

**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

MOTION TO ACCEPT REPLY
AND REPLY OF NEWSUN ENERGY LLC,
TO JOINT UTILITIES' RESPONSE TO
NEWSUN MOTION TO ALLOW BRITTANY
ANDRUS AS WITNESS

I. MOTION TO ACCEPT REPLY

As all sides recognize, the issues raised in Portland General Electric Company's, PacifiCorp's, and Idaho Power Company's (the Joint Utilities') Response are unprecedented. The Oregon Public Utility Commission (Commission or OPUC) has previously concluded that it would not permit a former employee to appear as an expert witness in the *same* contested case proceeding in which he had actively represented the Commission just three weeks after leaving the Commission. The Joint Utilities concede that Ms. Andrus played no active role in this proceeding and left the Commission nearly one year before submitting testimony in this proceeding. The Commission should accept this reply because it addresses the novel issues raised by the Joint Utilities and demonstrates the fatal flaws in the Joint Utilities' attempt to bootstrap Ms. Andrus's participation in prior *non-contested* case proceedings that happen to involve the Public Utility Regulatory Policies Act (PURPA) into a reason to bar Ms. Andrus's

participation in this separate, contested case proceeding.¹ Accordingly, NewSun respectfully requests leave to file this reply in accordance with OAR 860-001-420.

PGE objected that NewSun's initial motion to allow Ms. Andrus to be a witness was procedural in nature. Should the Commission choose to treat NewSun's initial motion as substantive, no leave to reply is required under OAR 860-001-0420. However, given that NewSun filed this as a procedural motion, NewSun seeks leave to file a reply. NewSun has conferred with the other parties on this request for leave to reply. The Northwest and Intermountain Power Producer's Coalition, Renewable Energy Coalition and Community Renewable Energy Association support NewSun's request to file this reply. The Alliance for Western Energy Consumers, Portland General Electric Company, PacifiCorp, Idaho Power Company, and do not oppose NewSun's request to file this reply. NewSun attempted to reach but has not heard back from Staff on their position on this request to file a reply. Staff did not oppose the initial motion to allow Ms. Andrus to be a witness.

II. NEWSUN REPLY

The Joint Utilities concede that Ms. Andrus took no active role in this docket. They concede that nearly a year passed between the date she left the Commission Staff on November 15, 2019, and the date she submitted expert testimony in this docket on October 30, 2020. The Joint Utilities attempt to manufacture a controversy here by pointing to Ms. Andrus's role in earlier, non-contested case proceedings involving PURPA that did little more than open this docket.

¹ Prior to submitting this reply, NewSun first requested that the Joint Utilities reconsider and withdraw their novel and unprecedented position in this matter. See Attachment A, Letter from NewSun to Joint Utilities dated November 25, 2020.

The Joint Utilities’ position – notably, not joined by the Commission’s staff – fails to demonstrate any genuine issue concerning a violation of Oregon rules concerning former government employees. Instead, it appears aimed at denying the Commission the benefit of testimony from one of the leading experts on PURPA in Oregon and intimidating Ms. Andrus by threatening her future employment prospects. The Joint Utilities’ gambit also appears aimed at artificially limiting the support for the qualifying facilities’ (QF’s) position in this matter so that they can preserve the existing OPUC policy. Little wonder, since the current policy is inconsistent with the approach used by the Federal Energy Regulatory Commission (FERC) and other states, antithetical to Oregon’s ambitious goals for promoting renewable energy and rapidly reducing greenhouse gas emissions, and forces QFs to subsidize Network Upgrades whose benefits flow primarily to the Joint Utilities.

I. Reply Argument

A. The Joint Utilities’ Bootstrap Argument Regarding UM 2000 and UM 1930 Fail Both As a Matter of Law and As a Matter of Fact.

1. *All Parties Concede Ms. Andrus Played No Active Role in This Proceeding.*

As the Joint Utilities concede, Ms. Andrus left her position with the Commission on November 15, 2019.² They also concede that Ms. Andrus took no active part in this docket, UM 2032.³ Indeed, no substantive activity took place in the docket until months after Ms. Andrus’s departure from the Commission.⁴ Further, the Joint Utilities concede that Ms. Andrus’s expert testimony was submitted in this proceeding on October 30, 2020, just two weeks shy of a full

² NewSun Energy LLC’s Motion to Allow Brittany Andrus as a Witness at 2 & Att.A, filed in this docket on Nov. 17, 2020 (“NewSun Motion”).

³ *Id.*

⁴ *Id.* at 2-3.

year after she left the Commission.⁵ Accordingly, OAR 860-001-330 on its face does not bar Ms. Andrus’s participation in this proceeding because it requires Commission permission only where the former employee “took an active part” on the Commission’s behalf in the same proceeding where the former employee seeks to testify.⁶ In any event, there is no violation of the regulation because sufficient time has passed from Ms. Andrus’s employment with the OPUC that there is no basis for barring her testimony here on public interest grounds.

2. *There Is No Basis For Concluding That Ms. Andrus’s Participation in UM 2000 or UM 1930 Bar Participation In This Proceeding.*

Rather than attempting to establish that Ms. Andrus took an “active part” in this proceeding, the Joint Utilities point to two other proceedings that Ms. Andrus took part in, UM 2000, the Commission’s general PURPA docket, and UM 1930, the Commission’s docket involving the Community Solar Program. The Joint Utilities’ claim is wrong both legally and substantively.

i. The Joint Utilities’ Claim Fails As A Matter of Law.

The Joint Utilities’ claim is wrong as a matter of law. Neither UM 2000 nor UM 1930 were contested case proceedings. But OAR 860-001-330 requires Commission approval for Ms. Andrus to testify on behalf of other parties in a “contested case proceeding[.]” only if she took an active role on the Commission’s behalf in that contested case proceeding.⁷ Because neither UM 2000 nor UM 1930 are contested case proceedings, OAR 860-001-330 does not apply by its plain terms and the Joint Utilities’ claim fails as a matter of law. In fact, it does not apply even to

⁵ *Id.* at 3. *See also* Response Testimony of Brittany Andrus, filed in this docket on October 30, 2020.

⁶ OAR 860-001-330(2).

⁷ OAR 860-001-330(2).

this proceeding, UM 2032, because this proceeding was not declared a contested case until July 1, 2020,⁸ more than seven months after Ms. Andrus left the Commission.

3. *The Joint Utilities' Claims Fail For Want of Factual Support.*

An examination of the facts surrounding both UM 2000 and UM 1930 demonstrate that there is no basis for concluding that Ms. Andrus's participation in this proceeding compromises the Commission's deliberations in any way.

The claim regarding UM 2000 fails because UM 2000 merely opened this proceeding, establishing that the treatment of network upgrades is an issue that needs to be resolved, and Ms. Andrus did not participate in any substantive consideration of issues bearing on this proceeding. UM 2000 arose from a special public meeting held on January 31, 2019, where comments were received on a variety of PURPA-related issues, including interconnection costs. At the February 14, 2019, public meeting of the Commission, Staff requested that the Commission open a general investigation of PURPA issues, which became UM 2000, and a separate docket to update avoided cost rates on an interim basis and to address data transparency in the interconnection process, which became UM 2001. The Staff Report for that meeting stated, "Staff would like to examine issues related to interconnection costs. Commenters at the [Special Public Meeting] had many issues with the current utility practices as related to interconnections. Staff would like to address these concerns with an investigation."⁹ The Commission opened UM 2000 as a "broad investigation" into PURPA focusing primarily on avoided cost rates."¹⁰

⁸ Prehearing Conference Memorandum (July 1, 2020).

⁹ Staff Report for Feb. 14, 2019 Commission Meeting at 11, attached as Appendix A to Order No. 19-051, *Investigation Into PURPA Implementation*, OPUC Docket No. UM 2000 (Feb. 19, 2019).

¹⁰ Order No. 19-051, *Investigation Into PURPA Implementation*, OPUC Docket No. UM 2000 (Feb. 19, 2019).

On March 14, 2019, in a Staff Report filed by Ted Drennan, a set of questions regarding Oregon’s implementation of PURPA were posed for stakeholders, which included a set of questions regarding interconnection issues.¹¹ After interested parties submitted two rounds of comments and participated in a workshop, Staff issued a draft whitepaper, again signed by Mr. Drennan, with a proposed scope and schedule for future proceedings, and identified a number of issues, including interconnection issues, to be addressed both in the short term and in the longer term. On June 11, 2019, the Commission held a special public meeting in which it identified four categories of issues, including interconnection. Shortly thereafter, on June 18, 2019, Ms. Andrus issued a Staff Report focusing narrowly on data transparency issues and calling for a workshop to resolve those issues.¹² Two days later, on June 20, Mr. Drennan issued a revised draft scoping whitepaper setting forth the Staff’s recommendations for procedures to address a range of PURPA issues.¹³ Shortly thereafter, Mr. Drennan left the Commission.

Thereafter, on July 31, 2019, the Commission adopted the recommendation from the Staff Report and attached the scoping whitepaper, with two modifications, including direction to the Administrative Hearings Division to consider whether the OPUC’s investigation of the treatment of network upgrade costs “should be expanded to a limited number of additional, discrete issues related to interconnection of QFs.”¹⁴ The Staff Report and whitepaper simply provide recommendations to the Commission concerning the division of issues involving QFs,

¹¹ UM 2000 Questions, OPUC Docket No. UM 2000 (filed March 14, 2019). The UM 2000 Questions document is dated March 15, 2019, but it was entered into the UM 2000 docket on March 14, 2019.

¹² Staff Report for June 18, 2019 Commission Meeting, dated June 11, 2019, OPUC Docket No. UM 2000 (filed June 13, 2019).

¹³ UM 2000 Draft White Paper – Staff Revisions, June 19, 2019, OPUC Docket No. UM 2000 (filed June 20, 2019).

¹⁴ Order No. 19-254, *Investigation Into PURPA Implementation*, OPUC Docket No. UM 2000 (July 31, 2019).

including interconnection, into separate proceedings and whether those issues should be resolved in the near-term or long-term. Neither the Staff Report nor the whitepaper takes any substantive position on any issue, let alone any issue relevant to this case.¹⁵ The only issue Ms. Andrus addressed that is even remotely substantive is a Staff Report, issued on August 6, 2019, reporting that Staff had successfully resolved transparency issues, which ALJ Moser adopted on August 15, 2019.¹⁶ That was Ms. Andrus's last substantive filing in UM 2000.

Thereafter, on September 10, 2019, UM 2032 was opened to address the narrow issue of cost allocation for QF interconnections subject to the OPUC's jurisdiction. As all parties concede, Ms. Andrus never played an active role in UM 2032.

UM 1930 involves the Community Solar Program and is not a contested case proceeding. While that proceeding involved questions of how generation participating in Oregon's Community Solar Program (by definition, generators with 3 MW or less of capacity) should be interconnected into the systems of existing Oregon utilities, that question is not the same issue presented here because the Commission was responding to specific legislative direction to both encourage Community Solar participation and to minimize costs borne by non-participating customers.¹⁷ In that docket, the Commission did not require testimony or an evidentiary record. Further, although there were a number of Staff Reports submitted in that docket, Ms. Andrus did not sign any of them. And the last Staff Report on which she could have had any influence

¹⁵ The Staff Report and Whitepaper are both appended to Order No. 10-254. The Staff Report was submitted by JP Batmale through Jason Eisdorfer, and was not signed by Ms. Andrus.

¹⁶ Order No. 19-272, *Investigation Into PURPA Implementation*, OPUC Docket No. UM 2000 (August 15, 2019).

¹⁷ ORS 757.386.

before her departure from the OPUC was issued on October 5, 2019, more than a year before her testimony in this case.

In short, UM 2000 is related to this proceeding primarily because UM 2000 decided non-substantive issues – the general issue to be resolved (treatment of network upgrades, although specific issues were not identified until 2020) and timing (that it would be addressed in the near-term). Ms. Andrus’s substantive involvement in UM 2000 ended with the issuance of the August 6, 2019, Staff Report addressing data transparency issues. Thus, even if it could be said that data transparency issues are somehow relevant to this proceeding, Ms. Andrus’s role in addressing those issues ended well more than a year before the testimony submitted in this case. Likewise, Ms. Andrus’s role in UM 1930 ended more than a year before her testimony in this case. The Joint Utilities can point to no evidence, and there is none, demonstrating that Ms. Andrus’s participation in this proceeding as an expert would compromise the Commission’s decision-making in any way.

B. The Joint Utilities’ Reliance on Order No. 01-249 Demonstrates The Fatal Flaws in Their Argument.

The Joint Utilities place heavy reliance on Order No. 01-249,¹⁸ which is the Commission’s sole interpretation of OAR 860-001-330. This reliance fails for a variety of reasons.

Most obviously, the facts at issue in Order No. 01-249 are vastly different than the facts at issue here. There, the Commission’s staff expert on capital issues had actively participated on behalf of the Commission in dockets UE 115 and UE 116, which were contested cases. Only

¹⁸ Order No. 01-249, *In re Portland General Electric Company’s Proposal to Restructure and Reprice Its Services in Accordance With Provisions of SB 1149*, Docket Nos. UE 115 & UE 116 (March 21, 2001).

three weeks after leaving the Commission, the expert sought to testify regarding capital issues on behalf of one of the parties in UE 115 and UE 116 over the objections of Commission Staff. The facts here are the opposite: Ms. Andrus did not appear or substantively participate on behalf of the Commission in UM 2032, her testimony was filed just short of a year after leaving the Commission, UM 2032 was not declared a contested case until months after Ms. Andrus's departure from the Commission, and Staff has registered no objection to her participation on NewSun's behalf.

None of the four factors for interpreting OAR 860-001-330 identified in Order No. 01-249 support barring Ms. Andrus's testimony in this case. The first factor is the employee's prior role at the agency and requires consideration of that employee's access to confidential information and level of responsibility. It is uncontested that Ms. Andrus had no substantive role in UM 2032, and the Joint Utilities can identify no reason that her participation in UM 2000 or UM 1930 gave her access to confidential information that is somehow incorporated into her expert testimony here. Indeed, the Staff Reports authored by Ms. Andrus in UM 2000 are public record. Likewise, the Staff Reports in UM 1930, although not authored by Ms. Andrus, are also public record, which alleviates any concern with respect to public perceptions of her role. And the Joint Utilities identify nothing that would suggest that Ms. Andrus would have outsized influence with Commission staff more than a year after her departure.

The second factor is the type of proceeding. As the Commission made clear in Order No. 01-249, "[f]ormal proceedings that involve specific, identified parties in a contested setting might require more consideration than other dockets, such as generic investigations that involve policy matters." But both UM 2000 and UM 1930 were "generic investigations" involving "policy matters," not formal contested proceedings, and UM 2032 did not become a formal,

contested proceeding until months after Ms. Andrus left the Commission. Indeed, the Joint Utilities base their claim on allowing Ms. Andrus to testify on “the very same policy questions”¹⁹ that Ms. Andrus worked on while at the Commission. But the animating factor for the Commission’s rule is not to prevent former staffers with deep knowledge of policy like Ms. Andrus from testifying at the Commission on the basis of that policy knowledge, but to prevent them from leveraging access to confidential information and staff connections to improperly influence the Commission. Ms. Andrus’s expert testimony in this case relies on her deep knowledge of electricity policy and the physical operation of the electric grid, not on inside information or connections, and the Joint Utilities provide no evidence of any improper influence.

The Joint Utilities also make much of Ms. Andrus testimony where she states an opinion “based on [her] experience as OPUC staff.”²⁰ However, what the Joint Utilities fail to recognize is that these statements are not made based on any inside or secret information she would have obtained solely as a result of her employment but rather, she is making the statements based on her generalized experience gained while employed by the Commission. Notably, in both instances where she uses that phrase, she is expressing an opinion that the regulatory process would be “burdensome” or otherwise present a “hurdle” for a QF, a simple fact that could be stated by anyone who has observed QF-utility disputes before the Commission. Hence, barring Ms. Andrus’s testimony would accomplish nothing other than compromising the Commission’s ability to assemble a comprehensive record to support its decision in this proceeding.

¹⁹ Joint Utilities’ Response at 7.

²⁰ *Id.* at 3.

The third factor is the length of time since the employee's departure. It is undisputed that Ms. Andrus's testimony was submitted just short of a year after she left the Commission. Further, her contributions to Commission policy-making in UM 2000 and UM 1930 occurred even earlier than that. Order No. 01-249 makes clear that the value of insider information and knowledge "dissipates over time as agency personnel change and confidential information becomes irrelevant or stale."²¹ The Order also recognizes that Oregon law provides no "timeframe to serve as a bright line" for identifying improper conduct, but points to the federal rule requiring one year before an ex-employee can appear before his or her former federal agency as a guidepost.²² Because nearly a year passed between Ms. Andrus's last day at the Commission and the submission of her expert testimony in this case, and well more than a year passed between her substantive involvement with any of the issues in this case, Order No. 01-249 provides no basis for forcing Ms. Andrus to withdraw her expert testimony in this case.

On the other hand, the Joint Utilities' argument would, if adopted, bar a former employee from ever testifying on an issue if that employee gained knowledge on the issue while working for the Commission, or at least bar such testimony for a long, but unspecified, period of years. The position makes no sense because the value of an employee's insider knowledge and connections dissipates over time, and the result would be to bar former staff from testifying on a wide range of topics before the Commission, undermining the ability of former staff to earn a living and denying the Commission access to their expertise.

The fourth factor is whether the parties agree to the former employee's appearance. The Commission Staff, which is the key party for identifying any possible abuse, does not object to

²¹ Order No. 01-249 at 5.

²² *Id.* at 4.

Ms. Andrus's participation in this proceeding. The Joint Utilities' opposition should be discounted because they have a direct pecuniary interest in seeing Ms. Andrus's testimony barred. That result will advance their agenda of maintaining Oregon's anomalous QF interconnection policy, which forces QFs to fund upgrades that primarily benefit the utilities, in violation of core tenets of utility and ratemaking policy and in derogation of Oregon's policy of promoting renewable energy resources and rapidly reducing its emissions of greenhouse gases.

3. The Denial of Intervenor Funding Supports Allowing Ms. Andrus To Testify.

As NewSun pointed out, the Commission's decision to deny intervenor funding in this case increases the importance of permitting a robust presentation on behalf of QFs by NewSun and other interested parties. The Joint Utilities profess "not to understand the relationship" between the denial of intervenor funding and the need for NewSun and other participants to present robust support for their position. But the relationship is easy to understand. Without intervenor funding, the burden to make the case for QFs falls on NewSun and allied parties, which are generally small developers whose resources are very limited compared to that of the utilities. If the Commission prevents NewSun from presenting Ms. Andrus's testimony, it will have erected an artificial and unnecessary barrier to creating a full record in this proceeding. And without full information, the Commission risks repeating the mistakes it made when it initially adopted its current QF interconnection policy, which departs from interconnection policies in other jurisdictions, unduly penalizes QF development, and creates a mismatch between the benefits created by Network Upgrades, which accrue to all transmission customers, and the costs of those Upgrades, which are imposed solely on QFs.

4. Denying Ms. Andrus's Right to Testify Is Contrary to The Public Interest.

Given her long experience on PURPA matters during her career at the OPUC, Ms. Andrus has become one of the leading experts on PURPA issues in Oregon. The Commission should encourage the participation of such experts in Oregon proceedings so that the Commission makes fully informed decisions based on the best available expert opinions. The Joint Utilities' position, which is that former OPUC staff should not be permitted to testify based on their experience at the OPUC,²³ would defeat this goal by preventing former OPUC staff from testifying on any matter they worked on at OPUC forever, or at least for a period of many years. It would also undermine the Commission's ability to attract and retain qualified employees because they would, if the Joint Utilities' position is adopted, be needlessly limited in the ways they might put expertise gained while employed by the Commission to use in future employment.

But the rules regarding former employees are not intended to prevent former employees from using the skills, experience, and knowledge gained at the Commission for future employers. Instead, they are designed to prevent the appearance of impropriety that may arise from the perception that former staff are using knowledge and connections unavailable to the public to disadvantage the public. Ms. Andrus's testimony relies on her general experience and knowledge as a former Commission employee, and there is no evidence or even implication that she is attempting to leverage inside knowledge or connections to unduly influence the Commission's deliberations.

In these circumstances, barring Ms. Andrus's testimony is contrary to the public interest because it will deny the Commission access to her considerable expertise in this highly specialized area. In addition, it will discourage and intimidate current Commission Staff, who

²³ Joint Utilities' Response at 3.

may be understandably concerned that the regulated utilities will attempt to limit their future employment prospects using the kind of dubious arguments on display here. This would be an unfortunate outcome at a time when the Commission already struggles to attract and retain qualified employees. Indeed, Ms. Andrus is one of the few former OPUC employees who has gone to work for entities other than the utilities regulated by the Commission. It would be extremely unfortunate for the Commission to send the message that former Commission employees need not apply for work with anyone other than a regulated utility.

III. CONCLUSION

NewSun respectfully requests that the Commission: (1) accept this reply; (2) reject the Joint Utilities' position; and, (3) allow Ms. Andrus to be witness on NewSun's behalf on this case.

Dated this 1st day of December 2020.

Respectfully submitted,

NewSun Energy LLC

/s/ Marie P. Barlow

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November 25, 2020

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Re: UM 2032 –Former PUC Employee Witness

Dear Utility Representatives:

I write on behalf of NewSun Energy LLC (NewSun) to urge Portland General Electric Company (PGE), PacifiCorp, and Idaho Power Company (Idaho Power) to reconsider and retract their unprecedented position that a former Oregon Public Utility Commission (Commission) employee should be excluded from appearing as a witness in any contested case which involves the same subject matter as another uncontested case on which that person previously worked while employed by the Commission.

Your position appears aimed more at depriving the Commission of the benefit of one of the leading experts on PURPA, Ms. Andrus, and aimed at intimidating her by threatening her future employment prospects rather than any genuine issues concerning a violation of Oregon rules concerning former Commission employees. Your claims have no basis in law or fact and simply appear to be a way to chill the participation of parties like NewSun in the regulatory process as well as the ability of non-utility to attract qualified witnesses to present testimony.

Notably, the Commission's rules do not restrict a former Commission employee from appearing as a witness in any future cases merely because that former employee worked on other cases on the same subject matter. The only relevant considerations are whether the former employee

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actively participated in the same contested case and even where they did, the Commission may still give its permission. In this UM 2032 docket, Ms. Andrus took no active role while employed by the Commission as the docket had only just been opened and no substantive activity had occurred. Then Ms. Andrus waited nearly a year before appearing as a witness on behalf of NewSun. She is in compliance with the Commission's rules. Your filing does not dispute these facts.

Rather than focusing on this case at hand, you assert that the very expertise Ms. Andrus gained while employed by the Commission is what prohibits her testimony, i.e., her participation in other uncontested dockets related to PURPA. Such a view would effectively prohibit Ms. Andrus from any ability to make a living. Docket No. UM 2000 in particular involved a host of issues related to PURPA implementation, and your attempt to bootstrap Ms. Andrus' participation in that and other dockets to bar her participation here would mean that she can never appear as a witness in any case related to any PURPA matter, ever. However, this type of thing happens all the time. Former Commission employees are allowed to move around to different jobs. Your position results in an incredibly harsh punishment for any former employee and would significantly chill the ability of the Commission to hire qualified staff. Former employees would not be able to rely on the expertise they developed and experience they gained over their tenure to acquire gainful employment. It is an absurd result and contrary to common sense.

NewSun is extremely disappointed by your position on this matter and for the reasons articulated above, strongly urges you to reconsider that unprecedented position and requests that you promptly withdraw your response to NewSun's motion to allow Ms. Andrus to be a witness in this case.

Sincerely,



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