

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2108

In the Matter of

PACIFICORP d/b/a PACIFIC POWER

Application for an Order Approving Queue
Reform Proposal.

THE INTERCONNECTION
CUSTOMER COALITION’S
RESPONSE TO NOVEMBER 23, 2020
STAFF REPORT

I. INTRODUCTION

On November 23, 2020, the Oregon Public Utility Commission (the “Commission”) Staff filed a Staff Report recommending denial of the two pending Applications for Rehearing or Reconsideration of Order No. 20-268 (the “Application”) filed by the Renewable Energy Coalition (the “Coalition”), the Northwest & Intermountain Power Producers Coalition (“NIPPC”), and the Oregon Solar Energy Industries Association (“OSEIA”) (jointly, the “Interconnection Customer Coalition”), and Community Renewable Energy Association (“CREA”), OSEIA, and NewSun Energy LLC (jointly, the jointly, the “Community Renewable and Solar Advocates”).¹

The Interconnection Customer Coalition provides this limited response (“Response”), which primarily addresses the new procedural arguments raised in the Staff Report. The Interconnection Customer Coalition continues to support the substantive and legal arguments

¹ Staff Report at 12-13 (Nov. 23, 2020); *see also* The Interconnection Customer Coalition’s Application for Rehearing or Reconsideration of Order No. 20-268 at 1-5 (Oct. 12, 2020) [hereinafter Application for Rehearing].

raised in its Application, and urges the Commission to reverse its decision that effectively suspends Public Utility Regulatory Policies Act (“PURPA”) contracting with PacifiCorp.

Staff incorrectly states that the issues addressed in the Application were not before the Commission and therefore the Commission did not make a determination on them. Staff also asserts that the issues would *only* be “properly” addressed in a different proceeding. For the reasons explained herein, the issues discussed in the Interconnection Customer Coalition’s Application were properly before the Commission, and the Commission is legally obligated to grant rehearing or reconsideration to correct the associated legal errors in this proceeding.

Also, since it was not addressed by Staff, the Interconnection Customer Coalition reminds the Commission that they seek rehearing or reconsideration so that the Commission may *either* correct the legal errors *or* specify its conclusions of law for an orderly and limited appeal.²

II. ERRORS IN ORDER NO. 20-268

The Interconnection Customer Coalition applied for rehearing or reconsideration of Order No. 20-268 on narrow grounds. Order No. 20-268 approved, with modifications, PacifiCorp’s Queue Reform Proposal.³ Upon reviewing PacifiCorp’s Queue Reform Proposal, the Interconnection Customer Coalition, among others, had raised a host of concerns and proposed modifications accordingly.⁴ The Interconnection Customer Coalition seek rehearing or

² Application for Rehearing at 1-2 (expressing concerns that: 1) Oregon courts may struggle to understand PacifiCorp’s piecemeal, inconsistent, and confusing Application and Order No. 20-268’s lack of clear conclusions of law and fact; and 2) Oregon courts may remand or void the decision as a result).

³ Order No. 20-268 at 1-3 (Aug. 19, 2020).

⁴ *See, e.g.*, Joint Reply Comments of the Coalition, Community Renewable Energy Association, NIPPC, and OSEIA (Aug. 7, 2020) [hereinafter Joint Reply Comments].

reconsideration only in regard to proposed modifications that the Commission omitted from its order.⁵ These omissions are legal errors which justify rehearing or reconsideration.⁶

The PURPA entitles qualifying facilities (“QFs”) to sell power to utilities like PacifiCorp at the utility’s avoided cost rate.⁷ QFs therefore must have both interconnection service and a power purchase agreement to effectuate their statutory right. The Commission has an obligation to enforce PURPA and encourage QF development.⁸ A state process that stymies or prevents QFs from securing long-term power sale agreements—effectively what the OPUC adopted—necessarily violates this mandate.

PacifiCorp’s Queue Reform Proposal sought to modify how it provides interconnection service, but PacifiCorp neglected to address certain corresponding impacts on the QF contracting process.⁹ PacifiCorp designed its state jurisdictional Queue Reform with Oregon’s specific PURPA contracting process in mind. At the federal level, PacifiCorp proposed that a QF could not participate in a Cluster Study unless the QF could demonstrate “commercial readiness”, which meant that the QF needed to enter into a power purchase agreement with PacifiCorp. This presented a “Catch-22” that would have effectively precluded QFs from ever getting an interconnection study or a power purchase agreement. This would have occurred because a QF could not participate in the Cluster Study without a power purchase agreement, but the QF could not get a power purchase agreement because it could not produce an interconnection study result.

⁵ *Id.* at 14-15 (discussing the issue here and proposing a solution); Application for Rehearing at 3 (explaining the limited scope).

⁶ Application for Rehearing at 1.

⁷ 16 USC 824A-3(b) (requiring FERC to promulgate rules governing the rates for purchasing QF energy); 18 CFR 292.304(d) (setting forth FERC’s rules); ORS 758.525(2).

⁸ ORS 758.515.

⁹ Joint Reply Comments at 14-15.

NIPPC, the Coalition and CREA raised this concern at the Federal Energy Regulatory Commission (“FERC”), and the issue was raised by individual developers prior to the filing at FERC. In approving PacifiCorp’s FERC jurisdictional Queue Reform, FERC discussed these concerns about contracting, but ultimately elected not to resolve them because “concerns about the treatment of state-jurisdictional QFs are outside the scope of this proceeding.”¹⁰ Thus, FERC determined that the Coalition, NIPPC, and CREA should raise their state jurisdictional issues when PacifiCorp proposed its Queue Reform before state commissions. In short, given that Oregon is the only state in which this “state-jurisdictional” matter applied, FERC referred resolution of this legitimate issue to the Oregon Commission, which has an obligation to address in a manner compliant with both state and federal regulations and statute.

In light of the arguments raised at FERC and FERC’s decision, PacifiCorp modified its state jurisdictional Queue Reform to supposedly remove the “Catch-22.” There were two ways in which PacifiCorp could have addressed the issue. First, PacifiCorp could have continued to require QFs to demonstrate commercial readiness by having an executed PPA, but allowed QFs to enter into contracts prior to obtaining an interconnection study. This would have been consistent with PacifiCorp’s historic practices, was the favored approach by the Coalition, NIPPC and CREA, and is consistent with the recommendations of both the Interconnection Customer Coalition and Community Renewable and Solar Advocates in UM 2108.

Second, PacifiCorp could have removed the commercial readiness requirement for QFs to participate in the Cluster Study, which is what PacifiCorp did. PacifiCorp unilaterally and without any notice revised the proposal to remove the commercial readiness requirement for

¹⁰ *PacifiCorp*, 171 FERC ¶ 61,112, P. 169 (2020).

QFs. Thus, even before the start of this proceeding, the issue of PURPA contracting has been a core part of the Queue Reform and has guided the specific details and requirements of the Queue Reform.

However, PacifiCorp did not inform the Commission or the parties that it also intended to prevent any QF from executing a PPA until after the QF was provided a Cluster Study result with a commercial operation date within three years of contract execution. In order to understand the impact on QF contracting, the Commission Staff and PacifiCorp held a workshop solely focused on contracting issues. In the workshop process, it was discovered PacifiCorp had changed the impact on PURPA contracting from an original approach in its FERC filing that would *never* provide a QF with a PPA to an approach that could result in significant delays in providing a QF with a PPA.

PacifiCorp made specific changes to the Queue Reform to clarify that its contracting restrictions would not apply to existing QFs that did not increase their interconnection size.¹¹ This was a positive and appreciated development, and demonstrates that contracting issues have always been appropriate for consideration of the Queue Reform.

By the time the Commission approved the Queue Reform, the details regarding how the state jurisdictional Queue Reform would impact PURPA contracting had been fully established.

The Interconnection Customer Coalition, among others, asked the Commission to rectify the

¹¹ See PacifiCorp Compliance Filing, Attachment 7 at 10-11 (revising Article 0025(1)(b) &(1)(e)(C) and explaining that an existing project will only be studied under the small generator interconnection rules if the small generator facility's capacity increases above the level authorized in the existing interconnection agreement.). Thus, existing projects that maintain their size will not be studied under the Cluster Study approach. This change was requested by NIPPC and REC to ensure that existing projects are not subject to the contracting restrictions.

contracting problem so that Queue Reform would not infringe on QFs’ statutory rights under federal and Oregon law.¹² PacifiCorp’s proposal would have the practical impact of preventing QFs from entering into contracts with PacifiCorp until after PacifiCorp decided to provide an interconnection Cluster Study, which could be over one and a half *years* and potentially up to around two *years* after the QF submitted an interconnection study request. This timeline and the denial of power purchase agreements could be even longer given the restudy timeline risks in the new Cluster Study approach. PacifiCorp’s proposal would also have the practical effect that avoided cost prices offered to the QF could change and drop during the time period in which the QF waited for PacifiCorp to provide an interconnection Cluster Study. The Commission did not rectify these legal infirmities, although the Commission discussed the issue in a hearing and in Order No. 20-268.¹³ Therefore, the Commission approved PacifiCorp’s proposal to suspend PURPA contracting so that a later and lower avoided cost is applicable.

It has now become even more clear that this result violates PURPA. FERC’s Order No. 872-A, issued on November 19, 2020, explains that a utility cannot require anything that is in the utility’s discretion to be a prerequisite to obtaining an enforceable PURPA contract or legally enforceable obligation (“LEO”). As FERC noted, “In the past, purchasing utilities impeded the development of QFs by unilaterally erecting barriers to QFs establishing an obligation, such as by requiring a QF to have entered into an interconnection agreement or a power purchase agreement with the purchasing utility.”¹⁴ But FERC has now adopted regulations that “take[] away from the purchasing utility the unilateral ability to determine when the purchasing utility’s

¹² Joint Reply Comments at 14-15.

¹³ See Application for Rehearing at 11-20.

¹⁴ *QF Rates and Requirements; Implementation Issues Under PURPA*, Order No. 872-A, 173 FERC ¶ 61,158 at P 385 (2020).

obligation arises.”¹⁵ Rather, the QF need only demonstrate commercial viability and financial commitment to form a LEO.¹⁶ If the QF can demonstrate commercial viability and a financial commitment sufficient to permit construction, the utility cannot delay the LEO by requiring further steps, such as requiring the QF to wait until the utility provides an interconnection Cluster Study.

As a result, Order No. 20-268 fails to uphold state and federal law as well as Commission rules and regulations.¹⁷ For this reason, the Interconnection Customer Coalition filed its Application for Rehearing or Reconsideration of Order No. 20-268. The Commission should grant the Application and either correct the legal errors the Commission’s conclusions of law, which are not stated in Order No. 20-268. If the Commission does not correct the legal errors, then the Interconnection Customer Coalition requests that the Commission at least explain its conclusions of law to aid in the judicial review of Order No. 20-268 that will occur.

III. RESPONSE TO STAFF

In recommending that the Commission deny the Interconnection Customer Coalition’s Application for Rehearing or Reconsideration of Order No. 20-268, Staff makes four crucial errors. First, Staff did not correctly characterize the prior arguments of the Interconnection Customer Coalition and other stakeholders. Second, Staff incorrectly asserts that the issue of PacifiCorp’s QF contracting practices (and compliance with PURPA) was not presented to the Commission.¹⁸ Third, Staff incorrectly asserts that the Commission made no determination on

¹⁵ *Id.* at P 385.

¹⁶ *Id.* at PP 385-87.

¹⁷ Application for Rehearing at 1.

¹⁸ Staff Report at 10-11 (Nov. 23, 2020).

the issue.¹⁹ Finally, Staff claims it would have been *inappropriate* for the Commission to address the issue, because (Staff says) the issue should be addressed in a PURPA investigation or rulemaking, or in a QF complaint, rather than this proceeding.²⁰ The Interconnection Customer Coalition respond to each assertion below.

Staff's fundamental position is that the Commission can approve a PacifiCorp Queue Reform that has the practical impact of fundamentally and illegally altering PacifiCorp's and this state's application of PURPA because PacifiCorp did not specifically ask to revise its PURPA tariffs. Staff's articulation of this view is on pages 10 and 11 of the Staff Report, which cites no legal authority or case law in support of its position. There is no legal analysis or authority that supports the view that the Commission can adopt a utility proposal (here, the Queue Reform) that violates the law (here, PURPA and Oregon law regarding PURPA implementation) simply because the utility PacifiCorp characterized its application in a certain manner (here, PacifiCorp and Staff characterize QRP as only an interconnection reform).

It is substance and not form that matters. The Commission cannot ignore that the Queue Reform was *specifically* designed with Oregon's PURPA contracting process in mind or ignore the direct and practical impacts of PacifiCorp's proposal by postponing consideration to a future proceeding, especially when those impacts are raised by stakeholders and understood by the Commission. For the Interconnection Customer Coalition, the *most* important aspect of the Oregon jurisdictional Queue Reform was not the specific changes to the interconnection process, but how those changes fundamentally alter PURPA contracting. This is demonstrated by their filing a narrow and discrete reconsideration and rehearing. The Commission has approved

¹⁹

Id.

²⁰

Id. at 11.

PacifiCorp's Queue Reform, which has the practical impact of suspending PacifiCorp's legal obligation to contract with QFs, and the Commission has a statutory obligation to address and correct those legal flaws regardless of how they were presented to the Commission.

Furthermore, the Commission has an obligation to ensure PURPA compliance at all times. Statutory obligations did not lapse merely because PacifiCorp and the Oregon Commission were *only* changing their interconnection practices. Indeed, the subsequent FERC decision highlights exactly this issue: the policies cannot be lawfully adopted which interfere with the ability of a QF to secure a long-term power purchase agreement, including actions within a utility's discretion. PacifiCorp designed these policies with the contracting process in mind, stakeholders raised these issues specifically, Commissioners acknowledged their existence, and now the Commission is legally required to ensure that the Queue Reform is consistent with PURPA.

A. Statutory Noncompliance is an Issue Before the Commission in this Proceeding

Staff argues that the pending Applications for Rehearing "bootstrap [] arguments made in this docket regarding adoption of PacifiCorp's Queue Reform Proposal into allegations the Commission's order adopting PacifiCorp's Queue Reform Proposal related to interconnection violates PURPA or Oregon law regarding PURPA implementation."²¹ As explained above, the Queue Reform and PURPA contracting have been inextricably linked from the very start, and PacifiCorp would have (and originally did) propose an entirely different Queue Reform because of the manner in which Oregon allows utilities to negotiate QF contracts.

²¹ *Id.*

Stakeholder comments noted that PacifiCorp’s QF contracting practice violates PURPA and would be even more harmful under Queue Reform.²² PacifiCorp never previously explained what appears to be a relatively new contracting practice to the Commission, under which PacifiCorp refuses to execute or event provide contracts unless the QF can provide an interconnection study with a specific commercial operation date. Further, stakeholders specifically referenced the Commission’s obligations to implement PURPA.²³ Staff held a workshop to address these PURPA contracting issues, but Staff did not address these arguments in the August 3, 2020 Staff Report.²⁴ However, Staff’s decision to omit the arguments in its Staff Report does not mean the arguments were not made. Now that PacifiCorp has told the Commission that it intends to violate the law, and made a proposal that will make it all but certain that it will in fact violate the law, the Commission cannot ignore the Interconnection Customer Coalition and Community Renewable and Solar Advocates legal and factual arguments explaining how PURPA will be violated. The Interconnection Customer Coalition is not “bootstrapping” new arguments by asking the Commission to address arguments that were raised and inadequately resolved.

B. The Issue of PacifiCorp’s QF Contracting Practices was Presented to the Commission

The issue of QF contracting practices was carefully considered by PacifiCorp when it filed its Queue Reform (although not addressed in the filing itself) and fully presented to the

²² *E.g.*, Joint Comments of the Coalition, Community Renewable Energy Association, and OSEIA at 28 (July 17, 2020).

²³ *E.g.*, *id.* at 15 n35.

²⁴ Application for Rehearing at 14 n.33 (“Notably absent from Staff’s summary of stakeholder comments is stakeholders’ explanation that PacifiCorp’s QF Proposal to delay executing PPAs was inconsistent with PacifiCorp’s legal obligations.”); *see also* Staff Report at 24-26 (Aug. 3, 2020).

Commission. Staff's position appears to be that an issue is *not* presented to the Commission unless an applicant (here, PacifiCorp) *explicitly* asks the Commission to address the issue.²⁵

Notwithstanding the fact that PacifiCorp redesigned its Queue Reform because of QF contracting matters, this extremely narrow view is untenable. The Commission's authority and obligation to regulate is not constrained by the actions of the regulated.²⁶ The Interconnection Customer Coalition maintains that Queue Reform's effects on QF contracting and PURPA compliance is an issue that *should have* been raised and explained by PacifiCorp.²⁷ However, PacifiCorp's attempt in its initial filing to hide, and its failure to acknowledge, how Queue Reform might impact its ability to comply with the law does not mean the Commission is powerless to act, nor that the issue of compliance is irrelevant to the proceeding. Finally, PacifiCorp's comments in the proceeding and its answer to reconsiderations only further confirms PacifiCorp will keep conditioning PPAs on a Cluster Study, and provides full briefing in response; the issue is once again squarely before the Commission.

Stakeholders raised the issue of noncompliance and asked the Commission to address it. In relevant parts, stakeholder comments explained PURPA's mandate upon PacifiCorp and then stated that "[h]ow PacifiCorp intends to implement its Queue Reform Proposal *will violate this*

²⁵ Staff Report at 10 (Nov. 23, 2020) ("PacifiCorp's implementation of PURPA was not at issue in PacifiCorp's application.")

²⁶ ORS 756.040(2) ("The commission is vested with power and jurisdiction to supervise and regulate every public utility and telecommunications utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.").

²⁷ Joint Comments of the Coalition, Community Renewable Energy Association, and OSEIA at 28 (July 17, 2020) ("PacifiCorp's Queue Reform Proposal is entirely silent as to the impact on the contracting process.").

mandate.”²⁸ Because the Commission has not adequately addressed it, the Interconnection Customer Coalition seeks rehearing or reconsideration.

The Staff Report does not acknowledge how the normal Commission administrative process for issuing orders in other than contested proceedings occurs. A utility, or other person, makes a filing asking the Commission to take action and make a decision. Interested persons file comments responding to the specific request, as well as the practical impacts of the proposal, and recommend changes to the proposal. If a legal error is identified, then the Commission cannot lawfully approve the illegal filing once the issues is presented for resolution.

Even if stakeholders cannot present an issue, at minimum, the *Commission* must have the power to make noncompliance an issue.²⁹ Even if the Commission decided *not* to make noncompliance an issue, it would be unreasonable for such a decision to be above any reconsideration or judicial review. Moreover, an appeal would show that the Commission cannot willfully ignore utility noncompliance. Oregon law states that the Commission “*shall* inquire into any neglect or violation of any law of this state” and “*shall enforce*” the same.³⁰ Oregon law does not require that only a utility or Commission staff raise the issue; the Commission’s obligation to investigate and enforce the law is ongoing.

Moreover, the issue of the *Commission’s* compliance with PURPA is necessarily presented to the Commission on an ongoing basis.³¹ Seeking rehearing or reconsideration on the

²⁸ *Id.* at 28 (emphasis added).

²⁹ See ORS 756.518(1) (providing the procedures for hearings “upon any matter or issue” whether raised by a petitioner or the Commission).

³⁰ ORS 756.160(1) (emphasis added).

³¹ See ORS 758.515.

basis of a legal error regarding the Commission’s statutory obligations is an entirely reasonable act, even if the issue had not been raised (which it was).

Both issues of PacifiCorp’s compliance with PURPA and of the Commission’s compliance with PURPA were properly presented in this proceeding.

C. The Commission’s Near-Silent Approval was a Determination

Next, Staff mischaracterizes near-silence as a non-decision.³² In effect, Staff asserts any decision *not* to act or speak on an issue means *no* decision was made. However, as detailed extensively in the Application for Rehearing or Reconsideration, the Commission discussed the issue of PacifiCorp’s QF contracting practices and PURPA compliance. The Commission’s decision not to resolve the issue, if that is what was decided, is not a non-determination that is beyond rehearing or judicial review.

D. It is Appropriate and Arguably Mandatory for the Commission to Address Issues Concerning PacifiCorp’s Statutory Compliance Now Instead of in a Later Proceeding

Finally, Staff posits that consideration of QF contracting in this docket would not have been appropriate, because it is “properly addressed in Docket No. UM 2000 or AR 631, or a Complaint under ORS 756.500 brought against PacifiCorp.”³³ The Interconnection Customer Coalition disagrees with Staff, as a matter of policy and of law. The issue regards non-compliance with the law, and the Commission cannot and should not postpone enforcement.

³² Staff Report at 10 (Nov. 23, 2020) (“By approving PacifiCorp’s application to change how PacifiCorp process requests for interconnection, the Commission neither approved nor disapproved PacifiCorp’s practice of requiring that QF’s obtain a completed System Impact Study as a condition of eligibility for a draft power purchase agreement (PPA)”).

³³ *Id.* at 11. Docket No. UM 2000 and AR 631 are both open non-contested proceedings, a general investigation and rulemaking, respectively.

As discussed above, the Commission has an ongoing obligation to supervise PacifiCorp, implement PURPA, and encourage the development of QFs. Further, PacifiCorp's QRP by its nature raised substantial questions about QF contracting. Therefore, it was appropriate for the Commission to make a determination about PacifiCorp's QF contracting practices as intertwined with PacifiCorp's interconnection processes. It is the position of the Interconnection Customer Coalition that the Commission made an incorrect determination.

Notably, even if the Commission did not make an incorrect determination about QF contracting but simply made no determination at all, as Staff claims, the courts can compel it to act. ORS 183.490 authorizes Oregon courts to "compel an agency to act where it has *unlawfully refused* to act or make a decision or *unreasonably delayed* taking action or making a decision."³⁴ Postponing enforcement of Oregon's utility laws until the resolution of another proceeding—which the Interconnection Customer Coalition anticipates would take at least a year³⁵—would be an unreasonable delay in light of the Commission's ongoing enforcement obligations.

In any event, Order No. 20-268 will be appealed if not corrected, and the Commission will not be simply deferring the consideration of the issues into a future proceeding, but putting the question into the hands of the courts and/or the FERC, which could permanently constrain this Commission's flexibility on PURPA contracting matters in the future.

IV. CONCLUSION

For the foregoing reasons, the Interconnection Customer Coalition respectfully requests that the Commission grant the Interconnection Customer Coalition's narrow Application for

³⁴ ORS 183.490 (emphasis added); *see also* ORS 756.610 (stating that PUC orders are subject to judicial review, including review under ORS 183.490).

³⁵ Application for Rehearing at 18.

Rehearing or Reconsideration and either correct the legal errors in the Order or state the Commission's conclusions of law so that the Interconnection Customer Coalition can expediently pursue an appeal before the appropriate tribunal.

Dated this 30th day of November 2020.

Respectfully submitted,

Sanger Law, PC



Irion A. Sanger
Joni Sliger
1041 SE 58th Place
Portland, OR 97215
503-756-7533 (tel)
503-334-2235 (fax)
irion@sanger-law.com

Of Attorneys for the Renewable Energy Coalition,
and the Northwest and Intermountain Power
Producers Coalition



Angela Crowley-Koch
Executive Director
Oregon Solar Energy Industries Association