

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

and

NEWSUN ENERGY, LLC,
Intervenor below.

Public Utility Commission of Oregon No. UM2108

Court of Appeals No. A175363

ORDER DETERMINING JURISDICTION; DISMISSING JUDICIAL REVIEW

Respondent Public Utility Commission (PUC)'s motion for leave to file an amended reply, which is unopposed, is granted. The court has considered the amended reply in ruling on the motions at issue in this order.

Respondents PacifiCorp and PUC each move for a determination of jurisdiction and argue that the PUC order at issue in this judicial review (arising from PUC Docket No. UM 2108) is an order in other than a contested case, and, therefore, jurisdiction for judicial review is with the circuit court. Petitioners respond that this is a contested case proceeding and, therefore, this court has jurisdiction over the judicial review. For the reasons explained below, the court determines that the proceeding is other than a contested case. Therefore, under ORS 183.484, jurisdiction for judicial review of the PUC order at issue is with the circuit court. Accordingly, this judicial review is dismissed.¹

¹ ORS 14.165(2)(a) provides that, if an action or other proceeding against a public body is filed in the Court of Appeals, but this court does not have authority to decide the case, the court shall "[t]ransfer the case to the court or tribunal authorized by law to decide the case if the Court of Appeals determines that another court or tribunal is authorized by law to decide the case." However, because petitioners have also filed a

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The relevant facts are as follows. PacifiCorp is a public utility company that, on a national level, is regulated by the Federal Energy Regulatory Commission (FERC) and, on a state level, by PUC. PacifiCorp receives connection requests from electricity generators, otherwise known as "qualifying facilities," to connect to PacifiCorp's transmission or distribution systems. In 2020, PacifiCorp applied for and received approval from FERC to make changes to its system for processing connection requests. After receiving approval from FERC, PacifiCorp sought similar approval from PUC by means of an "Application for an Order Approving Queue Reform Proposal." The proposal included, among other things, a request that PUC grant PacifiCorp a waiver from various administrative rules which provide that PacifiCorp must respond to connection requests in the order that they are received--the "serial process." PacifiCorp sought waiver because, under the serial process, its system became backlogged; in order to process connection requests more efficiently, PacifiCorp sought to respond based not on a "first received, first served" basis, but, instead, on a "first ready (to connect), first served" basis--the "cluster process." PUC did not hold a contested case hearing but, rather, gave notice that it would hold two public workshops regarding PacifiCorp's proposal. At a public meeting on August 12, 2020, PUC decided to adopt PacifiCorp's proposal; it later issued an order granting PacifiCorp's application (Order No. 20-268). Petitioners timely sought reconsideration of that order and PUC ultimately denied reconsideration and memorialized its decision in Order No. 20-465. Order No. 20-465 states,

"A party may request rehearing or reconsideration of this order under 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 860-001-0720. * * * A party may appeal this order by filing a petition for review with the Circuit Court for Marion County in compliance with ORS 183.484."

Petitioners filed petitions for judicial review of Order Nos. 20-268 and 20-465, in both this court and Marion County Circuit Court.

Pursuant to ORS 138.482(1), "[j]urisdiction for judicial review of contested cases is conferred upon the Court of Appeals." However, under ORS 183.484(1), jurisdiction for "judicial review of orders other than contested cases is conferred upon the Circuit Court for Marion County and upon the circuit court for the county in which the petitioner resides or has a principal business office." Thus, whether this court has jurisdiction over the judicial review proceedings depends on whether this is a contested case. "Deciding whether a proceeding is a contested case does not depend on the kind of hearing the

petition for judicial review of the PUC order in Marion County Circuit Court Case Number 21CV03740, it appears that no purpose would be served by transferring this judicial review to the circuit court.

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agency actually conducted; the appropriate analysis is whether the proceeding qualified as a contested case under the APA." *Oregon Env. Council v. Oregon State Bd. of Ed.*, 307 Or 30, 38, 761 P2d 1322 (1988).

"A proceeding is a contested case if it satisfies one of four definitions set forth in ORS 183.310(2)(a) and does not fall within the definitional exception in ORS 183.310(2)(b)." *Rooklidge v. DMV*, 217 Or App 172, 178, 174 P3d 1120 (2007), *rev den*, 345 Or 94 (2008). A contested case includes an agency proceeding in which "the agency has discretion to suspend or revoke a right or privilege of a person." ORS 183.310(2)(a)(B). Petitioners argue that this case falls into that category; that is, they argue that, here, PUC, in the proceedings below, had discretion to suspend or revoke a right or privilege of a person. In particular, they assert 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." According to petitioners, by issuing Order No. 20-268, PUC has prevented qualifying facilities from having control over the timeline through which they may obtain rights through contracts with PacifiCorp, thereby suspending or revoking the rights of those qualifying facilities. Simply put, petitioners' purported right is the right of interconnection customers to have their interconnection requests processed under the serial process. Thus, the issue the court must resolve is if interconnection customers have a right to process their interconnection requests under the serial process, then whether, through the UM 2108 proceedings, PUC had discretion to suspend or revoke that right.

"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 Electrical Joint Apprenticeship*, 155 Or App 26, 30, 963 P2d 712 (1998). The "defining source" is the rule of law that establishes the purported right or privilege at issue. Petitioners identify the defining sources as Order No. 10-132 from PUC Docket No. UM 1401 and OAR 860-082-0060. Through Order No. 10-132, PUC adopted various procedures regarding large generator interconnections. OAR 860-082-0060 sets forth procedures regarding small generator interconnections. Thus, the court turns to whether Order No. 10-132 and OAR 860-082-0060 confer rights on petitioners.

Order No. 10-132 explicitly provides that transmission providers, such as PacifiCorp, may study interconnection requests serially or in clusters, and may allocate the costs of interconnection requests without regard to queue position. Thus, PacifiCorp was entitled to deploy either the serial process or the cluster process to interconnection requests, and although it chose to deploy the serial process for a period of time, it was not required to do so, as related to Order No. 10-132. For that reason, Order No. 10-132 does not confer the right petitioners assert.

The court next turns to whether OAR 860-082-0060(3) confers the right to have interconnection requests processed under the serial process. That rule provides that, "[i]n addition to the timelines and requirements in OAR 860-082-0025, the timelines and

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requirements in sections (5) through (12) of this rule apply to Tier 4 interconnection reviews." Unlike Order No. 10-132, the timelines and requirements referred to in OAR 860-082-0060(3) do impose timing mandates on transmission providers such as PacifiCorp. However, even assuming that those mandates confer rights related to those timelines and requirements on interconnection customers, the court determines that PUC does not have discretion to "suspend or revoke" those rights and, therefore the UM 2108 proceedings do not constitute contested case proceedings under ORS 183.310(2)(a)(B).

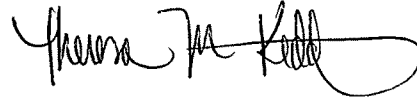
As noted, even assuming OAR 860-082-0060(3) confers the right that petitioners' assert, in order for the UM 2108 proceedings to constitute a contested case under ORS 183.310(2)(a)(B), PUC must have had discretion to "suspend or revoke" interconnection customers' purported right to have their connection requests processed under the serial process. Petitioners argue that, because PUC is authorized to waive OAR 860-082-0060 for good cause, and because that rule entitles qualifying facilities to have their connection requests processed within certain timelines, waiver of that rule is akin to suspending or revoking the right to those timelines. See OAR 860-082-0010(1) (authorizing PUC to "waive any of the Division 082 rules for good cause shown"). However, PUC's ability to waive one of its own rules for good cause is not equivalent to "discretion to suspend or revoke the rights" of qualifying facilities.

In *Berry v. Metro Electrical Joint Apprenticeship*, the court held that a nonprobationary apprenticeship that may only be terminated for "good cause" would trigger the contested case requirements of the APA pursuant to ORS 183.310(2)(a)(B). 155 Or App at 30-31. The court explained, "Because of that 'good cause' standard, a nonprobationary apprentice does have a right or privilege in continuing with the apprentice program and any dismissal triggers the contested case requirements of the APA." *Id.* at 31. Petitioners analogize to *Berry* to support their argument that the "good cause" standard that PUC must meet in order to waive a Division 082 rule ultimately confers a right on interconnection customers to have their interconnection requests processed under the serial process. Yet, "waiver" as to PacifiCorp is not synonymous with "suspension" or "revocation" as to qualifying facilities. By waiving OAR 860-082-0060 as to PacifiCorp, PUC is not directly suspending or revoking any right of the qualifying facilities; it is allowing PacifiCorp to not be bound by the rule's many requirements, and PacifiCorp's choices in light of that waiver do not amount to PUC's "discretion to suspend or revoke a right." In *Berry*, the "good cause" standard related to the agency's discretion to terminate the right itself. Here, although PUC's waiver may indirectly, ultimately impact petitioners' rights, that result does not meet the definition of "contested case" under ORS 183.310(2)(a)(B). PUC must have "discretion to suspend or revoke a right or privilege"--not discretion to take action that may indirectly, ultimately impact a right or privilege. Accordingly, it appears that PUC did not have discretion to suspend or revoke the right at issue in this case, and, therefore, the court concludes that the UM 2108 proceedings do not constitute a contested case under ORS 183.310(2)(a)(B).

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In sum, because, in this case, PUC did not have discretion to suspend or revoke a right, the proceedings underlying this judicial review do not meet the definition of contested case proceedings under ORS 183.310(2)(a)(B). Instead, the proceedings are other than a contested case. Accordingly, jurisdiction over this judicial review lies with the circuit court and, because petitioners have already filed a petition for judicial review in Circuit Court Case Number 21CV03740, and state that they are "prepared to proceed" with judicial review in the circuit court, this judicial review is dismissed.



HERESA M. KIDD
APPELLATE COMMISSIONER
6/17/2021 12:43 PM

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

Costs: No costs allowed

c: Karen Kruse
Adam Lowney
Irion A Sanger
Joni Sliger
Gregory M Adams
Anna Marie Joyce
Dallas Steven DeLuca
Stephanie S Andrus
Denise G Fjordbeck

ej

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