1	BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON			
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3	UM 1734			
4	In the Matter of PACIFICORP, dba PACIFIC POWER's Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap			
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8	I. Introduction			
9	On May 21, 2015, PacifiCorp filed an application asking the Commission to modify two			
10	policies implementing the Public Utility Regulatory Procedures Act (PURPA). Specifically,			
11	PacifiCorp asked the Commission to lower the eligibility cap for Standard Avoided Cost prices			
12	and standard contracts <sup>1</sup> for wind and solar qualifying facilities (QFs) from 10 megawatts (MW)			
13	to 100 kilowatts (kW), and shorten the fixed-price term of 20-year contracts for all QFs from 15			
14	years to three years. <sup>2</sup> On June 1, 2015, the Community Renewable Energy Association (CREA)			
15	and the Renewable Energy Coalition (REC) asked the Commission to dismiss PacifiCorp's			
16	application, arguing that PacifiCorp's requests are an impermissible collateral attack on the			
17	Commission's February 2014 order in Phase I of Docket No. UM 1610 and the UM 1610 Phase			
18	II litigation. <sup>3</sup>			
19	Staff has not yet had opportunity to investigate and analyze PacifiCorp's request to			
20	modify the eligibility cap for Standard Avoided Cost prices and standard contracts for wind and			
21	solar QFs and to reduce the 15-year fixed-price term of all QF contracts. Accordingly, Staff			
22	recommends that the Commission deny the Joint Motion to Dismiss and allow additional time			
23	for Staff to investigate and analyze PacifiCorp's requests. Staff may ultimately recommend			
24	<sup>1</sup> A standard contract is a term "used to describe a standard set of rates, terms and conditions that			
25	govern a utility's purchase of electrical power from QFs at avoided cost." (Order No. 05-584 at 16-17.)			
26	<sup>2</sup> PacifiCorp's Application Regarding Qualifying Facilities 10.			

- <sup>3</sup> Joint Motion to Dismiss at 1-3.
- $\begin{array}{l} Page \ 1-Staff \ Response \ to \ Joint \ Motion \ to \ Dismiss \\ SSA:DM6557459 \end{array}$

denial of PacifiCorp's application, but at this time, does not have a position on the merits of
PacifiCorp's application.

3 II. Argument

4 CREA and REC do not appear to argue that dismissal is *compelled* by the doctrine of 5 collateral estoppel, but instead appear to argue that dismissal is appropriate based on the 6 principles of judicial efficiency and fairness underlying these doctrines. In the event CREA and 7 REC do argue that dismissal is compelled because PacifiCorp is collaterally estopped from 8 requesting that the Commission modify its policies regarding the eligibility cap for standard 9 contracts and Standard Avoided Cost prices and the 15-year term for the fixed-cost portion of QF 10 contracts, the argument is not well taken.

11 The doctrine of "res judicata" prevents parties from relitigating issues that were actually 12 litigated and determined in a prior action.<sup>4</sup> "Collateral estoppel" bars litigation of an issue that 13 could have been raised, even if that issue was not actually raised, in an earlier proceeding.<sup>5</sup>

In June 1992, the Department of Justice issued an opinion regarding the applicability of "res judicata" to decisions by the Commission.<sup>6</sup> The opinion notes that while it is appropriate for an administrative agency to apply res judicata to cases in which it acts in a quasi-judicial capacity, the same is not true when the administrative agency acts in a legislative capacity. The opinion states,

[w]hen the purpose is one of regulatory action, as distinguished from merely applying
law or policy to past facts, an agency must at all times be free to take such steps as may
be proper in the circumstances, irrespective of its past decisions. Even when conditions
remain the same, the administrative understanding of those conditions may change, and
the agency must be free to act.<sup>7</sup>

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<sup>24</sup> <sup>4</sup> See e.g., Drew v. EBI Companies, 310 Or 134, 139, 795 P.2d 531 (1990).

25 <sup>5</sup> Id.

<sup>6</sup> Or. Op. Atty. Gen. OP-6454, 1992 WL 526799, (Or.A.G.), June 08, 1992. <sup>7</sup> *Id.*, Davis, *Administrative Law Text*, §18.09., at 370-71 (3d. Ed 72).

Page 2 – Staff Response to Joint Motion to Dismiss SSA:DM6557459 1 The Commission acts in a legislative capacity when it establishes general policies 2 regarding the implementation of PURPA. The Commission is not bound to continue 3 implementing previous policies even when the conditions under which the Commission issued 4 the old order may have changed. And, as the Department of Justice opinion notes in its 1992 5 opinion, the Commission is free to revise policies even if it is the viewpoints of the 6 Commissioners rather than circumstances that have changed.<sup>8</sup>

7 Staff understands CREA's and REC's concerns regarding PacifiCorp's application. 8 Staff's opposition to the Joint Motion to Dismiss is not based on Staff's position on the merits of 9 PacifiCorp's application. Instead, Staff has yet to investigate the merits of PacifiCorp's requests 10 and accordingly, is not prepared to support immediate dismissal of PacifiCorp's application. 11 While Staff recognizes that a relatively short period of time has passed since the Commission 12 issued Order No. 14-058, this short interval does not foreclose the possibility that there is a 13 change of circumstances that warrants re-visiting the two policies put at issue by PacifiCorp. 14 While the outcome of this docket could impact the significance of the Commission's 15 decisions in Phase II of UM 1610 to some QFs, Staff does not think it is likely that the impact is 16 as large as CREA and REC allege in their Motion to Dismiss. If the Commission were to re-visit 17 the eligibility cap for Standard Avoided Cost prices and standard contracts for wind and solar 18 QFs and the duration of the fixed-price term for all contracts for PacifiCorp, the Commission 19 would not be limited to the relief asked for by PacifiCorp. For example, the Commission could 20 lower the eligibility cap for standard contracts and prices for wind and solar QFs from 10 MW to 21 5 MW and leave the duration of the fixed-price portion of QF contracts as it is. In this 22 circumstance, the outcome of the issues in Phase II would continue to be relevant to a significant 23 number of QFs.

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<sup>8</sup> Id.

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1	III.	Conclusion		
2		Staff recommends that the Commission deny the Joint Motion to Dismiss.		
3		DATED this $10^{\pm 5}$ day of June 2015.		
4			Respectfully submitted,	
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