

1 denial of PacifiCorp's application, but at this time, does not have a position on the merits of
2 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.⁴ "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.⁵

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

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

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

25 ⁵ *Id.*

26 ⁶ Or. Op. Atty. Gen. OP-6454, 1992 WL 526799, (Or.A.G.), June 08, 1992.

⁷ *Id.*, Davis, *Administrative Law Text*, §18.09., at 370-71 (3d. Ed 72).

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.⁸

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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⁸ *Id.*

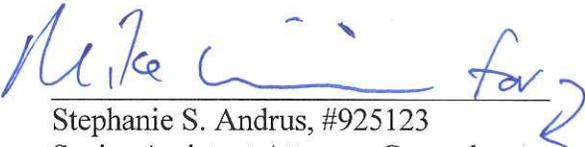
1 **III. Conclusion**

2 Staff recommends that the Commission deny the Joint Motion to Dismiss.

3 DATED this 10th day of June 2015.

4 Respectfully submitted,

5
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