



September 10, 2021

Mark Johnson
Washington Utilities & Transportation Commission
Executive Director / Secretary
621 Woodland Square Loop SE
Lacey, WA 98503

Re: NW Energy Coalition's Comments on the Commission's Examination of Intervenor Funding Provisions for Regulatory Proceedings (Docket U-210595)

Mr. Johnson:

The NW Energy Coalition ("NVEC" or "Coalition") appreciates the opportunity to comment on the Notice of Opportunity to Comment in Docket U-210595 on August 19th, 2021. The Coalition is an alliance of more than 100 organizations united around energy efficiency, renewable energy, fish and wildlife preservation and restoration in the Columbia basin, low-income and consumer protections, and informed public involvement in building a clean and affordable energy future. The Commission requested written responses to specific questions.

The overall purpose of the authorization for intervenor funding is to improve public participation before the Commission on issues that impact customers and the public interest. As the number and complexity of Commission proceedings has increased in recent years, it has become more difficult for stakeholders to participate effectively. In addition, some customer and general public interests have historically been unrepresented or underrepresented before the Commission, continuing systemic inequities of access to the Commission's public process – and creating inequitable outcomes for customers. Experience in other states has shown that providing funding for customer and public interest groups to participate in Commission proceedings improves the outcomes for customers, and supports a robust public process. For example, California's intervenor compensation program at its Public Utility Commission has allowed for the successful representation of a broad array of interests and bringing in new groups.¹ Notably, the program has seen a fourteen-to-one return on investment for utility customers.²

¹ Cal. Pub. Utils. Comm'n, *Intervenor Compensation Program Guide*, (Apr. 2017), <https://www.cpuc.ca.gov/icomp/>

² Tyson Slocum, *FERC Office of Public Participation: A Transformative Opportunity for Public Interest Advocacy*, Public Citizen (Feb. 10, 2021), <https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/TysonWEACT.pdf>

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We offer these comments as an indication of our preliminary thoughts on these issues, and look forward to addressing further details with the Commission and other stakeholders, as the Commission implements Washington’s intervenor funding program.

Questions regarding ESSB 5295 Section 4(1)

1. Section 4(1) of ESSB 5295 states: “A gas company or electrical company shall, upon request, enter into one or more written agreements with organizations that represent broad customer interests in regulatory proceedings conducted by the commission, subject to commission approval in accordance with subsection (2) of this section, including but not limited to organizations representing low-income, commercial, and industrial customers, vulnerable populations, or highly impacted communities.” How should the Commission interpret “broad customer interests” and “regulatory proceedings”?

We encourage the Commission to interpret “broad customer interests” as broadly as possible, with the goal of facilitating better public participation at the WUTC, to support the WUTC’s general powers and duties to regulate in the public interest.³ “Broad customer interests” might include any issue within the Commission’s purview, including those that may impact compliance with state policy. We also believe that “broad customer interests” applies to the overall scope of the program, and should not be interpreted to exclude organizations that represent specific customer types or communities, as long as the interests of those groups encompass “broad customer interests”, and the organizations meet the other eligibility criteria. Clearly, the Washington law is meant to expand participation beyond groups that are already represented; and to enhance, not to replace, existing funding.

Similarly, we believe that “regulatory proceeding” broadly includes any and all docketed proceedings or stakeholder processes under the Commission’s purview that a non-professional organization would have difficulty navigating without assistance. The Legislature specifically did not limit intervenor funding to “adjudicative proceedings,” as defined in RCW 34.05.010. In addition to general rate cases, mergers and acquisitions, and power cost updates, intervenor compensation should also be made available for: any application, complaint, or investigation (including compliance filings, and workshops); rulemaking, policy or interpretive statement; alternative dispute resolution procedures; and any planning process that requires public participation (including, but not limited to, Integrated Resource Planning and Clean Energy Implementation Plans.)

2. Should the Commission require intervenor funding agreements between utilities and organizations to take a particular form, and should the agreements require organizations to provide financial spreadsheets, details of funding need, reporting of costs and expenses, or other requirements? If so, please provide suggested agreement models from other states or other preferred agreement requirements, including content.

³ RCW 80.01.040

Yes and no. The Commission should approve at least one form of Intervenor Funding Agreement, for use by utilities and intervenors for this purpose. It may be necessary for the Commission to approve more than one form of agreement to meet the needs of a diverse set of intervenors. However, we recommend that the Commission avoid creating a process that would require it to review unique negotiated agreements between utilities and individual groups. To this end, we believe that the Oregon Intervenor Funding Agreement⁴ could serve as a starting point for Washington to consider. Since Washington and Oregon share four investor-owned energy utilities, it is reasonable to pursue some consistency between the states. However, we do not recommend that Washington simply replicate Oregon's program – some changes would be necessary in order to address Washington's specific circumstances, and to remove certain requirements that are unique to Oregon's program.⁵

We would also note that Oregon's Fourth Amended and Restated Intervenor Funding Agreement does not include recent changes adopted by the Oregon Legislature in HB 2475, which expanded the intervenor funding program to make \$500,000 available to organizations that represent the interests of low-income residential customers; and the interests of residential customers that are members of environmental justice communities.⁶ These updates to the Oregon program will be implemented when the new tranche of funding becomes available. We therefore recommend that Washington not model its program on Oregon's existing program, but rather advise the UTC to coordinate with the Oregon PUC on its implementation of the new law, which is more directly applicable to the UTC's implementation of SB 5295.

As discussed further below, we do not recommend that the Commission require organizations to submit their entire organizational budget to demonstrate need, or require matching funds.

3. What standards should the Commission use for approving, approving with modifications, or rejecting an agreement for funding?

The applicable standard is the public interest standard. We recommend that the Commission approve the form of agreement(s) upfront, and then the Commission's decision to "approve, approve with conditions, or reject" can be made as individual intervenors submit applications to the Commission to approve their agreements.

4. What constitutes a reasonable allocation of financial assistance?

⁴ <https://apps.puc.state.or.us/orders/2018ords/18-017.pdf>

⁵ For example, the Oregon intervenor funding program was originally established to fund the residential and industrial ratepayer advocates (Oregon Citizen's Utility Board, and the Industrial Customers of Northwest Utilities / NW Industrial Gas Users.) Since Washington residential ratepayers are represented by the Public Counsel Unit of the Attorney General's Office, which is funded through the Public Service Revolving Account, the need and purpose for intervenor funding in Washington is fundamentally different.

⁶ <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/HB2475/Enrolled>

Based on discussions during the development of SB 5295, we believe that the intent of this language was to limit unreasonable cross-subsidization between customer rate classes in the allocation of costs for intervenor funding to customer rates. (For example, to prevent any costs associated with supporting the intervention of residential or commercial customer groups from being borne by industrial customers and or vice-versa.) In general, we believe that this language does not prohibit *any* cross-subsidization, and would therefore argue that it is reasonable for the Commission to balance the administrative burden of allocating costs to specific customer rate classes with the overall impact of the program on customer rates. In other words, to the extent that the public interest is served by enhancing public participation through intervenor funding, it would be reasonable for the Commission not to strictly interpret this language as a prohibition on any cross-subsidization. Further, there are likely to be organizations that represent broad customer that would apply to all customer classes, as they are advancing the public interest. In these cases, it would reasonable for the Commission to allocate the costs of intervenor funding to all customer classes.

To inform further stakeholder comments and the Commission’s decision about what constitutes a “reasonable allocation of financial assistance”, it might be helpful for the UTC to request and provide the following data:

1. Annual expenditures by each utility for its own participation in Commission proceedings
2. Annual UTC budget for supporting public participation in Commission proceedings
3. Annual budget for the Public Counsel Unit of the Attorney General’s Office for participation in Commission proceedings

a. Should the Commission establish an overall amount of assistance provided to intervenors by each utility?

This seems like a reasonable approach, as long as the amount of assistance is reasonably proportional to the need. The Commission could conduct a review of public participation trends for each utility, and scale the funding requirement accordingly. Or, the Commission could adopt a proxy value (e.g. percent of annual operating revenues, or percent of utility spending on its own advocacy) to set an initial funding requirement. Alternatively, the Commission could allow the program to operate with no funding cap for two years to collect data before setting an overall funding amount.

b. What standards should the Commission use to determine whether an agreement is consistent with a reasonable allocation of financial assistance?

We think this question has multiple parts – our attempt to address these issues builds upon our previous answers:

1. Standard form of agreement: As stated above, we encourage the Commission to adopt one or more form(s) of agreement, to avoid the burden of having to review and approve non-standard agreements. See #2 above.

2. Overall amount of assistance available: In determining the amount of funding available from each utility for financial assistance, we recommend that the Commission establish a methodology that will provide some level of predictability and minimize variation in funding levels. The Commission should feel comfortable that the amount of funding available reflects a reasonable contribution to the overall value of public input into its processes, the availability of existing resources to support public participation, and the gap between the resources available to support customer participation and utility participation in Commission processes. See (a) above.
3. Amount of funding allocated to each intervention application: This will require more consideration and conversations with stakeholders. Our initial thinking on this is: (a) the program should minimize competition between groups for funding; (b) the program should especially minimize competition between “incumbent” intervenors (those groups who regularly participate in Commission processes who have access to outside funding for this purpose) and “new entrants” (those groups who have less experience intervening in Commission proceedings, and may or may not have access to outside funding for this purpose); (c) Specific attention should be given to organizations representing residential and small commercial customers, and organizations representing vulnerable populations and highly impacted communities should be prioritized for funding. In addition to this allocation, the Commission should also consider setting aside a specific amount of funding for Parties who are certified for intervenor funding to apply for case-specific funding, so that funds remain available over the course of the year as new issues arise.

Questions regarding ESSB 5295 Sections 4(2) and (3)

5. Should intervenor funding be prioritized and/or dispersed based on utility budgets for funding, or should agreements be considered case-by-case and without the use of utility budgets for intervenor funding?

To clarify, we recommend that the Commission - not the utilities - determine the budgets for intervenor funding. We therefore assume that this question is asking whether the Commission should set budgets on a per-utility basis, or on a case-by-case basis. We would suggest the Commission pursue a hybrid approach, which would have funding available on a per-utility basis to support intervention in individual utility proceedings, and also create a separate fund to support intervention in general proceedings. The Commission should also seek to accommodate the needs of different intervenors. Some intervenors may prefer to have access to an annual allocation of funding to cover a portion of their operating costs for ongoing intervention activities. Alternatively, some intervenors may prefer to apply for funding on a case-by-case basis, depending on the issue and their own resource needs. The program should accommodate both models.

6. Should eligibility for organizations to enter into an agreement for intervenor funding require a demonstration of need? Should eligibility be based on other considerations, such as a material contribution to a proceeding?

We do not recommend that the Commission require a demonstration of need for eligible organizations to enter into an agreement for intervenor funding. Such a demonstration is not required by the statute. Rather, we would recommend that the Commission apply a presumption of need to any application, and consider the application for intervenor funding based on the merits of the application and the public interest standard.

a. What parameters should guide this eligibility?

The Commission should consider the following questions in its approval of the agreements:

- What issues does the organization plan to address through its intervention(s), and on behalf of which customers/customer groups or overall public interest impact?
- Why is the organization qualified to act as a representative of this customer class, population, interest, or community?
- What specific expertise, including lived experience, does the organization bring to the proceeding?
- How will the organization demonstrate that funds will not be used for prohibited purposes, such as political action or lobbying?
- Are the issues and customer class, population, or community covered in the application adequately represented by other intervenors in the proceeding?

We note the UTC has rules on intervention for contested cases (WAC 480-07-355).⁷ While we do not recommend that the UTC apply all the same criteria to funding eligibility, we would support a policy that would allow for joint application of intervention status in a case with case-specific intervenor funding, assuming the organization is not ineligible for funding.

b. What organizations should not be eligible for funding, if any?

We recommend that the Commission's determination of eligibility be based on a public interest standard in all cases. As the public interest evolves over time, the Commission should maintain flexibility in how it defines eligibility. However, we recommend that the following organizations be deemed ineligible for funding:

- For-profit organizations
- Non-profit organizations representing exclusively or primarily for-profit organizations, unless the organization meets the following criteria: (i) the primary purpose of the organization is to represent customer or public interests; (ii) the organization represents a broad class of customers; (iii) the organization demonstrates that it is able to effectively represent the class of customers it seeks to represent (including, but not limited to, its past participation in matters before the Commission); and (iv) members who are customers of the utilities contribute to the organization's funding. The eligibility

⁷ <https://app.leg.wa.gov/WAC/default.aspx?cite=480-07-355>

of organizations meeting these criteria should still be evaluated based on a public interest standard.

- Government entities

c. Should the Commission consider or allow for pre-certification of organizations, similar to the methodology used by the Oregon Public Utilities Commission, to enter into agreements with utilities? Or should all agreements and all organizations be considered on a case-by-case basis?

We support a hybrid model. The program should allow for incumbent intervenor organizations who have met the public interest standard (and are not deemed ineligible for funding) to be recognized as eligible for intervenor funding, with their own allocation. And, the program should provide a process for “new entrant” organizations to apply for pre-certification for regular allocation of funding, or to apply for funding on a case-by-case basis.

7. Should the Commission consider interim funding needs, i.e., full or partial payments provided to organizations in advance of or during a proceeding, or should all funding be dispersed at the conclusion of a proceeding?

Yes. We recommend that the Commission allow for partial advance disbursement of funds, if requested. Advance disbursement of funds is critical to support the participation of community-based organizations and organizations representing environmental justice communities.

a. What factors should the Commission consider to determine whether an organization is eligible for interim funding?

The Commission should allow partial advance disbursement of funds, if requested. The Commission may consider limiting the option for advanced disbursement of funds to organizations for which lack of funding is a barrier to participation.

b. What documentation should an organization submit to support a request for interim funding?

We do not believe additional documentation is needed beyond what is required in the application.

c. Should the Commission consider a process for the return of interim funding payments if a payment grantee does not materially contribute to a proceeding or must excuse itself from the proceeding for any reason?

The Commission should retain oversight over the proper use of intervenor funding, and may open an investigation, file a complaint, and assess a penalty in the case of misuse of funds.

8. What administrative procedures should be in place for the distribution of financial assistance, such as cost audits, documentation, reporting, or others?

We would caution the Commission against making the administrative procedures so burdensome that they would dissuade organizations from applying for funding. We also would note that the intervenor organizations are not otherwise subject to the Commission's jurisdiction, so the documentation requirements should be significantly less than the Commission requires for financial reporting for regulated entities. The Commission may consider requiring organizations receiving funding above a certain threshold to submit a confidential copy of the organization's general financial audit after the proceeding. We may have more specific comments on this in the future.

9. What should be the Commission's role, if any, in administering agreements and funding after approving agreements? For example, should the Commission have a role in assessing the validity or reasonableness of intervenor costs; approving or rejecting final funding amounts or payments; providing templates for forms and paperwork, including agreements, funding applications, and cost or budget tracking of funding awards; or requiring reporting from intervenors and utilities? Please provide administrative models from other states or jurisdictions as relevant.

We believe this question has been answered in previous responses, but will clarify as follows:

- Once an application is approved, the Commission should not assess the validity or reasonableness of intervenor costs. It may be helpful for the Commission to provide a reference resource for intervenors showing the market rate for various services, so that intervenors can assess whether the costs they are paying for services are reasonable.
- Once a funding request is approved, the Commission should not have a role in approving or rejecting final payments. This should be an administrative function.
- Templates and forms are desired, with the intent of minimizing the administrative burden on intervenors. The Commission could also require an affidavit or attestation from the organization that the funds were not used for prohibited purposes. The Commission should retain the ability to open an investigation in the case of suspected misuse of funds.
- We do not think reporting is necessary, but if the Commission wants intervenors to report, we recommend that this requirement apply only to intervenors who receive funding above a certain threshold.

10. What types of expenses or costs should be eligible for funding (e.g., legal costs, professional services, expert witnesses, consultants, etc.)? What types of expenses or costs should not be eligible for funding, if any?

All of the above listed costs should be eligible, as well as overhead/administrative costs for the organization proportional to their public participation (e.g., hourly compensation for staff time, travel expenses). The Commission should define prohibited uses of funding, such as political action, lobbying, and durable goods.

11. If the Commission reviews the reasonableness of expenses or costs, what factors should the Commission consider? For example, what factors should the Commission consider to determine reasonable attorney and expert witness fees? What supporting documentation should the Commission require in order to establish the reasonableness of services provided?

As previously stated, we recommend that the Commission provide a reference resource for intervenors showing the market rate for various services, so that intervenors can assess whether the costs they are paying for services are reasonable. The Commission can require intervenors to submit invoices to the record for review, but these should not require Commission action.

12. How might the Commission require intervenor funding to be recovered in gas or electric utility rates? What should the Commission consider in adjusting rates to reflect any written funding agreements?

The cost of intervenor funding should be recovered in the overall cost of service of the utility. SB 5295 allows for the costs to be deferred for later recovery in customer rates.

Questions regarding ESSB 5295 Section 4(4)

13. Section 4(4) of ESSB 5295 states: “Organizations representing vulnerable populations or highly impacted communities must be prioritized for funding under this section.”

a. What does it mean to prioritize organizations representing vulnerable populations and highly impacted communities? Please explain in detail and relative to the other comments you have provided in response to this notice.

▪ *For example: If you advocate for utilities setting aside standing budgets for intervenor funding, should prioritizing vulnerable populations and highly impacted communities require a specific budget item? If so, what is a reasonable amount or percentage of an overall budget? If you advocate for all funding agreements to be considered on a case-by-case basis without the use of standing utility budgets, how might vulnerable populations and highly impacted communities be prioritized in such a case-by-case model?*

We recommend that the Commission maintain flexibility in how it prioritizes funding to organizations representing vulnerable populations and highly impacted communities. Initially, it may be sufficient for the Commission to set aside funding for community-based groups, so that they do not have to “compete” for funding with more established intervenors. Over time, as awareness and interest in the program increases, it may be necessary to revisit how funding is allocated so that the amount of funding available is not a barrier to participation for these groups.

b. Should the Commission define “highly impacted communities” and “vulnerable

populations”? If yes, please provide definitions or provide references to existing legal definitions in statute or administrative rule.

See RCW 19.405.020(23) and RCW 19.405.020(40)

Thank you for the opportunity to comment.

Sincerely,
/s/ Lauren McCloy, Policy Director
NW Energy Coalition
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