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 AND INTERMOUNTIAN POWER PRODUCERS COALITION, OREGON SOLAR ENERGY INDUSTRIES ASSOCIATION and COMMUNITY RENEWABLE ENERGY ASSOCIATION,

Petitioners,

and

NEWSUN ENERGY, LLC,

Intervenor Below.

Agency No. UM2108

Appellate Court No. A175363

AMENDED REPLY - DETERMINE JURISDICTION

The Public Utility Commission ("PUC") and PacifiCorp have each filed motions asking this court to determine that the circuit court, and not this court, is the appropriate venue in which to decide whether the orders on review are lawful. Petitioners have now responded, asserting that a contested case proceeding was required, and that this court therefore has jurisdiction. Because the PUC was entitled to make its decision through a public hearing process that

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did not include a contested case hearing, this court lacks jurisdiction. PUC's motion should be granted.

A. Introduction and Background

Petitioners seek judicial review of a final order and final order on reconsideration issued by the Oregon Public Utility Commission (PUC). Those orders approved PacifiCorp's application to modify the procedures used to process applications by certain electricity generators to connect to PacifiCorp's transmission system. PacifiCorp's application is referred to as the "Queue Reform Proposal."

Petitioners assert the PUC deprived certain electricity generators of their "right" to have their applications to interconnect to PacifiCorp's transmission system processed pursuant to the interconnection procedures in effect before the PUC approved PacifiCorp's proposed Queue Reform Proposal. *Response*, pp. 2-3. Petitioners argue that because the PUC "ha[d] discretion to suspend or revoke a right or privilege of a person," the underlying proceedings were a contested case under ORS 183.310(2)(a)(B). *Id.* Because the electricity generators had no "right or privilege" that could be impacted, a contested case was not required.

The Queue Reform Proposal relates to the way in which PacifiCorp reviews applications from other electricity generators to interconnect to its

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transmission system. The Large Generator Interconnection Procedures (LGIP) and Small Generator Interconnection Procedures (SGIP) previously in place specify that a public utility reviews a generator's request to interconnect by determining whether the proposed interconnection and additional energy flow would have adverse impacts on the safety and reliability of the public utility's system (the "system impact study"). OAR 860-082-0060(7); *Order* 10-132, App. A., p. 27.[1] When it conducts this study, the public utility assumes its electrical system includes the energy of and facilities necessary to interconnect all interconnection applicants who had already applied to interconnect but were not yet interconnected. *Id*. If the system impact study shows the interconnection would adversely impact the safety and reliability of the system, the utility identifies what equipment and facilities the interconnection customer would be required to pay for in order to safely interconnect to the public utility's electric system (the "facilities study"). OAR 860-082-0060(8); *Order* 10-132, App A., pp. 28-29. Once those studies are complete, the interconnection customer

[1] This order relates to Standard Interconnection Procedures and Agreements Adopted for Large Qualifying Facilities, and may be found at https://apps.puc.state.or.us/orders/2010ords/10-132.pdf (last visited March 24, 2021).

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must agree to pay the costs of interconnection, including the cost of additional equipment and facilities, in order to interconnect. *Id*.

Under the cluster study process in the Queue Reform Proposal, PacifiCorp studies interconnection applicants in clusters divided into electrically relevant areas. PacifiCorp determines the interconnection and system facilities necessary to interconnect all the applicants in a particular cluster and allocates the costs of the facilities to the applicants based on their relative size and other factors. *Order* 20-268, App. A., pp. 7-10.

As is further explained below, petitioners and their constituent electrical generators had no legal right to participation in the previous process, no right to a contested case hearing, and no right to review in this court.

B. "Contested Case" as Defined in ORS 183.310

ORS 183.310(2) describes the circumstances under which a contested case proceeding is required. As relevant here, subsection (2)(a)(B) provides for a contested case where the agency has discretion to suspend or revoke a right or privilege of a person. "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).

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The defining source as to whether any person had a "right" to have their interconnection application processed with certain procedures is the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 824a-3. The PUC's authority over the interconnections at issue arises from PURPA and the regulations implementing that statute adopted by the Federal Energy Regulatory Commission (FERC). 16 U.S.C. § 824a-3; 18 C.F.R. §§ 292.301-.314. PURPA requires states to implement FERC regulations designed to promote the purchase and sale of electricity from and to generating resources that are "qualifying facilities." 16 U.S.C. § 824a-3(f). Included in the FERC regulations the PUC must implement are regulations directing states to allocate costs of interconnection between public utilities and qualifying facilities seeking to interconnect to transmission systems. 18 C.F.R. §§ 292.306, .308.

PURPA specifies the procedures states must use when implementing FERC regulations: "(1) Beginning on or before the date one year after any rule is prescribed by the [FERC] under subsection (a) or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority." 16 U.S.C. § 824a-3(f). What is meant by the requirement for a "public hearing" in a federal statute depends on the intent of congress. See e.g., *Buttrey v. U.S.*, 690 F.2d 1170, (5th Cir. 1982).

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Nothing in PURPA suggests Congress intended to impose strict procedural requirements on states when implementing PURPA. Rather, the statute grants the states discretion to determine the process that should be used.

In a 1982 opinion, the Supreme Court noted FERC had given states considerable latitude with respect to implementing FERC's PURPA regulations as required under 16 U.S.C. § 824a-3(f):

> Pursuant [16 U.S.C. § 824a-3], FERC has adopted regulations relating to purchases and sales of electricity to and from cogeneration and small power facilities. See 18 CFR pt. 292 (1980); 45 Fed.Reg. 12214-12237 (1980). These afford state regulatory authorities and nonregulated utilities latitude in determining the manner in which the regulations are to be implemented. *Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules*.

FERC v. Mississippi, 456 U.S. 742, 75, 102 S.Ct. 2126, 2133, 72 L.Ed.2d 532 (1982) (emphasis added). The Supreme Court's observation that states may take any action reasonably designed to give effect to FERC's rules is inconsistent with the conclusion Congress intended to require states to conduct contested case hearings to implement PURPA. *Id*.; *See also Independent Energy Producers Ass'n. v. California Public Utilities Com'n*, 36 F.3d 848, 856 (1994) ("PURPA delegates to the states broad authority to implement section 210 of the statute.") (italics omitted). Nothing in

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PURPA requires that states use hearings in the nature of contested case hearings.

The PUC has previously concluded it was not required by PURPA or any Oregon statute to use contested case procedures to implement FERC's regulations. When adopting the Large Generator Interconnection Procedures (LGIP) in 2010, the PUC concluded that PURPA and the state statutes implementing PURPA do not require the PUC to hold hearings with contested case-like procedures before approving utility filings implementing Oregon's LGIP:

> We recently concluded that avoided cost rates, which must be filed with and approved by this Commission, are not tariffs subject to the filing and suspension requirements imposed by ORS 757.205, et seq. Rather, we concluded that the avoided costs rates were subject to a separate statutory scheme set forth in 758.505 to 758.555, implementing PURPA. Although the Commission must review and approve the rate filings, the legislature has not mandated an investigation or hearing to determine the reasonableness of those rates.
>
> We reach a similar conclusion here. The standardized procedures and agreements should be filed with the Commission for approval under our PURPA mandate, not as tariffs subject to suspension and investigation. We adopt the alternative language proposed by the Utilities.

Order 10-132, App. A., pp. 4-5. Similarly in this case, the PUC reasonably concluded the "notice and opportunity for a public hearing" the PUC must provide when implementing FERC regulations (i.e., approving

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the Queue Reform Proposal) was satisfied with the notice of a public meeting and the two-day public meeting held by the Commission at which it considered stakeholders' written and oral comments regarding PacifiCorp's Queue Reform Proposal. The final order was the culmination of that proceeding.

C. PUC's rules and orders do not require a contested case.

Under ORS 183.310(2)(a)(D), a contested case is required when an agency's rules or order require a hearing of that character. Petitioners argument that the PUC's previous orders and rules require a contested case is not well taken, for the reasons that follow.

Petitioners attempt to argue the "defining source" of their "right" to a contested case hearing is the PUC's order adopting the Large Generator Interconnection Procedures and rules with the Small Generator Interconnection Procedures (SGIP). *Petitioners Response to Public Utility Commission Motion-Determine Jurisdiction,* pp. 2-5. As noted above, the defining source for purposes of determining what type of "public hearing" is required is actually PURPA and FERC's regulations, not PUC's previous order and rules. Further, petitioners' interpretation of the PUC's previous order and rules is flawed.

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Under the cluster study process in the Queue Reform Proposal, PacifiCorp studies interconnection applicants in clusters divided into electrically relevant areas. PacifiCorp determines the interconnection and system facilities necessary to interconnect all the applicants in a particular cluster and allocates the costs of the facilities to the applicants based on their relative size and other factors. *Order* 20-268, App. A., p. 10.

Petitioners argue that interconnection applicants that submitted their applications prior to the time PacifiCorp submitted its application for approval of its Queue Reform Proposal had a right to have their applications studied and costs of interconnection assigned in serial order based on the date of the applications (aka based on queue position). This is incorrect.

First, the LGIP adopted in 2010 for generators 20 MW and larger expressly authorizes PacifiCorp to conduct clustered system impact studies rather than serial system impact studies. *Order* 10-132, App. A., p. 20 ("At Transmission Provider's option, Interconnection Requests *may be studied serially or in clusters* for the purpose of the Interconnection System Impact Study."). The LGIP also expressly provides the "Transmission Provider may allocate the cost of common upgrades for clustered Interconnection Requests without regard to Queue Position." *Id.*

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Second, the Commission had not previously adopted specific interconnection procedures for generators greater than 10 MW and smaller than 20 MW. Accordingly, petitioners are wrong that these generators had a "right" to any particular interconnection procedures.

Third, the rules adopting SGIP do not create a right to have interconnection applications studied in serial order based on queue position. Any of the rules in OAR 860, div. 082 could be waived for good cause. OAR 860-082-0010(1). The rule requires only that the request for waiver be in writing. The Queue Reform Proposal contains such a request for waiver. The rule does not specify that the Commission must hold a contested case hearing before finding good cause for a waiver, or otherwise create a "right" to those procedures.

Finally, petitioners' argument that the Commission's order revoked contractual rights is unfounded. Petitioners are associations and are not interconnection customers themselves and had no rights, contractual or otherwise, at issue. Although they represent a wide swath of potential generators, they were not able to identify any interconnection applicant with a contractual right revoked by the underlying orders.

In summary, petitioners have not established the PUC was required to hold a contested case proceeding before allowing PacifiCorp to change how it

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processed interconnection applications. The PUC did not revoke rights of persons that had interconnection applications pending at the time of the change. If there was a right at issue, it was defined by PURPA and was the right to notice and a public hearing before the PUC modified how it implemented PURPA. The PUC provided that notice and hearing.

CONCLUSION

Petitioners are incorrect that the underlying proceeding was a contested case proceeding. Accordingly, this court lacks jurisdiction to review this matter, and the petition for judicial review should be dismissed.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on April 2, 2021, I directed the original Amended Reply - Determine Jurisdiction to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Irion A. Sanger, attorney for petitioners; Gregory M. Adams, attorney for petitioner; Anna Marie Joyce and Dallas Steven DeLuca, attorneys for respondent; using the court's electronic filing system.

I further certify that on April 2, 2021, I directed the Amended Reply - Determine Jurisdiction to be served upon Karen Kruse and Adam Lowney, attorneys for respondent, and Joni Sliger, attorney for petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

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