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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 115 and UE 116

In the Matter of Portland General Electric)
Company's Proposal to Restructure and)
Reprice Its Services in Accordance With the)
Provisions of SB 1149 (UE 115).)

ORDER

In the Matter of PacifiCorp's Proposal to)
Restructure and Reprice Its Services in)
Accordance With the Provisions of SB 1149)
(UE 116).)

DISPOSITION: MOTIONS FOR COMMISSION CONSENT DENIED

Introduction

In UE 115 and UE 116, the Industrial Customers of Northwest Utilities (ICNU) seek an order allowing a former Commission employee, John Thornton, to appear as an expert witness in both dockets. ICNU filed the requests because OAR 860-012-0010(2) provides that:

Except with the Commission's written permission, no former Commission employee shall appear as an expert witness on behalf of other parties in a formal proceeding in which the former employee took an active part on the Commission's behalf.

ICNU requests the Commission to either: (1) determine that consent is unnecessary because Mr. Thornton did not play an active role in these cases; or (2) grant consent to ICNU's use of Mr. Thornton in these proceedings.

Portland General Electric, PacifiCorp, and Staff each filed a response to the motion. PGE and Staff believe that the interpretation of the rule rests with the Commission, and neither advocates how the Commission should decide the matter. PGE, however, raises several concerns about Mr. Thornton's appearance, and Staff disputes ICNU's claim that Mr. Thornton did not have an active role in these cases with the agency. PacifiCorp contends that Mr. Thornton actively participated in UE 115 and UE 116 as a Staff member and objects to his participation as an expert witness for ICNU.

Positions of the Parties

ICNU first contends that Commission consent is unnecessary, because Mr. Thornton did not actively participate in either UE 115 or UE 116. ICNU explains that Mr. Thornton neither prepared Staff's proposed settlement on cost of capital issues, nor prepared testimony. Rather, ICNU maintains that Mr. Thornton only attended meetings and performed functions normally part of his position with the agency.

If Commission consent is necessary, ICNU alternatively contends that the Commission should grant consent because Mr. Thornton's participation in these proceedings is in the public interest. ICNU notes that Mr. Thornton has extensive experience in cost of capital issues, and that his participation will assist the parties and the Commission in evaluating these issues. ICNU adds that Mr. Thornton's participation will not prejudice PGE or PacifiCorp any more than if Mr. Thornton had been a witness for Staff.

Staff disagrees with ICNU's assertion that Mr. Thornton had no active role in developing Staff's analysis in these matters while he was a Commission employee. Staff explains that, before his departure, Mr. Thornton helped another staff member on Capital Asset Pricing Model (CAPM) and Discounted Cash Flow (DCF) analyses in UE 115 and UE 116. Staff adds that, on several occasions, Mr. Thornton advised another staff member on the methods that Staff should employ in this docket to be consistent with past Staff practices. For these reasons, Staff contends that Commission consent is necessary in order for Mr. Thornton to appear.

PGE does not advocate a position, but expresses concern about the perception and timing of Mr. Thornton's appearance for ICNU. PGE notes that, in the recently adopted Internal Operating Guidelines (IOG), the Commission stated that Staff plays a unique role in contested case proceedings. The Commission recognized that, in most instances, Staff is the only participant that does not have a financial stake in the outcome of the case and makes its recommendations to further the public interest. For this reason, the Commission stated that it does not perceive Staff as acting as an advocate, and that advocacy "should be the province of the parties who are asserting the interests of the utilities, customer groups, or others with a financial stake in the proceeding." PGE fears that the Commission might be unable, as a matter of perception, to separate Mr. Thornton's role as an advocate from his prior role as Staff.

With regard to timing, PGE is concerned with Mr. Thornton's quick return to a contested case as a hired expert witness after a long tenure with Staff. PGE notes that Mr. Thornton worked for the Commission for about 13 years and testified on cost of capital in six different PGE dockets. PGE believes that the Commission should require some time to pass before allowing Mr. Thornton to appear as an advocate in a contested case. This additional time, PGE explains, will allow Mr. Thornton's relationship with the Commission to change from that of a collegial, team member to that of an arm's length advocate.

PacifiCorp contends that the Commission should not allow Mr. Thornton to switch sides mid-case and testify for another party in these significant cases. First, PacifiCorp asserts that Mr. Thornton was actively involved as a Staff member in both UE 115 and UE 116. It cites a letter from Staff's counsel indicating that, in addition to attending meetings and writing an analytical memorandum on cost of capital issues for use in both dockets, Mr. Thornton was

engaged in preparing testimony in UE 116. Next, PacifiCorp argues that granting consent to allow his appearance would undermine the policies that OAR 860-012-010 is designed to promote, specifically that of maintaining public confidence in Commission proceedings.

In addition, PacifiCorp contends that, contrary to ICNU's assertions, Mr. Thornton's appearance will prejudice other parties. PacifiCorp states that Mr. Thornton has inside knowledge of Staff's case that might include knowledge of Staff's strengths and weaknesses, as well as settlement ranges that Staff might accept. PacifiCorp claims that Mr. Thornton's use of this information, even indirectly, prejudices PGE and PacifiCorp. Finally, PacifiCorp contends that the Commission cannot grant ICNU's motion without a more detailed record establishing that Mr. Thornton's appearance is in the public interest.

OPINION

We must determine whether consent is necessary for Mr. Thornton to appear as an expert witness for ICNU and, if so, whether to grant that consent under OAR 860-012-0010(2). This inquiry is one of first impression. Although the Commission adopted OAR 860-012-0010 almost 50 years ago, it did so without comment and, to our knowledge, has never formally addressed or interpreted its meaning.¹

Background

While the application of the rule is unclear, its purpose is not. It is well understood that public service is a public trust. The Commission's authorizing statutes grant this agency and its employees with certain powers not available to others. The citizens of Oregon entrust that power to government for the purpose of furthering the public interest. In return, the Commission must ensure that such power will be used only for public good. This involves avoiding not only the fact, but also the appearance, of impropriety.

To avoid the appearance of impropriety, there is a need to regulate problems caused by the "revolving door" between government and private employment. In 1993, a national Committee on Government Standards addressed the issue of post-employment activities and noted:

Someone who has been intimately involved in governmental processes inevitably possesses advantages, flowing from that involvement, which can be used when working for someone other than the government. * * * First, there is knowledge. Without even getting into the issue of truly "confidential" material, an ex-government employee is likely to have a variety of "inside information" and insights about workings of his former employer. Second, there is personal influence. Connections made and relationships established during governmental service may remain sufficiently strong that the individual has special weight with her former colleagues. * * * On issues in which the government functions principally as a referee among competing outside parties,

¹ See Order No. 33203.

the individual may use her knowledge and influence to give one contender an advantage over the other.²

To address this issue at the federal level, Congress enacted the Ethics in Government Act to prevent government employees from engaging in certain post-employment activities. The Act prohibits former employees from representing another person before the employee's former agency. The time period for disqualification varies from a permanent ban to a period of one year, depending upon the nature of the prior employment.³ In Oregon, the legislature enacted the Government Standards and Practices Act to regulate the subsequent employment of public officials. Most notably, ORS 244.045 prohibits a Public Utility Commissioner from appearing as a representative before the Commission for a period of two years after leaving the agency.

OAR 860-012-0010

Unlike the federal act and state law, OAR 860-012-0010 provides no timeframe to serve as a bright line determination of the types of prohibited conduct. Instead, our rule restricts post-employment activities in situations where the former employee "took an active part on the Commission's behalf." The rule itself provides no definition of "active participation," nor does it provide guidance to assist the Commission in determining when consent should be given.

Because neither the rule language nor prior Commission decisions provide guidance for applying OAR 860-012-0010, we take this opportunity to address the important policy considerations that we deem relevant in regulating post-employment activities of our Staff. We believe that the application of the rule requires a careful balancing of competing interests. We must ensure that government power is used for the public good, and at the same time avoid imposing such harsh restrictions so as to limit our ability to attract knowledgeable and skilled employees.

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 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. We believe this liberal construction of OAR 860-012-0010 is necessary to avoid any appearance of impropriety that might arise when an employee leaves the agency during a proceeding and wants to appear on behalf of an outside party.

The more difficult task is determining whether to consent to the appearance of a former employee as an expert witness despite his or her involvement in the case as a Commission employee. After consideration, we believe that such a determination must be made on a case-by-case assessment of all relevant factors. While we decline to identify every possible factor, we address four primary considerations we deem relevant to the application of OAR 860-012-0010.

² Keeping Faith: Government Ethics & Government Ethics Regulation, 45 Admin. L. Rev. 287, 327 (1993).

³ See 18 U.S.C.A. Section 207.

The first factor to consider is the nature of the former employee's prior role with the agency. As reflected in the various disqualification periods set forth in the federal Ethics in Government Act, former employees that held influential positions with the Commission, such as advisory staff, senior managers, or technical experts, might, at least from a matter of perception, have had significant access to inside information of agency matters. This might include access to commercially sensitive information available only to Staff under modified protective orders. Moreover, these former employees with significant responsibilities also might be perceived as being able to carry more weight with former colleagues than less senior employees.

The second factor is the type of proceeding. Formal 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. This inquiry would also examine the significance of the case and the issue on which the former employee seeks consent to testify. Obviously, more significant matters will be subject to a higher level of scrutiny.

Another matter to consider is the length of time that has passed since the former employee left the agency. As noted above, both federal and state law governing the post-employment activities of public officials and employees utilize various time periods for disqualification. The mere passage of time does not automatically eliminate the concerns raised when a former Commission employee appears as an advocate for an outside party. As a practical matter, however, the value of influence and knowledge dissipates over time as agency personnel change and confidential information becomes irrelevant or stale.

The last factor is whether other parties agree to the former employee's appearance. The agreement of other parties to the proceeding will not preclude the Commission from analyzing other factors to determine whether to grant consent under OAR 860-012-0010. Nonetheless, it is an important element to consider and one that reflects the perception of fairness of allowing the former employee to appear in the matter.

Commission Resolution

Turning to the facts at issue, we first conclude that OAR 860-012-0010 is applicable here because Mr. Thornton was actively involved in dockets UE 115 and UE 116. In his affidavit, Mr. Thornton stated that he attended Staff meetings, initiated and reviewed data requests, and advised another Staff member on PGE's cost of debt and preferred stock. He also developed an analytical memorandum on cost of capital for use in UE 115 and UE 116 and, according to a letter from Staff counsel to PacifiCorp, was preparing testimony in UE 116 prior to his departure. We believe that these activities are sufficient to establish that Mr. Thornton actively participated in these dockets as Staff's lead policy witness on cost of capital issues.

We further conclude that ICNU's motions in both dockets should be denied to protect the integrity or perceived fairness of these proceedings. We base this conclusion on several findings that signal the need, at least from a matter of perception, to prohibit Mr. Thornton's ability to appear as an expert witness for another party after his prior involvement in the cases as a Commission employee. First, Mr. Thornton held a substantial role at the Commission. For some 13 years, he served as Staff's expert witness on cost of capital issues and testified in numerous rate cases involving PGE and PacifiCorp. His expertise at the agency is acknowledged by the fact that, after he announced his departure, he was asked to advise other

Staff members on the methods Staff should employ in these dockets to be consistent with past practices.

Second, UE 115 and UE 116 are significant cases involving specific parties and highly contested issues. The restructuring and repricing of services pursuant to SB 1149 will have a significant impact on PGE and PacifiCorp, their ratepayers, and the citizens of Oregon. In addition, cost of capital issues will play a major role in both dockets. PacifiCorp estimates that the combined value of the cost of capital issues in these cases probably exceeds \$100 million.

Third, little time has passed since Mr. Thornton left the Commission. As PacifiCorp notes, ICNU filed its motion for consent in UE 115 only three weeks after Mr. Thornton resigned from his position with the Commission. His departure during the middle of Staff's case to almost immediately become an expert witness for an outside party creates an appearance of impropriety.

Finally, while PGE does not advocate a position on ICNU's requests, the company raises concerns about the perception and timing of Mr. Thornton's appearance as an expert witness for ICNU. PacifiCorp expressly objects to ICNU's motions, because it believes that allowing Mr. Thornton to appear would undermine the policies that OAR 860-012-0010 is designed to promote.

In summary, Mr. Thornton played an active role as a member of Staff in his capacity as lead witness on cost of capital. Given the significance of the dockets, the implication of the issues involved, and the timing of the request, we believe that Mr. Thornton's appearance as an expert witness for an outside party is not in the public interest. ICNU's motion for Commission consent under OAR 860-012-0010 should be denied.

ORDER

IT IS ORDERED that the motions for Commission consent under OAR 860-012-0010, filed by the Industrial Customers of Northwest Utilities, are denied.

Made, entered, and effective _____.

Ron Eachus
Chairman

Roger Hamilton
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.