITTED June 14, 2019.

s/Diane Henkels

Diane Henkels
Attorney, Small Business Utility Advocates
www.utilityadvocates.org
T: 541.270.6001
E: diane@utilityadvocates.org

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UE 352

In the Matter of)
)
PACIFICORP, d.b.a. PACIFIC POWER) DECLARATION OF COUNSEL
)
2019 Renewable Adjustment Clause)
_____)

1. I am the attorney for Small Business Utility Advocates (“SBUA”) in the above-referenced matter.
2. The financial information provided in Confidential Exhibit B in Response of SBUA to Bench Request identifying assets of SBUA in Oregon are assets provided entirely by SBUA members and customers of electric utilities in Oregon subject to the Commission proceedings.
3. This information was not available earlier because there was insufficient time by the deadline of the Response to the ALJ Request for Information to provide more confirmed information regarding Oregon SBUA member support to the organization.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Respectfully submitted,

6/14/19

Date: _____

s/ Diane Henkels



Diane Henkels, Attorney
www.utilityadvocates.org
621 SW Morrison St. Ste 1025
Portland, OR 97205
541-270-6001 / diane@utilityadvocates.org

From: **GRANT Michael** michael.grant@state.or.us
Subject: RE: UM 1357
Date: April 17, 2017 at 2:52 PM
To: Diane Henkels dhenkels@cleantechlaw.com
Cc: MENZA Candice candice.menza@state.or.us



Hi Diane.

I am sorry for the confusion, but thought my staff had informed you that docket UM 1357 is not a contested case docket under our rules and the Administrative Procedures Act. Therefore, there are no formal parties and any request to become a party is unavailing.

We have placed you on the interested persons list, so that you will receive notice of Commission action relating to the docket. Unless docket UM 1357 becomes a contested case proceeding, the Commission will take no action on the petition to intervene filed either by SBUA or any other person.

I hope this helps explains the status of your petition.

Mike

Michael Grant
Chief Administrative Law Judge
Public Utility Commission of Oregon
(503) 378-6102

From: Diane Henkels [<mailto:dhenkels@cleantechlaw.com>]
Sent: Monday, April 17, 2017 2:08 PM
To: GRANT Michael
Subject: UM 1357

Hello Michael,

Since phone contact is not working well today, I write to check in re the SBUA intervention in UM 1357. SBUA had filed a Petition to Intervene in March due to interest in the docket, and also the (then) upcoming public meeting. Is possible to get a status on this petition as it stands now w/no objections filed and now a few months later?

Sincerely,
Diane

Diane Henkels
Of Counsel, Cleantech Law Partners PC.
t: 541.270.6001
420 SW Washington St. Ste 400
Portland, OR 97204

EXHIBIT 2
PAGE ____ OF ____