

**IN THE COURT OF APPEALS OF THE
STATE OF OREGON**

In the Matter of:

PACIFICORP, dba Pacific Power,
Applicant-Respondent,

and

OREGON PUBLIC UTILITY
COMMISSION,
Respondent,

v.

RENEWABLE ENERGY COALITION,
NORTHWEST & INTERMOUNTAIN
POWER PRODUCERS COALITION,
COMMUNITY RENEWABLE ENERGY
ASSOCIATION and OREGON SOLAR
ENERGY INDUSTRIES
ASSOCIATION,
Petitioners,

And

NEWSUN ENERGY, LLC,
Intervenor below.

CA No. A175363

Public Utility Commission of Oregon
Docket No. UM 2108

**PETITIONERS' RESPONSE TO
PACIFICORP'S MOTION-
DETERMINE JURISDICTION**

and

**PETITIONERS' RESPONSE TO
PUBLIC UTILITY COMMISSION'S
MOTION-DETERMINE
JURISDICTION**

I. INTRODUCTION

Petitioners Renewable Energy Coalition, Northwest & Intermountain Power
Producers Coalition, Community Renewable Energy Association, and Oregon Solar

PETITIONERS' RESPONSE TO PACIFICORP'S MOTION-
DETERMINE JURISDICTION and PETITIONERS' RESPONSE TO
PUBLIC UTILITY COMMISSION'S MOTION-DETERMINE
JURISDICTION

Energy Industries Association provide this response to the Motions to Determine Jurisdiction filed by PacifiCorp dba Pacific Power (“PacifiCorp”) and the Public Utility Commission (the “PUC”).

Petitioners oppose the Motions to Determine Jurisdiction, which both assert that the circuit court—and not this Court—has jurisdiction over this matter. (PacifiCorp’s Mot. to Determine Jurisdiction at 1-2; PUC’s Mot. To Determine Jurisdiction at 1.). Although Petitioners are prepared to proceed in either venue, this Court should conclude that it has jurisdiction.

II. ARGUMENT

Petitioners agree that jurisdiction to review the PUC orders properly resides in this Court when the underlying proceeding was a contested case. ORS 183.482(1).

Petitioners also agree that when the underlying proceeding was a proceeding “other than a contested case”, jurisdiction properly resides in the circuit court. ORS 183.484.

Because there is a good faith basis to conclude jurisdiction could exist in either venue and PacifiCorp’s position on the matter was previously unknown, Petitioners filed a petition for judicial review with this Court and the Circuit Court for Marion County. *See* Pet. For Judicial Review at ¶ 14, Filed Jan. 29, 2021, Case No. 21CV03740.

Although the PUC treated the underlying proceeding, Docket No. UM 2108, as a proceeding other than contested case, the agency’s actions are not dispositive as to a court’s jurisdiction. *See G.A.S.P. et. al. v. Env’t Quality Comm’n*, 198 Or App 182, 188,

108 P3d 95 (2005). Even where the agency fails to provide contested case procedures, this Court “has jurisdiction if a proceeding meets the definition of a ‘contested case’ under any part of ORS 183.310(2).” *Patton v. State Bd. of Higher Educ.*, 293 Or 363, 366, 647 P2d 931 (1982).

Most pertinent here, a “contested case” includes a proceeding where “the agency has discretion to suspend or revoke a right or privilege of a person.” ORS 183.310(2)(a)(B). “The starting point for determining whether an interest amounts to a ‘right’ or ‘privilege’ for purposes of ORS 183.310 is the defining source, not ORS 183.310 itself.” *Berry v. Metro Elec. Joint Apprenticeship & Training Comm.*, 155 Or App 26, 30, 963 P2d 712 (1998). For example, in *Berry*, the petitioner’s interest in a probationary apprenticeship terminated by an agency did not rise to the level of either a right or a privilege because it was “terminable without cause[.]” *Id.* at 30-31. But an interest in a non-probationary apprenticeship is a right or privilege where it is terminable only for “good cause.” *Id.* at 31 (citing *Fairbanks v. Bureau of Labor and Indus.*, 323 Or 88, 913 P2d 703 (1996)). Likewise, a proceeding to revoke a student’s privilege to attend a university is considered a contested case under ORS 183.310(2)(a)(B). *Morrison v. Univ. of Or. Health Sciences Cent.*, 68 Or App 870, 872, 685 P2d 439 (1984).

Here, the PUC exercised discretion to alter rights or privileges within the meaning of ORS 183.310(2)(a)(B). The PUC orders on review arose from a proceeding that effectively suspended or revoked the rights or privileges of renewable energy developers

in PacifiCorp's serial interconnection queue at the time of the order. As explained below, developers in the serial interconnection queue at the time of PacifiCorp's application, on June 15, 2020, had existing rights under administrative rules, PUC orders, and executed contracts (interconnection study agreements) to proceed through that process, and those rights could not be revoked without the PUC exercising its discretion.

The pre-existing serial queue process entitled these developers to obtain up to three progressive interconnection studies on the cost and feasibility of interconnecting their proposed generator to PacifiCorp's electric system, referred to as the feasibility study, system impact study, and the facilities study. *See* OAR 860-082-0060 (describing the Tier 4 interconnection process for generators 10 MW or less, which PacifiCorp's queue reform replaced); *In re Pub. Util. Comm'n of Or. Investigation into Interconnection of PURPA Qualifying Facilities*, PUC Docket No. UM 1401, Order No. 10-132, App. A (Apr. 7, 2010), available at <https://apps.puc.state.or.us/orders/2010ords/10-132.pdf> (procedures previously applicable to large generators over 20 MW). After completing applicable studies, the rules required PacifiCorp to tender a generator interconnection agreement to outline the utility and interconnection customer's interconnection construction duties. OAR 860-082-0025(7)(e); PUC Docket No. UM 1401, Order No. 10-132, App. A at 32-33.

The pre-existing administrative rules and Commission Order No. 10-132, as well as study agreements executed by PacifiCorp and each applicant, established the costs

assessed to the interconnection customers and deadlines for the studies to be completed by PacifiCorp. *E.g.*, OAR 860-082-0060; PUC Docket No. UM 1401, Order No. 10-132, App. A at 24-25, 53-56 (Feasibility Study Agreement provisions and form). Under these pre-existing rules, the interconnection customer could enter the interconnection queue by applying and paying the applicable fee at any time and progress through the process to completion by following the deadlines and paying PacifiCorp to perform the studies therein. OAR 860-082-0025(3)(a) (requiring payment of a \$1,000 fee for Tier 4 interconnection applications to commence interconnection process); PUC Order No. 10-132, App. A at 16 (requiring \$10,000 deposit for large generator's application).

Additionally, a key feature of the serial queue process is the priority rights of the interconnection customers ahead of other customers in the interconnection queue. Each customer accepted into the queue possessed priority rights based on the time it entered the queue and would not be assigned the interconnection upgrade costs associated with generation facilities that subsequently entered the queue. *See* OAR 860-082-0015(29) (defining "queue position"); OAR 860-082-0060(6)(e) & (7)(f) (studies of costs assigned to interconnection customer consider only higher queued generators, not lower queued customers, in determining adverse system impacts caused interconnection customer).

However, in the UM 2108 proceeding below, the PUC approved of a new Cluster Study process for state-jurisdictional interconnections to PacifiCorp's electric system. The PUC exercised its discretion to make the new Cluster Study process applicable even

to many interconnection customers who were already engaged in the prior serial queue interconnection process.¹ As a result of the PUC’s Order No. 20-268, only interconnection customers who executed a facilities study agreement by April 30, 2020, were allowed to continue within the serial queue process and executed study agreements therein. *In re PacifiCorp, Appl. For an Order Approving Queue Reform Proposal*, PUC Docket No. UM 2108, Order No. 20-268 at 1 (Aug. 19, 2020). Interconnection customers who were not as far along in the process lost their priority right to proceed through the study process in advance of lower queued customers, even if they had already incurred costs and entered into feasibility or system impact study agreements before April 30, 2020, or even facilities study agreements after April 30, 2020. *See id.* at App. A, pp. 3, 6 (describing the change from a “first come, first served serial queue” to a “first ready, first served Cluster Study process”). In other words, as a result of the PUC’s UM 2108 orders, PacifiCorp no longer has to fulfill its contractual obligations with some

¹ The PUC directed PacifiCorp to provide a new set of interconnection rules that would replace the previously effective process for Tier 4 interconnections in OAR Chapter 860, Division 82 rules and large generator interconnections previously governed by PUC Order No. 10-132, which PacifiCorp did through its UM 2108 compliance filing. *See* PUC Docket No. UM 2108, Order No. 20-268 at 2; PUC Docket No. UM 2108, PacifiCorp's Compliance Filing per Order No. 20-268, Small Generator Interconnection Procedures (SGIP) for Oregon-jurisdictional generators that are 20 MW or less and Large Generator Interconnection Procedures for Oregon-jurisdictional generators greater than 20 MW (LGIP) (Aug. 31, 2020), available at <https://edocs.puc.state.or.us/efdocs/HAD/um2108had153615.pdf>.

interconnection customers that had paid interconnection application fees and even entered into certain fully executed interconnection study agreements.

Instead, the PUC orders force such entities to start over in the new Cluster Study process. Indeed, the purpose of PacifiCorp's application included its intent "to clear the backlog of non-commercially ready interconnection requests" from the serial queue in a manner that existing administrative rules and procedures would not allow. PUC Docket No. UM 2108, Order No. 20-268, App. A at 9. The PUC Staff Report appended to the order acknowledges "a small number of existing interconnection applicants in Oregon will be directly impacted by the Oregon Commission's decision." *Id.* at 10, 35-36 (listing existing interconnection customers who had applied and entered the serial queue and would thus be impacted by PacifiCorp's proposal to transition to a Cluster Study process). Thus it was well-understood that the very purpose of the proceeding was to force some developers to either move from an existing process into a new process or else abandon their projects, which altered their rights or privileges under their contracts and/or PUC rules and policies.

Further, the PUC applied a "good cause" standard in deciding whether to waive applicable administrative rules, policies, and study agreements under which those existing interconnection customers had invested time and money to participate. *Id.* at 2 (asserting that "Commission may grant a waiver of any of the Division 82 rules for good cause shown"); OAR 860-082-0010(1) (allowing PUC to grant waiver or rules for good

cause). Thus, the PUC appeared to acknowledge it could not simply suspend or revoke the rights or privileges of existing interconnection customers without any exercise of discretion, and indeed it exercised discretion within the meaning of ORS 183.310(2)(a)(B) in rendering its decision. *See Berry*, 155 Or App at 31 (application of the good cause standard is an exercise of discretion when revoking existing rights).

Focusing on ORS 183.310(2)(a)(A), PacifiCorp incorrectly suggests that no person has been or is being harmed by the PUC's orders upon which Petitioners seek judicial review. Even if PacifiCorp is correct that the facts of this case do not justify a right to a contested case hearing under the Procedural Due Process Clause, as would also implicate ORS 183.310(2)(a)(A),² PacifiCorp overstates the case to assert that no harm exists and no rights were impaired. PacifiCorp claims that "the orders from UM 2108 do not implicate Petitioners' (or anyone's) existing rights" and that "Petitioners' statements in support of this petition do not indicate that the orders in UM 2108 deprived them or their members of existing rights and instead contend only that the orders will impact them and their members in the future." (PacifiCorp's Mot. to Determine Jurisdiction at 11-

² *See, e.g., Mathews v. Eldridge*, 424 US 319, 335, 96 S Ct 893, 47 L Ed 2d 18 (1976) (holding that the Procedural Due Process Clause requires consideration of the private interest affected, the risk of an erroneous deprivation of such interest through the procedures used, and the burden on the government of substitute procedural requirements).

12.). That “future” is already occurring, and Qualifying Facilities (“QFs”)—which include Petitioners’ members—are being harmed currently.

This truth is evident in the record of this proceeding and in a subsequent complaint proceeding filed against PacifiCorp regarding its actions as a direct result of the PUC’s Orders in this case. In UM 2108, a QF named Dalreed Solar, LLC (“Dalreed Solar”) sought rehearing or reconsideration on multiple issues, including whether the PUC’s Order No. 20-268 meant that PacifiCorp no longer needed to honor its obligations under a fully executed interconnection feasibility study agreement. PUC Docket No. 2108, Dalreed Solar, LLC’s Appl. for Reh’g and Recons. and/or Req. for Waiver at 5 (Sept. 14, 2020), available at <https://edocs.puc.state.or.us/efdocs/HAG/um2108hag171623.pdf>.³

In Order No. 20-334, the PUC denied rehearing or reconsideration to Dalreed Solar, effectively concluding that PacifiCorp did *not* need to honor those contractual obligations. PUC Docket No. 2108, Order No. 20-334 at 1, available at <https://apps.puc.state.or.us/orders/2020ords/20-334.pdf>. Thus, Dalreed Solar, and any similarly situated interconnection customer, will not receive its contracted-for feasibility study and no longer has a basis to demand the same be supplied by PacifiCorp. The

³ Although Dalreed Solar’s executed feasibility study agreement was not filed in the UM 2108 proceeding, it was filed and is available in Dalreed Solar’s complaint proceeding. *Dalreed Solar v. PacifiCorp*, PUC Docket No. 2125, Dalreed Solar’s Motion for Summary Judgment, Att. B at 13-16 (Jan. 4, 2020), available at <https://edocs.puc.state.or.us/efdocs/HAO/um2125hao1709.pdf>.

revocation of Dalreed Solar's interconnection study rights provides a concrete example of the contractual study rights revoked by the PUC's orders on review.

Although impairment of pre-existing rights under interconnection studies and study agreements is not the focus of the issues Petitioners pled in their petition filed in the circuit court, that aspect of the proceeding is relevant for purposes of determining the proceeding below included the PUC's exercise of discretion in revoking a right or privilege under ORS 183.310(2)(a)(B). Accordingly, the proceeding was a contested case, and this Court has jurisdiction over the petition for review.

III. CONCLUSION

For the reasons stated above, the Court should conclude that it has jurisdiction because the proceedings below met the definition of contested case in ORS 183.310(2)(a)(B).

Dated this 10th day of March 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **PETITIONERS' RESPONSE TO PACIFICORP'S MOTION-DETERMINE JURISDICTION and PETITIONERS' RESPONSE TO PUBLIC UTILITY COMMISSION'S MOTION-DETERMINE JURISDICTION** on all of the following:

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- Mailing, by placing the copy in a postage prepaid sealed envelope addressed to the attorney's or other person's last known address as shown above and deposited with the U.S. Postal Service at Portland, OR by registered or certified mail.
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I further certify that I served a copy of the foregoing **PETITIONERS' RESPONSE TO PACIFICORP'S MOTION-DETERMINE JURISDICTION and PETITIONERS' RESPONSE TO PUBLIC UTILITY COMMISSION'S MOTION-DETERMINE JURISDICTION** on all of the following:

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DATED this 10th day of March 2021.

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CERTIFICATE OF FILING

I certify that I filed the foregoing **PETITIONERS' RESPONSE TO PACIFICORP'S MOTION-DETERMINE JURISDICTION** and **PETITIONERS' RESPONSE TO PUBLIC UTILITY COMMISSION'S MOTION-DETERMINE JURISDICTION** with the Appellate Court Administrator via the Oregon Appellate Court eFiling system.

DATED this 10th day of March 2021.

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