

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 390

In the Matter of	)	
	)	
PACIFICORP 2022	)	APPLICATION OF SMALL BUSINESS
TRANSITION ADJUSTMENT	)	UTILITY ADVOCATES FOR
MECHANISM	)	RECONSIDERATION
	)	
	)	

**I. INTRODUCTION:**

Small Business Utility Advocates (“SBUA”) submits this Petition to the Oregon Public Utility Commission (“Commission”) to reconsider the Commission’s denial of SBUA’s Petition for Case Certification in this matter. The TAM is an eligible proceeding that qualifies for Intervenor Funding and requires case certification for an intervenor like SBUA.<sup>1</sup>

**II. BACKGROUND:**

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<sup>1</sup> Fourth Amended and Restated Intervenor Funding Agreement, approved in Public Utility Commission of Oregon UM 1929 Order 18-017 entered January 17, 2018 (“IFA”), Article 1, Section 6.1.

SBUA was party to the UE 374 Rate Case and represented the Schedule 23 customers, also known as small general service or small commercial customer class fully in UE 374 PacifiCorp dba Pacific Power Request for General Rate Revision.<sup>2</sup>

On April 8, 2021 SBUA filed to intervene in the UE 390 PacifiCorp dba Pacific Power 2022 Transition Adjustment Mechanism<sup>3</sup> and the intervention was granted on April 20, 2020.<sup>4</sup> SBUA filed a petition for case certification in UE 390 in order to seek intervenor funding in this docket on May 19, 2021.<sup>5</sup> On July 22, 2021, Chief Administrative Law Judge Moser (“ALJ”) issued a Memorandum on June 22, 2021 informing parties that Citizens Utility Board of Oregon (“CUB”) and the Alliance of Western Energy Consumers (“AWEC”), together “Joint Respondents”, sought to respond to the SBUA Petition pursuant to the section 6.2 of the Fourth

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<sup>2</sup> The Commission incorrectly describes SBUA’s reference to its participation in docket UE 374. Order 21-245 p3. In that docket, SBUA did not obtain expert testimony informing the Commission on the state of small businesses in Oregon, the impact of PURPA projects on these businesses, and comparisons of rate increases. Rather, SBUA maintained that it had “demonstrated the ability to represent small business within the scope of its intervention these matters, including UE 374 the Company’s recent general rate case, including preparing expert testimony, filing documents, and participating in docket workshops and other proceedings. SBUA represented its constituency fully in UE 374 the Company’s recent Request for General Rate Revision which resulted in a Partial Stipulation approved on 12/18/2020 by Order 20-473 by which the Company and SBUA would work together with regard to implementing Paragraph 21 of the Partial Stipulation. UE 374 Petition for Case Certification of SBUA p5.

<sup>3</sup> UE 390 Petition to Intervene of Small Business Utility Advocates, (Last accessed 9/30/21).

<sup>4</sup> UE 390 ALJ Ruling (Last accessed 9/30/21).

<sup>5</sup> UE 390 Petition of Small Business Utility Advocates for Case Certification, (Last accessed 9/30/21) (“Petition”).

Intervenor Funding Agreement (“IFA”)<sup>6</sup>, and allowing the Joint Respondents to do so.<sup>7</sup> On June 25, 2021 Joint Respondents filed their Response to SBUA’s Petition on objecting to SBUA’s Petition.<sup>8</sup> The Response objected to case certification based on the opening testimony of SBUA’s expert. Joint Respondents provided no evidence to support their objection. SBUA filed a Reply on July 2, 2021.<sup>9</sup>

The Commission issued a decision on August 2, 2021 denying SBUA’s Petition in Order 21-245.<sup>10</sup> The Commission identified that no party contested SBUA’s demonstration that it met the criteria a, b, c, d, f, and g for case certification.<sup>11</sup> The key basis for the Commission’s denial was criteria “e” which states “The organization demonstrates or has demonstrated in the 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 proceedings in which the organization was case certified and received a grant.

This is not the first time SBUA has filed to seek case certification, nor is it the first time SBUA has filed a Petition for Reconsideration of the Commission’s denial of SBUA’s case

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<sup>6</sup> Fourth Amended and Restated Intervenor Funding Agreement (In the Matter of Public Utility Commission of Oregon Approval of the Fourth Amended and Restated Intervenor Funding Agreement, Docket No. UM 1929, Order No. 18-017, Appendix A (Jan 17, 2018)).

<sup>7</sup> UE 390 Memorandum, (Last accessed 9/30/21).

<sup>8</sup> UE 390 Response of the Alliance of Western Energy Consumers and Oregon Citizens’ Utility Board, (Last accessed 9/30/21).

<sup>9</sup> UE 390 Reply of SBUA, (Last accessed 9/30/21).

<sup>10</sup> UE 390 PacifiCorp dba Pacific Power 2022 Transition Adjustment Mechanism, Order 21-245 entered August 2, 2021, (Last accessed 9/30/21).

<sup>11</sup> Id, at 3.

certification petition. A previous SBUA Application for Reconsideration filed on June 14, 2019 is incorporated herein for efficiency.<sup>12</sup>

### **III ARGUMENT**

#### **A. The Application for Reconsideration is complete.**

Commission rules require this Application 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 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.” OAR 860-001-0720(2).

The portion of the Order 21-245 that SBUA maintains is erroneous is the Commission’s determination that SBUA did not meet criteria “e” in this proceeding based on assertions by the Joint Respondents. This is in contrast to previous findings that SBUA demonstrates or has demonstrated in the past Commission proceedings the ability to contribute to the record on behalf of customer interests related to rates and the terms and conditions of service, including in proceedings in which the organization was case certified and received a grant.

SBUA relies on the following portion of the record, laws, rules, and policies to support this application as follows: The entire record of SBUA case certification in Commission proceedings as identified in the UE 352 Petition of SBUA for Case Certification, including

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<sup>12</sup>UE 352 PacifiCorp dba Pacific Power 2019 Renewable Adjustment Clause, Application for Reconsideration of Small Business Utility Advocates, <https://edocs.puc.state.or.us/efdocs/HAG/ue352hag17539.pdf>. The Commission denied this Application on August 8, 2019 in Order 19-262, (Last accessed 9/30/21).

responses and orders, the UE 374 PacifiCorp dba Pacific Power Request for General Rate Revision Petition for Case Certification of SBUA and the UE 374 Order granting SBUA Case Certification, the case certification filings in this docket UE 390 including the Petition to Intervene of SBUA, the Petition of SBUA for Case Certification, the ALJ's Memorandum, the Joint Parties Response in opposition, and the IFA.

SBUA requests that the Commission amend its Order 21-245 by finding that SBUA has met the requirements for case certification and grant SBUA case certification, and instruct that the SBUA be permitted to submit a proposed budget. Pursuant to OAR 860-001-0720(2)(d), The requested change would qualify SBUA as case certified,<sup>13</sup> and it would qualify SBUA to be requested to propose a reasonable budget which if approved would defray a certain amount not to exceed 20% of SBUA's expenses incurred in this docket.

**B. Grounds for Reconsideration pursuant to OAR 860-001-0720(2):**

1) The Commission's decision that SBUA does not contribute significantly to the development of the record is not supported by substantial evidence and substantial reasoning.

Commission orders must be supported by substantial evidence in the record.<sup>14</sup> Substantial evidence supports the PUC's findings "when the record, viewed as a whole, would permit a reasonable person to make that finding."<sup>15</sup> PacifiCorp bears "the burden of showing that the rate or schedule of rates proposed to be established or increased or changed is fair, just and

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<sup>13</sup> OAR 860-001-0120(4)

<sup>14</sup> ORS 183.482(8)(c); *Calpine Energy Solutions LLC v PUC*, 298 Or App 143, 159 (2019).

<sup>15</sup> *Id.*

reasonable.”<sup>16</sup> Also, the PUC “may not authorize a rate or schedule of rates that is not fair, just and reasonable.”<sup>17</sup>

The Commission bases its decision based only on Opening Testimony of SBUA’s expert Darren Wertz and assertions by Joint Respondents.<sup>18</sup> Commission relies on the Response to find that SBUA does not demonstrate ability to substantially contribute to the docket on behalf of customer interests.<sup>19</sup> Respondents put forth no evidence to support their assertions. For these reasons the Commission does not meet the substantial evidence standard.

The Commission states that SBUA’s Reply does not attempt to explain or clarify SBUA’s initial testimony.<sup>20</sup> Nevertheless, given the close of testimony and briefing in this proceeding, and as further demonstration of the evidence supporting SBUA’s position, SBUA replies further to the Joint Respondents, and bases this on evidence. SBUA’s expert’s Opening Testimony included certain topics that SBUA developed in further discovery, testimony, and briefing.<sup>21</sup> The focus for SBUA has been on the economic impact of COVID-19 on load, and structures related to this 2022 TAM where the reduced load would impact the analysis of whether the TAM was just and reasonable.<sup>22</sup> Wertz explained the impact of the proposed TAM would impact customer

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<sup>16</sup> ORS 757.210(1)(a).

<sup>17</sup> Id.

<sup>18</sup> Order No. 21-245 p4-5.

<sup>19</sup> Order 21-245 p3-4.

<sup>20</sup> Order 21-245 p4.

<sup>21</sup> UE 390 Rebuttal Testimony of Darren S. Wertz <https://edocs.puc.state.or.us/efdocs/HTB/ue390htb174714.pdf> (Last Accessed 9/30/21), UE 390 Reply Brief of SBUA <https://edocs.puc.state.or.us/efdocs/HBC/ue390hbc15343.pdf>

<sup>22</sup> Wertz Opening Testimony.

rates, per the Company's own testimony, by increasing customer rates by .1 percent.<sup>23</sup> Joint Respondents did not refute this. Wertz expressed this in his opening testimony by pointing out that the power costs subject to the TAM impact rates of customers by resulting in possible increase in customer rates. Id. Also, Wertz focuses specifically on application of Provision 3.1.9 of the 2020 Protocol and this 2022 TAM proceeding where there is impact by COVID-19, a recognized significant economic factor.<sup>24</sup> For example, the Hearing Transcript demonstrates the interest by Commissioner Tawney in the impact of COVID's reduced load on the system, and the response from Witness McNeil that "the change in load impact of COVID-19 particularly solely in the 2021 year, was relatively small as compared to the change that we implemented for the low case with no sales."<sup>25</sup> Other witnesses also referred to the pandemic.

Wertz also testified regarding the Energy Imbalance Market ("EIM"). Wertz suggested that less load created more potential sales in the Energy Imbalance Market and that these sales revenues of generation opened for market on the EIM could be return to the customers who had created less load.<sup>26</sup> Respondents did not deny the concept of returning revenue to all customer classes but rather dismissed that such revenue would return to a specific class.<sup>27</sup> Joint Respondents provide no evidence to support their assertions. [The Record of UE 390 includes

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<sup>23</sup> Wertz Opening Testimony p3.

<sup>24</sup> Wertz Opening Testimony; Wertz Rebuttal Testimony p3-4. See also T

<sup>25</sup> UE 390 PacifiCorp dba Pacific Power 2022 Transition Adjustment Mechanism Public Hearing Transcript from August 26, 2021, p65-66.

<sup>26</sup> Wertz Opening Testimony p6.

<sup>27</sup> Joint Response p4. Joint Respondents **make other assertions regarding the EIM benefits, and state that SBUA's position could in fact harm small commercial customers by engaging in retroactive ratemaking but offered no evidence to support that position.**

significant reference to the EIM benefits.<sup>28</sup> ] PacifiCorp’s third sentence in its Opening Brief places the 2022 TAM in part in the context of load and the EIM.<sup>29</sup> Simply because Wertz suggested the EIM benefits may return to customer class in proportion of reduced load as a subject for a future rate design proceedings does not demonstrate a lack of understanding of the EIM.<sup>30</sup> No-one in the docket denied Wertz’ expertise which included years of utility proceeding practice regarding the EIM.<sup>31</sup>

2) The Commission’s decision to base denial of case certification only on present demonstration is an improper inconsistent application of the rules governing case certification.

An agency’s exercise of discretion is unlawful if it is inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency.<sup>32</sup> Interpreting OAR 183.482(8), the Oregon Court of Appeals noted a requirement for remand where exercise of discretion is inconsistent with rule, officially stated agency policy or prior practice does not require agencies to support consistency of rulings with substantial evidence in record, but requires only that appellate court remand order upon clear showing of unexplained inconsistency.<sup>33</sup>

In this proceeding there is an unexplained inconsistencies in how the Commission is applying the rule and the IFA to SBUA. The Commission appears to interprets “demonstrates or

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<sup>28</sup> PAC Opening BRIEF, STAFF OPENING BRIEF, AWEC OPENING BRIEF.

<sup>29</sup> UE 390 PacifiCorp dba Pacific Power Opening Brief, p2

<sup>30</sup> UE 390 Rebuttal Testimony of Darren Wertz, SBUA/200 Wertz/4.

<sup>31</sup> Opening Testimony of Darren S. Wertz SBUA/100 Wertz/101 (Resume of Darren Wertz including direct experience in EIM application.)

<sup>32</sup> ORS 183.482(8)

<sup>33</sup> *Assoc. of Engineering Employes v. Dept. of Trans.*, 72 Or App 371,(1985).



has demonstrated” to support its position that either it can base its position on past demonstration or it can base its decision on actions taken in a present docket. But the Commission’s justification takes into account only a portion of SBUA’s work in the docket, where case certifications have been granted in the past based on participation in the full docket, and SBUA has been found in multiple dockets to have met all the criteria in the rules governing case certification, including criteria OAR 860-001-0120(4)(e) and the IFA.<sup>34</sup> In this Order the Commission applies a different standard to SBUA when it states, “However, in this particular case, the testimony submitted does not contribute significantly to the development of the record and therefore denial of the petition is appropriate.” The rule does not state “significant contribution”. Rather the requires “the ability to substantively contribute to the record on behalf of customer interests related to the rates and the terms and conditions of service, including in proceedings in which the organization was case certified and received a grant.” OAR. , IFA.

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<sup>34</sup> UE 374 PacifiCorp dba Pacific Power Request for General Rate Revision, Order 20-187 entered June 10, 2020, (Last accessed September 20, 2021)(Granting SBUA’s Petition for Case Certification but noting that only \$100 remained in the issue funds); UM 1751 Implementing Energy Storage Guidelines pursuant HB 2193), Order 16-266 entered 7/14/2016 (Last accessed 9/30/21)(Granting case certification finding that SBUA had met the criteria), UM 1754 2021 Renewable Portfolio Standard Implementation Plan :// apps.puc.state.or.us/orders/2016ords/16-113.pdf, Order 16-113 (May 18, 2016)(Last accessed 9/30/21)(Granting case certification); UM 1773 PGE Petition for Partial Waiver of Competitive Bidding Guidelines and Approval of Request for Proposals Schedule, Order 16-256 entered July 7, 2016 (Last accessed 9/30/21) (Granting case certification); UM 1790 PacifiCorp dba Pacific Power 2017-2021 Renewable Portfolio Standard Implementation Plan, Order 16-428 entered November 9, 2016, https:// apps.puc.state.or.us/orders/2016ords/16-428.pdf (Last accessed 9/30/21)(Granting case certification.). In two dockets the determination was inconclusive at best where the Commission declined to decide due to a depletion of funds and instead found the Petition for Case Certification to be moot. UE 319 Portland General Electric Request for General Rate Revision, Order 17-167 entered May 16, 2017, https://apps.puc.state.or.us/orders/2017ords/17-167.pdf (Last accessed 9/30/21)(Case Certification of SBUA denied as moot where no funds remained in the issue funds.), UE 335 Portland General Electric Request for General Rate Revision, Order 18-196 entered May 29, 2018 (Last accessed 9/30/21)(Case certification of SBUA dismissed as moot where only \$10 issue funds remained in the issue fund account.)

In this matter SBUA has participated in proceedings to review the impact of COVID-19 and apply SBUA's directly previous relevant background as a party to UE 374, attended workshops, provided expert testimony from an expert whose credentials were not contested, and SBUA has provided other evidence and cross-examined a witness at hearing. The Commission has deemed this substantively contributing to the record.

The Commission has previously found several times that SBUA has substantively contributed to the record on behalf of small commercial customers. SBUA has demonstrated the ability to represent small business within the scope of its intervention these matters, including UE 374 the Company's recent general rate case, including preparing expert testimony, filing documents, and participating in docket workshops and other proceedings. SBUA represented its constituency fully in UE 374 the Company's recent Request for General Rate Revision which resolution included a Partial Stipulation by which the Company and SBUA were to collaborate with regard to small commercial ratepayers.<sup>35</sup>

The Order 21-245 arbitrarily applies an incorrect standard to SBUA's Petition for Case Certification. This prevents SBUA from being able to access funding intended for those who meet the criteria under the rule and the IFA.<sup>36</sup> This is an unfair application of case certification procedure to a party who represents a ratepayer class that is traditionally under represented.

The Commission states that even if SBUA contributes to the record in a way that advances the interests of small commercial customers, it would need to provide further

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<sup>35</sup> Paragraph 21 of the Partial Stipulation approved in Order 20-473 entered December 18, 2021.

<sup>36</sup> IFA 5.3.

information to a number of criteria. This statement is an inconsistent application of the rule and the IFA to SBUA without explanation.

Also the Commission indicates that it would consider a subsequent request for case certification, but observes that SBUA would need to provide further information in response to a number of criteria, as explained above. This is an unexplained inconsistency where SBUA has been found in this proceeding to have satisfied the other criteria and SBUA has previously been found to have satisfied all criteria of OAR 860-001-0120 in previous dockets.<sup>37</sup>

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<sup>37</sup> UE 374 PacifiCorp dba Pacific Power Request for General Rate Revision, Order 20-187 entered June 10, 2020, (Last accessed September 20, 2021)(Granting SBUA's Petition for Case Certification but noting that only \$100 remained in the issue funds); UM 1751 Implementing Energy Storage Guidelines pursuant HB 2193), Order 16-266 entered 7/14/2016 ( (Last accessed 9/30/21)(Granting case certification finding that SBUA had met the criteria), UM 1754 2021 Renewable Portfolio Standard Implementation Plan :// apps.puc.state.or.us/orders/2016ords/16-113.pdf, Order 16-113 (May 18, 2016)(Last accessed 9/30/21)(Granting case certification); UM 1773 PGE Petition for Partial Waiver of Competitive Bidding Guidelines and Approval of Request for Proposals Schedule, Order 16-256 entered July 7, 2016 (Last accessed 9/30/21) (Granting case certification); UM 1790 PacifiCorp dba Pacific Power 2017-2021 Renewable Portfolio Standard Implementation Plan, Order 16-428 entered November 9, 2016, [https:// apps.puc.state.or.us/orders/2016ords/16-428.pdf](https://apps.puc.state.or.us/orders/2016ords/16-428.pdf) (Last accessed 9/30/21)(Granting case certification.); UE 319 Portland General Electric Request for General Rate Revision, Order 17-167 entered May 16, 2017, <https://apps.puc.state.or.us/orders/2017ords/17-167.pdf> (Last accessed 9/30/21)(Case Certification of SBUA denied as moot where no funds remained in the issue funds.), UE 335 Portland General Electric Request for General Rate Revision, Order 18-196 entered May 29, 2018 (Last accessed 9/30/21)(Case certification of SBUA dismissed as moot where only \$10 issue funds remained in the issue fund account.)

#### **IV. CONCLUSION**

For the reasons stated herein the Commission should reconsider its Order 21-245 and grant case certification to SBUA in this proceeding.

RESPECTFULLY SUBMITTED October 1, 2021.



s/ Diane Henkels

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