PACIFIC POWER
A DIVISION OF PACIFICORP

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June 10, 2015

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
3930 Fairview Industrial Dr. S.E.
Salem, OR 97302-1166

Attn: Filing Center

RE: Docket UM 1734—Opposition to Joint Motion to Dismiss

PacifiCorp d/b/a Pacific Power encloses for filing in the above-referenced docket its Opposition to the Joint Motion to Dismiss.

Please direct any informal inquiries to Erin Apperson, Manager of Regulatory Affairs, at (503) 813-6642.

Sincerely,

R. Bryce Dalley /AS

R. Bryce Dalley
Vice President, Regulation

Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1734

In the Matter of PACIFICORP d/b/a PACIFIC POWER Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap.	**PACIFICORP'S OPPOSITION TO JOINT MOTION TO DISMISS**

I. INTRODUCTION

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) respectfully asks the Public Utility Commission of Oregon (Commission) to deny the Joint Motion to Dismiss (Motion) filed by the Community Renewable Energy Association and the Renewable Energy Coalition (collectively, Movants). Contrary to the Movants' arguments, PacifiCorp's Application to Reduce the Qualifying Facility (QF) Contract Term and Lower the QF Standard Contract Eligibility Cap (Application) is not a collateral attack on Order No. 14-058 issued in Phase I of Docket No. UM 1610.

The Application presents substantial and compelling new evidence on the appropriate fixed-price term for avoided cost power purchase agreements (PPAs) and eligibility threshold for standard avoided cost pricing. Specifically, the Application and supporting testimony quantify the dramatic increase in the must-purchase obligations under the Public Utility Regulatory Policies Act of 1978 (PURPA) and requests for new avoided cost PPAs, and the related customer impact, that PacifiCorp has experienced since Order No. 14-058 was issued in February 2014. Since that time, PacifiCorp has executed 104 MW of new Oregon Schedule 37 PPAs, and now has 338 MW of executed QF PPAs in Oregon. PacifiCorp has

also received requests for an additional 587 MW of Oregon PPAs since Order No. 14-058 was issued. In 2015 alone, PacifiCorp's customers are projected to pay $170.5 million to QFs on a total-company basis, with Oregon's allocated share at $42.6 million.[1] PacifiCorp could not have presented this evidence in Phase I of UM 1610 for the simple reason that the increase in QF activity had not yet occurred.

PacifiCorp is not seeking an end-run around Order No. 14-058 by repackaging arguments from Phase I of UM 1610 and presenting them in this docket. Instead, the Application demonstrates that changed circumstances necessitate revisions to the fixed-price term and eligibility threshold to ensure that Oregon's PURPA policies continue to satisfy the "customer indifference" standard. The fixed-price term and eligibility threshold have never been static.

The Movants have asked the Commission to dismiss the Application on purely procedural grounds and without any substantive consideration. But if the Movants' arguments are accepted, any future effort to reevaluate PURPA policies would be an impermissible "collateral attack," and the Commission's ability to craft rationale policies that adjust for changes in the QF development environment would be frustrated.

II. ARGUMENT

A. PacifiCorp's application is not a collateral attack on Order No. 14-058

PacifiCorp's Application presents substantial and compelling new evidence demonstrating that the QF development landscape in Oregon has radically changed since Order No. 14-058 was issued in February 2014, and that amending the fixed-price term and standard PPA eligibility threshold is now necessary to protect PacifiCorp's customers. As

[1] This result is particularly concerning since PacifiCorp's 2015 Integrated Resource Plan, which shows that the Company does not need new generating resources until 2028.

detailed below, the Movants' arguments conflict with Commission precedent and would undermine the Commission's ability to develop PURPA policies that encourage QF development while ensuring customer indifference.

1. The Commission has the discretion to revise PURPA policies to accurately reflect trends in QF development and impacts to utilities.

The gravamen of the Movants' argument is that general QF policies must remain fixed—even when compelling evidence indicates that changes are necessary to ensure compliance with the customer indifference standard. The Commission, however, has broad discretion to set and revise QF contracting and pricing policies.[2]

The Commission has used its discretion to revise its PURPA policies to reflect the realities of QF development in Oregon. For example, the Commission has routinely adjusted the standard price eligibility threshold to balance concerns about QF financiability and retail customer indifference. The Commission initially set the threshold at 100 kW in 1981 consistent with FERC's regulations.[3] The threshold was increased to 1 MW in 1991.[4] The Commission established the current 10 MW cap in 2005.[5] The Commission has similarly modified the fixed-price term of standard QF PPAs. The Commission established a five-year fixed-price term in 1996,[6] and increased the term to 15 years in 2005.[7]

The Commission's adjustments to the fixed-price term and eligibility threshold demonstrate that the Movants and other QFs do not have a vested right in particular policies,

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[2] *Indep. Energy Producers Ass'n, Inc. v. California Pub. Utils. Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994) ("[T]he states play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilities operating under the regulations promulgated by the Commission."); *Massachusetts Inst. of Tech.*, 74 FERC ¶ 61221, 61749-50 (Feb. 29, 1996) ("Under PURPA and our implementing regulations, states have broad authority to determine the specific parameters of QF contracts.")

[3] Docket No. R-58, Order No. 81-319 at 4 (May 6, 1981).

[4] Docket No. AR 246, Order No. 91-1605 (Nov. 26, 1991).

[5] Docket No. UM 1129, Order No. 05-584 at 1 (May 13, 2005).

[6] PAC/100 Griswold/15.

[7] Order No. 05-584 at 19.

and that the Commission's PURPA contracting policies can be revised when circumstances change. Indeed, the Movants cite no authority stating that state PURPA policies, once set, must remain static. But if the Movants' position is accepted, the Commission would have its hands tied and would be unable to revisit its PURPA polices in light of changed circumstances because efforts to do so (whether initiated by utilities or QF developers) would be deemed impermissible "collateral attacks."

2. The Application does not seek to re-litigate evidence and arguments from Phase I of UM 1610; instead, the Application presents new evidence and new argument concerning the QF contracting environment.

PacifiCorp has not asked the Commission to reconsider the same evidence and arguments it considered in Phase I. PacifiCorp has readily acknowledged that the parties submitted testimony and arguments concerning the proper fixed-price term and eligibility threshold during Phase I. Those arguments, however, were largely limited to concerns about QF financiability.[8] In Order No. 14-058, the Commission retained the 10 MW eligibility threshold based primarily on its concerns about finaciability and barriers to market entry.[9] In contrast, the Application raises an entirely new set of considerations that were not ripe during Phase I—namely, the customer impact and load-and-resource balance consequences of the dramatic rise in QF activity. These changed circumstances have rendered the current fixed-price term and eligibility threshold obsolete, and the Commission should reexamine whether its policies ensure customer indifference in light of PacifiCorp's substantial new evidence.[10]

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[8] *See, e.g.*, PAC/200, Griswold/16-21, and Griswold/31-33.

[9] Order No. 14-058 at 7-8. Although the parties submitted testimony on the fixed-price term in Phase I, Order No. 14-058 did not expressly address that issue.

[10] *See Connecticut Light & Power Co.*, 12 FERC ¶ 63,042, 65,127-28 (Sept. 9, 1980), quoting *Commn'r of Internal Revenue Serv. v. Sunnen*, 333 U.S. 591, 599 (1948) ("The doctrine of collateral estoppel "is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities[.]") (internal quotations and footnotes omitted).

3. The Movants' caselaw is inapposite and does not support dismissing the Application.

The Movants' authority is inapposite and does not support dismissing PacifiCorp's Application. First, *Oregon v. Guzek* is readily distinguished.[11] That case involved a defendant in a capital criminal case who had been found guilty but wanted to offer exculpatory evidence during the sentencing phase of the trial. The Supreme Court held that the state was permitted to exclude innocence-related evidence during the sentencing phase, noting in that context that the law "typically discourages collateral attacks" on matters previously tried. The distinction between the final judgment in a capital criminal trial and regularly-modified policy determinations made by administrative bodies like the Commission is obvious.

The Movants' reliance on *Louisville Gas & Electric Co*. is similarly misplaced.[12] In that case, Southern Company attempted to challenge the applicability of FERC Order No. 1000 in a compliance filing. FERC rejected those efforts as an improper collateral attack on Order No. 1000. Central to FERC's conclusion was the fact that Southern Company raised, and FERC rejected, the exact same arguments in the Order No. 1000 proceedings. And Southern Company did not present new evidence; instead, it simply copied and resubmitted evidence it had previously submitted during the Order No. 1000 merits proceedings. Therefore, FERC concluded that Southern Company's revive previously rejected arguments was an improper collateral attack on Order No. 1000.

Here, PacifiCorp's Application is not a collateral attack on Order No. 14-058 like the one addressed in *Louisville Gas & Electric*. Where Southern Company sought to re-litigate the same issues using the same evidence in a compliance filing, PacifiCorp is asking the

[11] 546 U.S. 517 (2006).
[12] 144 FERC ¶ 61,054 (2013).

Commission to revisit a policy determination made in Order No. 14-058 based on substantial evidence demonstrating changed circumstances. PacifiCorp is not, as the movants suggest, recycling arguments raised in UM 1610 Phase I. In fact, PacifiCorp could not have presented the evidence supporting its application in Phase I because PacifiCorp (along with staff and the other parties) completed Phase I testimony filings in May 2013—*before* the dramatic upswell in solar QF activity materialized.[13]

Order No. 03-085 is also easily differentiated. In that order, like FERC did in *Louisville Gas & Electric*, the Commission rejected Verizon's efforts to raise substantive issues in a compliance filing, observing that compliance filings are not "forum[s] to re-litigate issues that have already been decided."[14] The Commission also rejected Verizon's argument that evidence developed in a separate docket should be considered.[15] Finally, the Commission ruled that Verizon would not be prejudiced because a forum for revisiting the contested issue existed.[16]

PacifiCorp, unlike Verizon, is not seeking to re-litigate issues as part of a compliance filing, and is not seeking to incorporate extra-record evidence into an existing docket. Instead, PacifiCorp has initiated a new docket based on compelling evidence of changed circumstances. And unlike Verizon, PacifiCorp is not attempting to re-litigate issues addressed in Phase I with the same evidence and arguments. The Application presents evidence that was not available during Phase I but bears directly on the appropriateness of the Commission's current policies regarding fixed-price terms and standard PPA eligibility.

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[13] *See* PAC/100 Griswold/2-3 (demonstrating that PacifiCorp has executed 104 MW of new Oregon Schedule 37 PPAs and received requests for an additional 587 MW of Oregon PPAs since Order No. 14-058 was issued).
[14] Docket No. UT 138/UT 139, Order No. 03-085 at 16 (Feb. 5, 2003).
[15] *Id.*
[16] *Id.* at 17.

Furthermore, PacifiCorp does not have (and if the Movants' motion is granted, will never have) a forum where it can seek relief.

4. The Movants' arguments on the merits indicate that there is a material dispute concerning the appropriate fixed-price term and eligibility threshold that warrants Commission consideration.

The Movants' arguments are not limited to procedural concerns. Rather, the Movants raise arguments on the merits, arguing that PacifiCorp's requested relief violates PURPA.[17] In support of that argument, the Movants point to "[e]xtensive testimony" developed in the Idaho Public Utilities Commission's PURPA docket that is considering fixed-price PPA terms. The testimony the Movants cite to indicates that there is a material dispute concerning the appropriate fixed-price term and standard rate eligibility threshold. Rather than having the Commission weigh the evidence and resolve PacifiCorp's arguments on the merits, the Movants would rather have the Commission dismiss the Application and leave PacifiCorp without a forum for seeking relief.

5. PacifiCorp's recent solar RFP has no bearing on the appropriateness of the Application.

The Movants' reference to PacifiCorp's recent request for proposals for 25-year contracts with solar resources is disingenuous. Under Oregon's solar capacity standard, PacifiCorp is required to own or contract to purchase 8.7 MW of qualifying solar capacity by January 1, 2020.[18] The solar capacity standard, like PURPA, requires PacifiCorp to acquire this capacity regardless of need. But unlike its PURPA purchase obligation, PacifiCorp's solar capacity obligation is fortunately subject to a competitive RFP bidding process that can minimize customer impact. PacifiCorp's RFP seeks 25-year terms since the compliance

[17] Motion at 8.
[18] OAR 860-084-0020.

obligation arises in 2020 and must be maintained beyond that date.[19] A shorter-term acquisition would not be prudent in light of PacifiCorp's 2020-and-beyond compliance obligation. PacifiCorp's decision to take advantage of current market conditions to comply with the 2020 solar capacity standard has no bearing whatsoever on the appropriate PPA term for QF purchases and does not justify dismissing PacifiCorp's application.

6. Reducing the fixed-price term and eligibility threshold will not undermine Oregon renewable energy policies.

Finally, the Movants' suggestion that PacifiCorp's requested relief would undermine Oregon policies encouraging small renewable generation is unpersuasive. It is true that ORS 469A.210 established a goal that eight percent of Oregon load should be served by small renewable resources (under 20 MW) by 2020. ORS 469A.210 established policy objectives and did not create any new substantive obligations for PacifiCorp or other utilities. Nonetheless, Mr. Griswold's testimony filed in support of the Application reveals that PacifiCorp's QF purchase obligations will greatly exceed the eight-percent goal established in ORS 469A.210. In fact, PacifiCorp's 925 MW of existing and proposed PURPA contracts in Oregon at their nameplate capacity would be enough to supply 56 percent of the Company's average Oregon retail load and 90 percent of its minimum Oregon retail load.[20] The Commission is obligated to balance promoting the development of renewable resources with ensuring that customers remain indifferent to utility PURPA purchase obligations.[21]

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[19] *Id.*

[20] PAC/100, Griswold/11-12.

[21] *See, e.g.*, Order No. 05-584 at 11 ("We seek to provide maximum incentives for the development of QFs of all sizes, while ensuring that ratepayers remain indifferent to QF power by having utilities pay no more than their avoided costs."); Docket UM 1129, Order No. 06-538 at 37 ("[O]ur overriding goals in this docket are to encourage QF development, while ensuring that ratepayers are indifferent to QF power."); Docket No. UM 1129, Order No. 07-360 at 1 (Aug. 20, 2007) ("This Commission's goal is to encourage the economically efficient development of QFs, while protecting ratepayers by ensuring that utilities incur costs no greater than they would have incurred in lieu of purchasing QF power (avoided costs)"); Order No. 14-058 at 12 ("We first return to the goal of this docket: to ensure that our PURPA policies continue to promote QF development while

Dismissing the Application would impermissibly skew the balance in favor of QF development at the expense of PacifiCorp's customers.

B. PacifiCorp's application is not a collateral attack on the UM 1610 Phase II issue list

The Application does not violate PacifiCorp's agreement regarding UM 1610 Phase II issue list. On February 20, 2015, PacifiCorp and other parties stipulated to the issue list for Phase II of UM 1610.[22] The Issue Stipulation set out the agreed-to issue list for Phase II and stated that Idaho Power reserved the right to raise certain QF policy issues outside of UM 1610. Those policy issues include revisions to the eligibility threshold and fixed-price term.[23] As an initial matter, the Phase II issue list, as adopted by the Administrative Law Judge on March 26, 2015, is a procedural ruling, not a fully litigated substantive judgment. Non-substantive, non-final procedural rulings are not subject to collateral estoppel because they adjudicate nothing.[24]

By joining the Phase II issue list stipulation, PacifiCorp did not waive its right to file the Application or otherwise pursue policy changes in a separate docket. Under Oregon law, a waiver will not be presumed or implied in the absence of an express agreement and courts will not interpret a stipulation as admitting something that was not expressly stated.[25] While Idaho Power sought to clarify its existing right to seek policy changes outside of Phase II,

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ensuring that utilities pay no more than avoided costs."); Conference Report on PURPA, H.R. Rep. No. 1750, 95th Cong., 2nd Sess. 97-98 ("The provisions of this section are not intended to require the rate payers of a utility to subsidize co generators or small power producers.")

[22] Stipulation re: Issue List, Docket No. UM 1610 (Feb. 20, 2015) (Issue Stipulation).

[23] Issue Stipulation at 3.

[24] *State v. Hollandsworth*, 64 Or. App. 44, 47 (1983) ("Collateral estoppel bars relitigation of particular facts or questions which were actually or necessarily determined in prior litigation"); *Koos v. Roth*, 43 Or. App. 383, 386 (1979) ("A final judgment is a necessary basis for the assertion of collateral estoppel as a bar to relitigation of an issue already tried … [a]n order of dismissal without prejudice adjudicates nothing.")

[25] *Waterway Terminals Co. v. P.S. Lord Mech. Contractors*, 242 Or. 1, 26-27 (1965) (en banc); *Matter of Comp. of Townsend*, 60 Or. App. 32, 37 (1982).

PacifiCorp is not required to secure permission from the Movants or any other party before it may seek relief from the Commission.

The fact that Idaho Power followed through with its intention to seek revisions to the fixed-price term and eligibility threshold supports considering PacifiCorp's Application on the merits. Idaho Power filed its applications on April 24, 2015, and they are docketed as UM 1725. Idaho Power seeks, among other things, to lower the eligibility cap for wind and solar QFs from 10 MW to 100 kW, and reduce the fixed-price term of standard QF PPAs to two years. In Order No. 14-058, the Commission rejected arguments that PacifiCorp, Idaho Power, and Portland General Electric should be subject to different contract standards.[26] PacifiCorp's Application is necessary to ensure that PacifiCorp and its customers are not disadvantaged by having one utility that is subject to more favorable contracting standards.

Commission Staff's recent filing in UM 1725 supports this point. As part of its filing, Idaho Power asked the Commission to temporarily stay its PURPA purchase obligation pending resolution of its applications. On June 2, 2015, Staff opposed Idaho Power's request for a stay but argued that the reduced fixed-price term (five years) and eligibility threshold (100 kW) should be put into place on an interim basis while Idaho Power's applications are litigated.[27] In support of its argument, Staff referenced the dramatic increase in Idaho Power's PURPA contract obligations despite the fact that the Commission had considered the

[26] Order No. 14-058 at 7-8. *See also* ORS 758.515(3)(b) (directing the Commission to "[c]reate a settled and uniform institutional climate for [QFs] in Oregon." Establishing different fixed-price terms and standard price eligibility thresholds for the three investor-owned utilities would encourage QFs to engage in geographic arbitrage. Rather than developing projects based on considerations of price, location, and need, QF development would be driven in large part by determining which utility is subject to the most favorable contracting obligations. There can be little doubt that granting Idaho Power's application for a reduced fixed-price term and eligibility threshold will shift QF development onto PacifiCorp unless PacifiCorp's Application is also granted.

[27] Docket UM 1725, Staff Response to Motion for Temporary Stay at 5-6 (June 2, 2015).

issues in Phase I of UM 1610.[28] It would be manifestly unfair to allow Idaho Power to proceed on the merits of its application while preemptively dismissing PacifiCorp's application, which demonstrates almost identical changed circumstances.

Finally, the Movants spend considerable time discussing how the relief PacifiCorp is seeking in the Application would interfere with resolution of issues in Phase II. First, by stipulating to allow Idaho Power to address contract term and eligibility threshold issues in a separate docket, the Movants have already accepted the fact that some of the issues in Phase II may be rendered moot. Second, PacifiCorp does not deny that the relief it has requested has the potential to impact issues under consideration in Phase II. But the problems the Movants have identified with respect to Phase II can be avoided by staying that proceeding pending the resolution of Idaho Power's and PacifiCorp's contract term and eligibility threshold dockets.

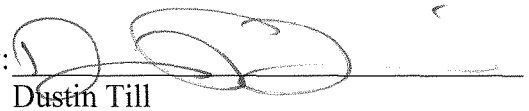
III. CONCLUSION

The Movants' Motion to Dismiss should be denied. PacifiCorp's Application is not an impermissible collateral attack on Order No. 14-058. The Application presents substantial and compelling new evidence concerning the appropriate fixed-price term and eligibility threshold for QF PPAs. The dramatic growth in PacifiCorp's must-purchase obligations and avoided cost PPA requests, and the related customer impact, demonstrate that the requested policy changes are needed to protect customers. PacifiCorp's new evidence should be addressed on the merits. To conclude otherwise would limit the Commission's ability to craft rational PURPA policies that balance encouraging QF development while ensuring that

[28] *Id.* at 7-8.

utility customers remain economically indifferent to mandatory PURPA purchase obligations.

Respectfully submitted this 10th day of June, 2015

By: 

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