BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of The Commission's Examination of Intervenor Funding Provisions For Regulatory Proceedings.	DOCKET U-210595

SECOND COMMENTS OF THE ENERGY PROJECT

OCTOBER 5, 2021

I. INTRODUCTION

1 In response to the Commission's invitation at the workshop on September 28, 2021, The Energy Project (TEP) files these comments supplementing our earlier filing and addressing some of the issues which were raised at the workshop. The Energy Project appreciates the Commission initiating this discussion and bringing many key stakeholders together in a well-organized and useful workshop to help begin development of a program for intervenor funding (IF) in Washington. Coming out of the workshop, there are several key themes that are important from TEP's perspective:

2 Access for vulnerable populations and highly impacted communities. The Energy Project strongly supports designing intervenor funding to enhance and facilitate participation by vulnerable populations and highly impacted communities.

3 Timing/process: The goal of the process in this docket should be to establish an intervenor funding program, at least on an initial basis, that is available by early 2022 when new

Simon J. ffitch
Attorney at Law
321 High School Rd. NE,
Suite D3, Box No. 383
Bainbridge Island, WA 98110
(206) 669-8197

filings under SB 5295 are anticipated, as contemplated by the legislation. Establishing a stakeholder workgroup is likely to be the most efficient means to this end.

4 Protect ratepayers. The IF program should be designed to avoid a material impact on customer bills.

5 Avoid unneeded barriers. The Washington IF program should not include matching fund or other requirements that will *de facto* make it impossible for some otherwise eligible intervenors to participate.

6 Commission central role: The statute contemplates that the Commission will have a central role in administering intervenor funding, avoiding the conflicts inherent in giving utilities a "gatekeeper" role.

7 These points are discussed in more detail in the Comments section below.

II. COMMENTS

A. Prioritization

8 The intervenor funding statute has two key and overlapping purposes. One is to support more effective participation in regulatory proceedings by customers through providing financial assistance (intervenor funding) to organizations representing broad customer interests "including but not limited to low-income, commercial, and industrial customers, vulnerable populations or highly impacted communities."[1] The second is to prioritize intervenor funding for organizations representing highly impacted communities or vulnerable populations.

[1] RCW 80.28.430(1). Codification of ESSB 5295, Session Laws 2021, Chapter 188.

Simon J. ffitch
Attorney at Law
321 High School Rd. NE,
Suite D3, Box No. 383
Bainbridge Island, WA 98110
(206) 669-8197

9 The Energy Project strongly supports designing Washington's IF program to ensure that the voices of vulnerable populations and highly impacted communities are heard before the Commission. It is apparent that additional work will be required to bring this to fruition, including further outreach to engage these communities in the IF planning process. Lack of resources and lack of familiarity with the regulatory process create hurdles, but it is important that community-based organizations have a seat at the table. In moving forward to put an overall IF program in place in a timely manner, it is also critical, to protect funding availability for these communities, and to avoid creation of barriers and restrictions that effectively preclude their participation.

10 As the intervenor funding structure is developed, there are some design elements that should be considered to help improve access. One is the provision of advance or interim funding. If organizations are required to wait until the end of the proceeding to receive funding, this may preclude them as a practical matter from obtaining counsel, experts, or consultants, and hence from preclude them from effective participation. A second helpful mechanism could be to earmark or carve out separate funding for statutorily identified priority groups to ensure that funding is available, independently of funds for other intervenor organizations.

B. Timing and Process

11 To address the issue of timing and process that came up at the workshop, TEP recommends a process in which the interested stakeholders (utilities, potential intervenors, Public Counsel, and community-based organizations) convene as a workgroup, with participation, and potentially facilitation by a senior Commission ALJ or Staff Advisor. The group would develop a proposed omnibus Intervenor Funding Agreement (IFA) for presentation

Simon J. ffitch
Attorney at Law
321 High School Rd. NE,
Suite D3, Box No. 383
Bainbridge Island, WA 98110
(206) 669-8197

to the Commission, to be brought to the Commission at Open Meeting or other appropriate forum prior to the end of 2021. The Commission would approve, approve with modifications, or reject the agreement.[2] This is similar to the Oregon process where an IFA covering all utilities and intervenors was developed by stakeholders, and then presented to Oregon PUC Staff and the Commission for final review and approval in an order.[3]

12 Washington's intervenor funding requirement under SB 5295 has been in effect since July 25, 2021. It is consistent with the letter and intent of SB 5295 for the Commission to move expeditiously to establish a framework to put intervenor funding in place for the first round of filings in 2022. ESSB 5295 has several components that work together. In addition to the "regulatory reform" multiyear rate plan provisions, the law contains companion provisions for low-income funding and for intervenor funding which are intended to work together with the new regulatory initiatives. The statute reflects an understanding that the new regulatory changes will place new burdens on consumer participants. and that intervenor funding will be needed to help alleviate the burden. If intervenor funding does not become available to parties until after new multiyear rate plan dockets have been processed, a central purpose of the legislation will have been defeated.

13 While the timing is relatively tight, putting a framework in place by the start of 2022 is practical, at a minimum on an initial basis. It appears there is broad agreement that the Oregon framework provides a reasonable starting point, with some modifications. Stakeholders are

[2] *Id.* If the workgroup could not reach agreement on all points, it could present a report to the Commission identifying proposed areas of agreement, and those issues where Commission resolution was needed.

[3] *In the Matter of the Public Utility Commission of Oregon, Approval of the Fourth Amended and Restated Intervenor Funding Agreement*, Docket UM 1929, Order (January 17, 2018).

Simon J. ffitch
Attorney at Law
321 High School Rd. NE,
Suite D3, Box No. 383
Bainbridge Island, WA 98110
(206) 669-8197

already engaged, and several of the utilities and customer organizations have direct experience with the Oregon program. At a minimum it should be feasible to develop a program for a first round of funding, with the understanding that modifications and improvements can be made based on experience with the early implementation.

14 Issuance of a policy statement would introduce some delay, since utility companies and stakeholders will still need to develop one or more IF agreements to bring before the Commission. Policy statements are non-binding and can be subject to differing interpretations by parties. On the other hand, if a workgroup process is started now, and a proposal brought to the Commission later this year, the Commission can provide policy guidance in the order on the proposed agreement, including proposed modifications. A level of Commission guidance can also be provided to the parties during the workgroup process via senior Staff involvement, subject to the final review of the Commissioners themselves.

C. No Material Impact on Ratepayers

15 The Washington intervenor funding statute provides that the costs of the program will be recovered from customers in rates.[4] This is reasonable because the representation that is funded is intended to ultimately benefit customers. This approach is consistent with the fact that in Washington essentially all costs of the regulatory process are paid for by ratepayers. The costs of the Commission and Public Counsel are paid via the statutory "regulatory fee" paid by the utilities in to the Public Service Revolving Fund.[5] The utilities pass their regulatory fee on to

[4] RCW 80.28.430(3).
[5] RCW 80.01.080, RCW Chapter 80.24.

Simon J. ffitch
Attorney at Law
321 High School Rd. NE,
Suite D3, Box No. 383
Bainbridge Island, WA 98110
(206) 669-8197

their customers in rates. In addition, all of the reasonable regulatory expenses of the utility itself, including staff time, attorney and expert witness costs, are passed on to its customers in rates.

16 As a ratepayer representative, TEP shares the concern that the cost of intervenor funding not overburden customers and should not have a material impact on the bill. The Energy Project is generally comfortable with the discussion at the workshop that suggested allowing funding up to the level of 0.1 percent of the company's revenue, with the option scale for larger utilities, by setting a fixed cap. The Energy Project also generally supports establishing a cap in the agreement on the overall level of funding for all intervenors. This has several benefits: providing certainty for planning purposes, streamlining the administrative process, and ensuring that the total rate impact on ratepayers is reasonable and non-material.

D. Enhancing Access and Avoiding Barriers

17 As a general matter, a goal in designing Washington's intervenor funding system should be to create a fair, administratively efficient IF program that enhances and facilitates participation in Washington's regulatory process, while avoiding the creation of artificial and unnecessary barriers to access.

18 The Oregon IFA includes some Oregon-specific requirements which would set up barriers or restrictions on participation and should be avoided in the Washington program. For example, Washington should not impose a requirement that an intervenor organization provide matching funds in some amount or percentage in order to qualify. The Washington statute does not include any matching requirement. Such a requirement could effectively bar a small non-profit organization with limited funding from eligibility. The purpose of the legislation in part is to open up access to groups with limited funds who could not otherwise afford to participate.

Simon J. ffitch
Attorney at Law
321 High School Rd. NE,
Suite D3, Box No. 383
Bainbridge Island, WA 98110
(206) 669-8197

Requiring such groups to "pay to play" undermines that purpose. The very type of intervenor the legislation seeks to encourage would be barred. This requirement appears to be specifically tailored to the Oregon model which was primarily built around CUB and AWEC. In Washington, most regular intervenors likely would meet a matching requirement as they already expend funds on UTC participation. Compliance would be therefore be inefficient "make work" for these parties and the Commission, while for organizations new to the process, it could prove to prevent their involvement entirely.

19 Similarly, a requirement that an organization's membership make a significant contribution towards UTC costs is not contemplated by the statute, is not a good fit for Washington, and would be counterproductive. In Oregon, the primary participants in the IFA both easily meet such a requirement because they have dues paying members that fund their organizations. This is not necessarily the case in Washington, either for existing intervenor groups, or for potential new participants. No purpose would be served by this restriction.

20 The Energy Project urges the Commission to focus on a practical approach based on the current regulatory landscape in Washington, and not be distracted by a hypothetical "parade of horribles" and potential abuses. The community of potential intervenors is Washington generally known, both from docket activity over the past few years, and from workshop participation. There is also a preliminary sense of the level of intervention and participation by community groups, and the need to devote attention to enhance access for these groups. Efforts are better spent building on these existing realities, not on establishing defenses and restrictions to address imagined problems. There is no indication to TEP's knowledge that serious problems

Simon J. ffitch
Attorney at Law
321 High School Rd. NE,
Suite D3, Box No. 383
Bainbridge Island, WA 98110
(206) 669-8197

of abuse or excessive funding have occurred in the Oregon program, nor has it generally been contentious or burdensome to administer.

E. Other Comments on the Oregon Agreement

21 The Energy Project has several additional comments regarding aspects of the Oregon IFA. The Oregon agreement provides a good starting point as a general structural framework for building a Washington program. This framework is a way to organize addressing the major components of an IF program, recognizing the necessary addition of prioritization for vulnerable populations and highly impacted communities. As a general matter, the administrative provisions (e.g., Articles 6 and 7) seem to strike a reasonable balance between accountability and avoiding undue administrative burden for the Commission and parties.

22 While the framework is useful, however, not every aspect of the Oregon-specific content is appropriate to incorporate. As an example, the "three-fund" structure, with two funds designed expressly for CUB (as the Public Counsel equivalent) and two industrial customer groups (ICNU and NWIGU, the predecessor organizations to AWEC) is not transferable to Washington. The Energy Project is open to considering other fund structures that may be proposed. One reasonable approach could be to have one primary fund (akin to the Oregon "Issue Fund") for intervenors, with a second fund earmarked and protected for community-based organizations representing vulnerable populations and highly impacted communities. As a variation, the primary fund could have two components or "sub-funds", one for GRCs, and another for other types of cases such as rulemakings and policy dockets. These options can be discussed in the workgroup.

Simon J. ffitch
Attorney at Law
321 High School Rd. NE,
Suite D3, Box No. 383
Bainbridge Island, WA 98110
(206) 669-8197

23 As noted, the Oregon agreement does not address the need to prioritize access for new participants representing equity interests in the process. Oregon has new legislation on this issue that will require modifications to their approach. Washington can develop its own approach on this issue.

24 The five-year term of the Oregon IFA is probably too long for an initial agreement in Washington. It is not advisable to lock in the terms of the new plan for such a long period. A shorter period, of three years for example, would allow modifications to be made as the Commission and stakeholders gain experience with the program. If necessary, an interim or pilot program could be designed to establish funding for the 2022-2023 SB 5295 dockets, while program details are further refined.

25 The definitional section of the Oregon IFA will need some amendment to revise some definitions that create restrictions that would limit or prevent participation by many organizations.

26 The Energy Project at this point is comfortable with the use of both precertification and case-by-case certification of eligibility as generally structured in the Oregon IFA. Precertification for a set period is an efficient mechanism for parties who regularly intervene in many Commission proceedings for all or most of the regulated companies. Absent precertification, the Commission and parties would need to process dozens of eligibility applications every year for the same intervenors and companies an unnecessary administrative burden for all concerned. Precertification would simply establish baseline eligibility. Specific funding applications, review, and approval would still be required for each intervenor in each docket. Case-by-case certification would be an effective alternative mechanism for parties new

Simon J. ffitch
Attorney at Law
321 High School Rd. NE,
Suite D3, Box No. 383
Bainbridge Island, WA 98110
(206) 669-8197

to the process or who did not plan to be regular intervenors in many dockets. This could be designed to encourage involvement by vulnerable populations and highly impacted communities.

III. CONCLUSION

27 The Energy Project respectfully submits these supplemental comments and looks forward to working with the Commission, the utilities and other customer representatives to develop Washington's new intervenor funding program.

Dated this 5th day of October, 2021.

/s/ Simon J. ffitch, WSBA No. 25977
Simon J. ffitch
Attorney at Law
for The Energy Project

/s/ Shawn Collins
SHAWN COLLINS
DIRECTOR
THE ENERGY PROJECT
A PROGRAM OF OPPORTUNITY COUNCIL
3406 REDWOOD AVE. BELLINGHAM, WA 98225
SHAWNC@OPPCO.ORG
CELL: (360) 389-2410

Simon J. ffitch
Attorney at Law
321 High School Rd. NE,
Suite D3, Box No. 383
Bainbridge Island, WA 98110
(206) 669-8197