

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2032

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON,

Investigation into the Treatment of Network
Upgrade Costs for Qualifying Facilities

NEWSUN ENERGY LLC’S MOTION FOR
CLARIFICAITON OF ORDER 21-343 AND
ALTERNATIVE APPLICATION FOR
RECONSIDERATION

I. INTRODUCTION

Pursuant to OAR 860-001-0420, NewSun Energy LLC (“NewSun”) hereby moves the Public Utility Commission of Oregon (“Commission” or “PUC”) for an order clarifying that Order 21-343 is not a “final order” as defined by ORS 183.310(6)(b). Should the Commission determine that Order 21-343 is a final order, NewSun submits, in the alternative, an application for reconsideration of Order 21-343.

Order 21-343 denied NewSun’s motion to compel utility data regarding benefits that various transmission system upgrades provide to the transmission system. NewSun asserted and continues to believe that the existence of broad-ranging system benefits is relevant to questions presented in this first phase of this docket including the questions of who should pay for upgrades that provide those benefits and whether a qualifying facility should have the option to interconnect under different levels of interconnection service. This docket is being handled as a contested case, which typically provides parties with discovery rights and in which the Commission typically bases its decisions on evidence in the record. However, in Order 21-343, the Commission indicated that while “[t]his question requires some evidence and elucidation to evaluate,...the scoping ruling essentially designated it as a general policy question to be initially

addressed in this first phase, with a second phase available to address associated issues that are more detailed, technical, and nuanced.”¹ Further, the Commission concluded that “[it] will have sufficient information to answer the first question in the first phase of these proceeding” and noted that “[t]o the extent that issues raised by NewSun’s motion to compel are deemed relevant to the second phase’s defined scope, they will be addressed then.”² Finally, in the scoping ruling in this docket, it was noted that the docket may not proceed to a phase two, depending upon the resolution of the questions in phase one.³

NewSun is concerned that Order 21-343 limits NewSun’s ability to participate in the contested case process as a stakeholder to discover and submit evidence to the Commission, and that the lack of such will deprive the Commission of relevant knowledge to inform its substantive decision in this case. Order 21-343 presupposes that the Commission will have sufficient information to make its decision without having had the opportunity to review the data requested by NewSun. NewSun had genuinely good reasons for asking for the requested information based on the utility assertions in their testimony. While the Commission could ultimately decide in NewSun’s favor, NewSun cannot know the outcome of the case at the time it conducts its discovery. Rather, the purpose of discovery is to gather the best evidence to support and inform the Commission about the issues to advocate for a particular outcome. It should be viewed as an opportunity and critical function of the contested case process that all stakeholders can use to elucidate facts, data, and utility behaviors that may not otherwise come before the Commission. Therefore, NewSun has significant concerns that the denial of its motion to compel unduly limits its participation in the contested case process and that it will have

¹ Order 21-343 at 5-6.

² *Id.* at 6.

³ ALJ Ruling at 2 (May 22, 2020).

implications going forward for non-utility stakeholders' ability and willingness to participate in Commission processes. This is particularly concerning in this case, given the Commission's finding that phase one presents policy issues despite being a contested case. If this docket is resolved in phase one and does not proceed to a phase two where more technical issues are presented, Order 21-343 will have effectively prevented NewSun from participating in the docket to the full extent permitted in contested case proceedings. As such, NewSun makes the below motion for clarification asking the Commission to issue a simple ruling clarifying that Order 21-343 is not a "final order."

II. MOTION FOR CLARIFICATION

NewSun moves for clarification of Order 21-343's finality to the extent that it limits or denies in part NewSun's participation in this phase one of the docket and the possibility that the docket may not proceed to a phase two. A "final order" is defined as a:

final agency action expressed in writing. "Final order" does not include any tentative or preliminary agency declaration or statement that:

- (A) Precedes final agency action; or
- (B) Does not preclude further agency consideration of the subject matter of the statement or declaration.⁴

Further, under the Commission's rules, administrative law judges ("ALJs") are delegated authority to "supervise and control discovery," but not to "grant contested motions to dismiss or other contested motions that involve final determination of the proceedings."⁵ If an ALJ issues a ruling, a party may request that the ALJ certify the ruling for the Commission's consideration and the ALJ must do so if the ALJ finds among other things that [t]he ruling denies or terminates a person's participation.⁶

⁴ ORS 183.310(6)(b).

⁵ OAR 860-001-0090(1)(e) and (g).

⁶ OAR 860-001-0110.

NewSun understands that Order 21-343 is not a final order. This is so because the Commission has yet to decide the substantive outcome in this docket and the Commission has reserved the right to further consider the issues that are the subject of NewSun's motion to compel in phase two. In addition, Order 21-343 does not include the typical language the PUC often includes at the end of its final orders articulating a party's appeal rights. However, as noted above, should this docket not proceed to a phase two, NewSun believes Order 21-343 is ambiguous as to whether it is a final statement limiting or denying, in part, NewSun's ability to participate fully in this contested case. Further, the order was issued by the Commission itself, rather than the ALJ. NewSun believes that this creates uncertainty as to whether the PUC views it as simply an interim ruling supervising and controlling discovery or whether the PUC views it as a final determination denying or terminating NewSun's participation in this proceeding (at least in part). As such, good cause exists to grant NewSun's motion for clarification, simply clarifying that the Commission does not consider Order 21-343 to be a "final order."

NewSun considers this motion for clarification to be a procedural motion. NewSun conferred with the parties to the case on this motion for clarification. The Community Renewable Energy Association, Renewable Energy Coalition, and Northwest and Intermountain Power Producers Coalition support this motion, Obsidian renewables does not object, the Alliance for Western Energy Consumers takes no position, Portland General Electric, PacifiCorp and Idaho Power take no position but reserve the right to inform the Commission of their position and NewSun has not heard back from Staff.

III. ALTERNATIVE APPLICATION FOR RECONSIDERATION

In the event the Commission considers Order 21-343 to be a "final order," NewSun submits in the alternative, this application for reconsideration. If Order 21-343 is considered a

“final order,” the order is erroneous and incomplete in that it does not clearly state that it is a final order and does not articulate its findings of fact and conclusions of law as to each of NewSun’s data requests at issue in the motion to compel.

Under ORS 756.525, “any person may apply to the [C]ommission for permission to appear and participate in the proceeding,” and “[t]he [C]ommission shall determine the interest of the applicant in the proceeding and shall grant the application, subject to appropriate conditions.” Further, in contested case proceedings, [a]fter the completion of the taking of evidence, and within a reasonable time, the [C]ommission shall prepare and enter findings of fact and conclusions of law upon the evidence received in the matter and shall make and enter the order of the [C]ommission thereon.”⁷

NewSun continues to believe that the topics addressed in its motion to compel are relevant to this phase of the proceeding. However, Order 21-343 broadly denies NewSun’s motion to compel and limits NewSun’s ability to participate in this phase one on the basis that the question presented in this phase is essentially “a general policy question,” and based upon the conclusion that the Commission “will have” sufficient information to answer that question without the discovery NewSun seeks. To the extent Order 21-343 is a “final order,” the order should more clearly and individually articulate how its denial of each of NewSun’s data requests at issue in the motion to compel will not help inform that policy decision and/or how the Commission will have the necessary information to inform its decision. As such, should the Commission consider Order 21-343 a “final order,” there is good cause for reconsideration.

⁷ ORS 756.558(2).

IV. CONCLUSION

NewSun's first and primary request in this filing is for an order clarifying that Order 21-343 is not a "final order" as defined by ORS 183.310(6)(b). Alternatively, should the Commission determine that Order 21-343 is a final order, NewSun submits an application for reconsideration of Order 21-343.

Dated this 21st day of December 2021.

Respectfully submitted,

NewSun Energy LLC

/s/ Marie P. Barlow

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