BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

IN PACIFICORP, dba PACIFIC POWER's Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap	DOCKET NO. UM 1734 JOINT REPLY IN SUPPORT OF MOTION TO DISMISS OF THE COMMUNITY RENEWABLE ENERGY ASSOCIATION AND THE RENEWABLE ENERGY COALITION

I. INTRODUCTION

Pursuant to the procedural ruling issued on June 2, 2015 in this docket, the Community Renewable Energy Association ("CREA") and the Renewable Energy Coalition ("REC") (collectively "Movants") respectfully submit to the Public Utility Commission of Oregon ("OPUC" or "Commission") this Joint Reply in Support of the Joint Motion to Dismiss PacifiCorp's Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap ("Application"). The responses filed by other parties only reinforce and emphasize the need for the Commission to dismiss PacifiCorp's attempt to re-litigate Phase I of docket UM 1610 in a new docket while Phase II of docket UM 1610 is underway.

Staff "understands CREA's and REC's concerns regarding PacifiCorp's application," yet disagrees that the Application should be dismissed at this time. *Staff Response* at 3. PacifiCorp effectively maintains that it is free to re-litigate any Commission order at any time and, further, to side-step the plain terms of any stipulation that it signs in a Commission proceeding. PacifiCorp's arguments fail for the reasons already set forth in the Motion to Dismiss, as further

argued in the Joint Response of Obsidian Renewables, LLC ("Obsidian") and Cypress Creek Renewables, LLC ("Cypress Creek"), and the comments in support of Renewable Northwest. Movants stand by their arguments and respond herein only to a limited number of points raised by Staff and PacifiCorp that are not already addressed by the filings in support of dismissal.

II. REPLY ARGUMENT

A. PacifiCorp's Application Is An Impermissible Collateral Attack.

PacifiCorp and Staff argue primarily regarding the doctrines of res judicata and collateral estoppel and why, in their view, the elements of those doctrines are not met. These arguments fail to rebut the Motion to Dismiss because the bar against collateral attacks is broader than the doctrines of res judicata and collateral estoppel. *See Klein v. Whitehead*, 389 A.2d 374, 385-387 (Md. Spec. App. 1978) (explaining this distinction in detail and finding that bar against collateral attack precluded an action even though collateral estoppel did not). The prohibition against collateral attacks bars a proceeding that undermines parallel proceedings. *See Lewis v. Bluementhal*, 71 N.E.2d 36 (1947) (explaining this point in detail). In *Blumenthal*, as in this case, the collateral attack was upon "the proceeding in another case" and an interlocutory order in that proceeding. *Id.* at 39. The court acknowledged res judicata would not apply and explained "the principle forbidding collateral attack, however, has a broader scope than res judicata, and is applicable to interlocutory orders." *Id.*

Those same principles apply equally here. PacifiCorp is incorrect to suggest that it may freely undermine a "non-final procedural ruling" by initiating a new case in a different docket. *See PacifiCorp's Response* at 9. PacifiCorp's Application upends not only a final order in Phase I of docket UM 1610, but also a procedural ruling establishing the schedule for further

implementation of the policies established in that order and the first round of testimony that has already been filed under that schedule. The bar against collateral attacks does not allow PacifiCorp to first sign a stipulation and request a ruling from the Administrative Law Judge that there be a limited set of issues in Phase II of docket UM 1610, and, after waiting until the schedule is adopted and testimony prepared, file a new set of entirely inconsistent issues in this docket. The bar against collateral attacks – as well as notions of fundamental fairness – proscribes such unfair conduct and bars PacifiCorp's Application.

Movants do not argue that the Commission should never revisit PURPA policies. But fundamental fairness dictates that there must be significant changes to grant the extraordinary procedural remedy of revisiting the issue so quickly. No such circumstances are alleged in PacifiCorp's Application. PacifiCorp could have raised its concerns when the issues list in Phase II of UM 1610 was negotiated, and either obtained the parties approval to re-address the issues or an order from the Administrative Law Judge adding them to the issues list.

Cypress Creek and Obsidian correctly point out that Order No. 14-058 was issued against the factual backdrop of utility allegations of an overwhelming tidal wave qualifying facility ("QF") contract requests. *See Cypress Creek/Obsidian Response* at 5-6. PacifiCorp merely indicates it has had a large amount of contract inquiries without specifying when it received these inquiries during the year-long period since Order No. 14-058. PacifiCorp's rates have substantially decreased once already since Order No. 14-058 and are currently subject to another significant reduction. *See* Order No. 14-295; *Application to Update Schedule 37 Avoided Cost Purchases from Qualifying Facilities of 10,000 KW or Less*, Docket No. UM 1729. The Application to reduce the size threshold and contract term is devoid of any allegation that the

alleged contract requests are current and mature requests for the currently effective pricing. Because PacifiCorp's alleged surge in QF requests since issuance of Order No. 14-058 is of no larger proportion and significance than the surge assumed to exist for Idaho Power in Order No. 14-058, there are no new facts to consider.

B. PacifiCorp Provides Incorrect Assertions Regarding ORS 469A.210.

Oregon's renewable portfolio standard ("RPS") expressly *requires* the Commission to implement policies that will enable eight percent of the State's electrical load to be served by RPS-eligible resources up to 20 MW in size by 2025. Aside from PURPA, there are currently no such policies in place, and the utilities under the Commission's jurisdiction have persistently sought to undermine that sole policy. *See* UM 1610 CREA/500, Skeahan/5.

Although PacifiCorp argues that ORS 469A.210 does not impose any substantive obligations, the statute expressly provides that the Commission, as an agency of the executive department, "shall" develop policies promoting the eight-percent goal. ORS 469A.210. PacifiCorp also suggests that if all of the 587 MW of QFs that have allegedly requested pricing are constructed, PacifiCorp will serve 56 percent of its Oregon load from 20-MW projects as described in ORS 469A.210. *PacifiCorp's Response* at 8. However, PacifiCorp incorrectly compares the nameplate capacity rather than average energy output of these alleged QF inquiries to its *average* energy load to develop a 56-percent figure that is misleading, grossly inaccurate and entirely meaningless. It also fails to note that many existing and proposed QFs are not RPS-eligible, and that many existing QFs will be unable to stay online when their contracts expire in the coming years if PacifiCorp's draconian Application is granted. Entertaining PacifiCorp's Application will undermine the Commission's only existing policy promoting the eight-percent

goal.

III. CONCLUSION

For the reasons set forth above and in the Motion to Dismiss, the Commission should promptly dismiss PacifiCorp's Application.

RESPECTFULLY SUBMITTED this 15th day of June, 2015.

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