

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2032

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON,

Investigation into Treatment of Network
Upgrade Costs for Qualifying Facilities.

RULING

DISPOSITION: MOTIONS GRANTED

I. INTRODUCTION AND PROCEDURAL HISTORY

On November 17, 2020, NewSun Energy LLC (NewSun) filed a motion requesting permission under OAR 860-001-0330 to engage Brittany Andrus, a former employee at the Public Utility Commission of Oregon, as an expert witness. OAR 860-001-0330 provides in pertinent part:

- (1) A former employee may not appear on behalf of other parties in contested case or declaratory ruling proceedings in which the former employee took an active part on the Commission's behalf.
- (2) Except with the Commission's written permission, a former Commission employee may not appear as a witness on behalf of other parties in contested case proceedings in which the former employee took an active part on the Commission's behalf.

New Sun conferred with the other parties about the motion before filing it. The Northwest & Intermountain Power Producer's Coalition, Renewable Energy Coalition, and the Community Renewable Energy Association support the motion. NewSun indicates that Staff does not object because Ms. Andrus' involvement in this docket ended prior to substantive analysis or discussion of the issues. PacifiCorp, dba Pacific Power, and Portland General Electric Company indicated concerns but did state particular positions when contacted. NewSun indicates that the Alliance for Western Energy Consumers (AWEC) and Idaho Power Company were contacted, but did not respond before the motion was filed.

On November 24, 2020, a joint response was filed by PGE, PacifiCorp, and Idaho Power (together the Joint Utilities). On December 1, 2020, NewSun filed a reply together with a motion to accept the reply. The same day, a reply was also jointly filed by the Northwest & Intermountain Power Producers Coalition, Renewable Energy Coalition, and

Community Renewable Energy Association (collectively Interconnection Customer Coalition) together with a motion to accept the reply. The reply seeks to support NewSun's original motion, but the Interconnection Customer Coalition also indicates that its members may be directly affected by a decision regarding the ability of former Staff members to participate on behalf of parties. The Interconnection Customer Coalition indicated that other parties were contacted prior to the filing and that NewSun responded with support while PGE, PacifiCorp, Idaho Power and AWEC responded to indicate no opposition. On December 2, 2020, Staff filed a reply along with a motion to accept the reply. Staff states that the other parties were contacted prior to filing and that PGE, PacifiCorp, and Idaho Power responded to indicate no opposition. On December 3, 2020, the Joint Utilities filed a motion to supplement the record. They state that the other parties were contacted and that NewSun, AWEC, and Staff responded to indicate no opposition. On December 7, 2020, Staff filed an errata to its reply. No party filed an opposition to the replies or the motion to supplement the record within the deadlines, regardless of whether NewSun's motion is considered a substantive or procedural motion.

II. FILINGS

A. NewSun's Motion to Allow Brittany Andrus as a Witness

This docket was opened on September 9, 2019. Brittany Andrus was employed by the Commission until November 15, 2019. NewSun acknowledges that Ms. Andrus remained on the docket's service list until January 8, 2020, but reminds she did not receive communications or documents, and was otherwise uninvolved, as she had already left the Commission's employ. In a declaration that accompanies the motion, Ms. Andrus affirmatively states that she did not take an active role in the docket as a Commission employee.

In any case, NewSun observes, the docket was just starting up, with no substantive actions occurring between the docket's opening and the departure from the Commission of Ms. Andrus; only petitions to intervene were filed during this time. This docket did not substantively move forward for several months until after an issues list was established in May of 2020, and it was determined in June of 2020, that a contested case process would be used to address the issues.

Under OAR 860-001-0330, a former Commission employee may appear as a witness in a docket for another party if the former employee did not take an active part on the Commission's behalf in that same docket, NewSun asserts. Even if the former employee did take an active part on behalf of the Commission in a particular docket, the former employee may still be a witness for another party in that same docket if the Commission consents. Even though NewSun asserts that Ms. Andrus did not take an active part as a Commission employee in this docket, NewSun seeks the Commission's permission for Ms. Andrus to serve as a witness on its behalf out of courtesy and extreme caution. NewSun argues that it is in the public interest to allow a qualified expert such as Ms Andrus to be retained as an expert in this docket to ensure representation for an interconnection coalition, particularly when the Interconnection Customer Coalition was denied intervenor funding, despite having eligibility.

B. Response by Joint Utilities

The Joint Utilities express concern that allowing Ms. Andrus to serve as a witness for NewSun in this case would impair the integrity and perceived fairness of these proceedings, which OAR 860-001-0330 has the purpose to avoid. They worry that the significant and recent Commission role of Ms. Andrus as the primary Staff expert on Public Utility Regulatory Policies Act (PURPA) policies and regulation with additional experience regarding qualifying facility (QF) interconnection requirements and policies would create the appearance of impropriety should she now represent another party in a docket that was initiated while she was still employed by the Commission, having been spun off from the Commission's general PURPA investigation, UM 2000, which she helped scope. They ask that she be prohibited from testifying on behalf of NewSun pursuant to OAR 860-001-0330.

In the only order addressing OAR 860-001-0330, the Commission emphasized that “the purpose of the rule is to avoid the appearance of impropriety that would result if former Commission employees used the knowledge or relationships they gained during public service to advantage a private party,” the Joint Utilities observe.¹ The Commission also clarified that the phrase, “took an active part on the Commission’s behalf,” in OAR 860-001-0330(1), should be “broadly construed to protect the integrity and perceived fairness of the Commission proceedings.”² The Commission interpreted the rule to “apply to any former employee that participated personally on any assigned matter during his or her employment.”³

Although the Joint Utilities acknowledge that Ms. Andrus had limited participation in UM 2032 when she was a Commission employee, they argue that the rule should be broadly construed to consider her active participation with regard to two intertwined dockets: UM 2000 and UM 1930. Docket UM 2000 originated from a recommendation in a Staff Report that Ms. Andrus co-authored; she subsequently participated in the lengthy scoping process for the docket, including helping to draft a white paper that guided the investigation’s development.⁴ This whitepaper also included recommendations to split the investigation into separate dockets, including one to investigate the treatment of network upgrade costs for QFs. Adopting these recommendations, the Commission opened UM 2032 on July 31, 2019.⁵ Ms. Andrus also participated in internal Staff discussions regarding issues in UM 1930 that may also be addressed in UM 2032 as there is overlap in questions posed in the two dockets. The participation of Ms. Andrus in dockets UM 2032, UM 2000 and UM 1930 should be broadly viewed together with regard to the applicability of OAR 860-001-0330, the Joint

¹ Joint Utilities’ Response to NewSun’s Motion, at 3, citing *In the Matter of Portland General Electric Company’s Proposal to Restructure and Reprice its Services in Accordance with the Provisions of SB 1149* and *In the Matter of PacifiCorp’s Proposal to Restructure and Reprice its Services in Accordance with the Provisions of SB 1149*, Dockets UE 115 and UE 116, Order No. 01-249 at 3 (Mar. 21, 2001).

² *Id.*

³ *Id.*

⁴ Joint Utilities’ Response at 5, citing Order No. 19-051 & Appendix A at 1.

⁵ *Id.* at 6, citing Order No. 19-254 at 1, Appendix A at 1 (July 31, 2019).

Utilities assert. If this approach is taken, it is clear that Ms. Andrus took an active part on behalf of Staff in these proceedings, they argue.

In the prior order addressing the application of OAR 860-001-0330, the Commission indicated that if a former employee was deemed to have taken an active part in a docket on the Commission's behalf, then the Commission would consider four factors to evaluate whether the former employee should nevertheless be allowed to participate on behalf of another party: (1) the nature of the former employee's prior role with the Commission; (2) the type of proceeding in which the former employee seeks to participate; (3) the length of time since the former employee left the Commission; and (4) the agreement or disagreement of other parties to the proceeding. Applying these factors to Ms. Andrus, the Joint Utilities argue that she should not be allowed to testify on behalf of another party in this docket: 1) as a member of Staff for eight years and the principal Staff representative on PURPA, Ms. Andrus had a substantial role with the Commission; 2) UM 2032 is a contested case addressing highly contentious issues about the rights and obligations of utilities and QF with likely significant and long-lasting impacts—e.g., the network upgrade costs at issue could total hundreds of millions of dollars or more;⁶ 3) less than a year has passed between the date Ms. Andrus left the Commission and the date she filed testimony on behalf of NewSun which is insufficient to “erase the implication that Ms. Andrus may still have information or relationships from her time at Staff that could influence her participation, or the Commission's decision-making, in this case;” and 4) the Joint Utilities have strong concerns.

C. Reply and Motion to Accept Reply by NewSun, the Interconnection Customers Coalition, and Staff

NewSun, the Interconnection Customer Coalition, and Staff each seeks to admit a reply rebutting the Joint Utilities' position that Ms. Andrus should be denied the ability to testify on behalf of NewSun. Should NewSun's motion be deemed procedural in nature, they contend that replies are appropriate and should be accepted in order to address the novelty of the arguments posited by the Joint Utilities about the application of OAR 860-001-0330.

The replies all argue that OAR 860-001-0330 is inapplicable because Ms. Andrus did not take an active part on behalf of the Commission in UM 2032, the contested case proceeding in which NewSun seeks to have Ms. Andrus testify. The scope of the rule's prohibition on the testimony of a former employees applies in narrow and specific circumstances, they assert: a former employee that took an active part for the Commission in a particular contested case may not appear on behalf of another party in that same contested case without the Commission's written permission. Although UM 2032 has been deemed to be a contested case, Ms. Andrus never played an active role in UM 2032 as a Staff employee. Indeed, there was little activity in the docket at all during the time that Ms. Andrus was a Commission employee or inadvertently on the service list, Staff confirms. NewSun also notes that nearly a year had passed (just two weeks short) between the departure of Ms. Andrus from the Commission and the filing of

⁶ *Id.* at 8, citing Joint Utilities/100, Vail-Bremer-Foster-Larson-Ellsworth/20 & n.25.

her expert testimony on behalf of NewSun. The Joint Utilities (along with all of the other parties) concede these points, NewSun states.

According to New Sun, the Joint Utilities raise the unprecedented claim that the prior participation by Ms. Andrus for Staff in dockets other than this one (UM 2000 and UM 1930) should disqualify her from being NewSun's expert witness, under OAR 860-001-0330, in UM 2032. New Sun states that since neither UM 2000 nor UM 1930 are contested case proceedings, OAR 860-001-330 does not apply by its plain language. Moreover, as the nature of UM 2032 was questioned and the case was not ruled to be a contested case proceeding until seven months after Ms. Andrus left the Commission, OAR 860-001-330 doesn't even apply to Ms. Andrus' limited participation in UM 2032 during her employment. For these reasons, the Joint Utilities' claim fails as a matter of law, New Sun asserts.

The Joint Utilities reliance on discussion in Order No. 01-249 that the phrase, "took an active part on the Commission's behalf," in the OAR 860-001-0330, should be broadly construed to protect the integrity and perceived fairness of the Commission's proceedings"⁷ to argue that the Ms. Andrus' participation in dockets other than UM 2032 should trigger the rule's prohibition for UM 2032 is misguided and unfair, the replies argue. The underlying case addressed in Order No. 01-249 involved the assertion that a former employee who had neither filed testimony nor drafted Staff's proposed settlement position did not actively participate in the docket at issue. The Commission disagreed because the person at issue had prepared an analytical memorandum in the case and was actively developing testimony at the time of his departure. The Commission only reviewed the former employee's work in the docket at issue, however, NewSun reminds. There is no suggestion in the order that the Commission intended the broad evaluation of any and all activities undertaken by a former employee in the docket at issue to extend to any and all activities undertaken by the former employee in dockets not at issue, Staff asserts. Such a sweeping interpretation of OAR 860-001-0330 would likely bar Ms. Andrus from ever testifying in any matter related to PURPA implementation policies, one of her subjects of expertise while employed at the Commission, thereby imposing unreasonable burdens on future employment of Commission Staff and undermining the Commission's ability to attract qualified Staff.

NewSun and Staff counter the Joint Utilities' application of the four factors delineated in Order No. 01-249, arguing that even if Ms. Andrus is deemed to have actively participated in UM 2032 as a Commission employee, she should still be permitted to testify on behalf of NewSun in the docket. With regard to the first factor, New Sun notes that it is uncontested that Ms. Andrus had no substantive role in UM 2032, and argues the Joint Utilities fail to explain why her prior participation in either UM 2000 or UM 1930 provided her with confidential information (the Staff Reports in both cases, whether authored by her or not, are public record) or gave her outsized influence with the Commission. As for the second factor, although UM 2032 is a contested case, it was not identified as such until after Ms. Andrus had left the Commission, and neither UM 2000 or 1930 are contested cases. Moreover, her references to prior Staff experience are made

⁷ Order No. 01-249 at 4.

about opinions about the regulatory process, and not policy. Order No. 01-249 indicates that the value of information obtained as Staff dissipates with time, and although a timeline isn't specified, the federal rule's requirement that one-year pass before an ex-employee appears before his former agency. Given that nearly a year passed between the last day at the Commission of Ms. Andrus and submission of her expert testimony for NewSun in this case, with more than a year passing between any substantive involvement with any issues related to the case, there is no basis for arguing that the length of time between Commission employment and a new role is insufficient. Concerns raised by the Joint Utilities about Ms. Andrus representing NewSun in UM 2032 are fully offset by Staff's support for Ms. Andrus, NewSun argues.

D. Motion by Joint Utilities to Supplement Record

NewSun's reply attached a letter sent from NewSun to the Joint Utilities' on November 25, 2020, the day after the Joint Utilities filed a response. The Joint Utilities assert that the letter includes the erroneous claim that the Joint Utilities filed a response having no basis in law or fact and an unfounded charge that the Joint Utilities have the goals to disadvantage NewSun in litigation and to personally harm Ms. Andrus. NewSun did not attach the responding letter sent by the Joint Utilities to NewSun on December 1, 2020. The Joint Utilities seek to complete the record by requesting leave to file their letter. In addition, the Joint Utilities clarify that the position stated in their response is "unprecedented" only because NewSun seeks to create the unprecedented situation of having a former Commission employee testify on its behalf on issues that the former employee actively participated for Staff in interrelated dockets if not the docket at issue.

III. RULINGS

A. Motions to Accept Replies

NewSun's original motion is a procedural motion as it seeks an interpretation of a procedural rule, OAR 860-001-0330, that regulates a former employee's ability to participate on behalf of other parties in Commission proceedings. The Commission's rules do not expressly allow replies to be filed to a response to a procedural motion. NewSun, Staff, and the Interconnection Customers each filed a reply, along with a motion for leave to file the reply pursuant to OAR 860-002-0420.

I find that the response arguments by the Joint Utilities are novel in nature and could not have been anticipated by NewSun, Staff, and the Interconnection Customers Coalition. Reading all of the filings, I conclude that all of the replies are merited and, indeed, helpful to resolving of NewSun's original motion. I note that no party registered opposition to the replies. For these reasons, the motions for leave are granted and the replies are admitted into the record.

B. Motion to Supplement Record

I find it is appropriate to complete the record by admitting the letter, dated December 1, 2020, from the Joint Utilities to NewSun responding to NewSun's letter that was

attached to NewSun's reply. I note that no party indicated opposition to the motion to supplement the record filed by the Joint Utilities. For these reasons, I grant the motion by the Joint Utilities to admit the letter into the record.

C. Motion to Allow Brittany Andrus as a Witness

OAR 860-001-0330, regulating the appearance of former employees of the Commission on behalf of other parties, is a long-standing Commission rule that has been interpreted to date only once in a Commission order, Order No. 01-249.⁸ That order includes a lengthy discussion about the purpose of the rule, to "avoid the appearance of impropriety" by regulating "problems caused by the 'revolving door' between government and private employment" and considered comparative federal and state policy and laws.⁹ The Commission concluded that applying the former employee rule "requires a careful balancing of competing interests" that "ensures that government power is used for the public good" but avoids the imposition of "such harsh restrictions" that would "limit the ability to attract knowledgeable and skilled employees."¹⁰

The Commission established a two-part inquiry when applying the former employee rule, with the threshold question being whether the Commission's consent is necessary for a former employee to appear on behalf of another party in a particular docket. NewSun's motion poses that question for Ms. Andrus in UM 2032, out of caution and courtesy the motion represents. In Order No. 01-249, the Commission stated:

With regard to the threshold issue of whether Commission consent is necessary, we conclude that the phrase "took an active part on the Commission's behalf" should be broadly construed to protect the integrity and perceived fairness of the Commission's proceedings. Thus, the rule should be read to apply to any former employee that participated personally on any assigned matter during his or her employment. Such active involvement would, at the very least, give rise to the belief that the employee had gained inside knowledge about Staff's opinions and strategies of the case.¹¹

It is important, when applying the above guidance, to be clear that the interpreted phrase about a former employee having taken an active part on the Commission's behalf applies, at least in the current rule, pertains by the words of the rule only to contested case or declaratory ruling proceedings. There is no disagreement among the parties that UM 2032 is recognized as a contested case proceeding, and that

⁸ Order No. 01-249 at 3 (As of 2001, the predecessor rule, OAR 860-012-0010, was 50 years old but had yet to be addressed or interpreted), citing Order No. 33203.

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 4.

¹¹ *Id.*

Ms. Andrus is not perceived to have taken an active or substantive role in UM 2032 as a Commission employee. Reviewing the information contained in the filings, with particular emphasis on Staff's account, I concur that Ms. Andrus did not take an active or substantive role in UM 2032 on behalf of the Commission while employed by the Commission, as only procedural filings were made between the docket's opening and her departure.

The Joint Utilities ask that a wider eye be cast on the activity of Ms. Andrus as a Commission employee in two other dockets, UM 2000 and UM 1930, because issues there are closely related to those in UM 2032. The Joint Utilities make this request, alleging that the activity in the other dockets creates the appearance of impropriety that the Commission clearly articulated an interest, in Order No. 01-249, of avoiding.

I agree with the Joint Utilities that Order No. 01-249 makes it clear that it is very important to be careful that a former employee's appearance for another party in a docket that she appeared for the Commission as an employee should not create any appearance of impropriety, and for this reason, I appreciate NewSun's filing a motion that created the opportunity to fully explore the application of OAR 860-001-0330 in UM 2032. Indeed, I discern some ambiguity with regard to the language in OAR 860-001-0330. Due to the plurality in the phrase, "a former Commission employee may not appear as a witness on behalf of other parties in contested case proceedings, in which the person took an active part on the Commission's behalf," I find it arguable that a former employee's activity in a group of contested case proceedings could be considered under the rule. It is not arguable, however, that an employee's activity in *non-contested* case proceedings is subject to evaluation about whether OAR 860-001-0330 applies to prohibit a former employee from appearing on behalf of another employee in a contested case proceeding. I note that this interpretation is consistent with the Commission's guidance about balancing the competing public interests underlying the former employee rule, and the observation that the restrictions on former employees should not be overly harsh. For these reasons, I conclude that the answer to the threshold question is no, and that the Commission need not further evaluate whether to allow Ms. Andrus and to appear on behalf of NewSun. I grant NewSun's motion to allow Ms. Andrus as a witness for NewSun in this docket.

Dated this 23rd day of December, 2020, at Salem, Oregon.



Traci Kirkpatrick
Administrative Law Judge