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BEFORE THE PUBLIC UTILITY COMMISSION
OF THE STATE OF OREGON

UM 1002

WAH CHANG,

Petitioner,

v.

PACIFICORP,

Respondent.

PACIFICORP'S RESPONSE TO WAH
CHANG'S MOTION TO EXCLUDE
"ASSUMPTION OF RISK" AS AN ISSUE

INTRODUCTION

In this proceeding, Wah Chang seeks relief from the Master Electric Service Agreement ("MESA") on the purported ground that the market rates that Wah Chang paid for electricity under that contract were not "just and reasonable." Now, with its new Motion to Exclude "Assumption of Risk" As An Issue, Wah Chang argues that in determining whether the rates under the MESA were just and reasonable, the Commission should be precluded from considering what risks Wah Chang *knowingly accepted* when it entered into the MESA. Wah

1 Chang contends that PacifiCorp should not be allowed to argue that Wah Chang assumed the risk
2 that rates would reach the levels they did. In other words, Wah Chang asks the Commission to
3 decide whether rates under a *private contract* were "just and reasonable" *without* examining the
4 parties' expectations when they formed that contract.

5 This request to limit the scope of the Commission's examination is unreasonable,
6 impractical, and unfair. Moreover, Wah Chang identifies no legal rule, standard, or principle
7 that requires the Commission to distort its analysis in this manner.

8 Wah Chang attempts to justify its request by suggesting that the Linn County Circuit
9 Court is the only proper venue for considering contract issues between these parties. This
10 argument is without merit. Under Oregon law, the Commission has the authority to supervise,
11 regulate, and control special contracts like the MESA, just as it does with filed tariffs and rate
12 schedules. The Commission's authority naturally extends, therefore, to contract interpretation,
13 and the Commission applies common law principles to such contracts. Indeed, the Commission
14 has previously applied common law contract analysis in this very proceeding, without objection
15 by Wah Chang.

16 Nor does the recent decision by the Oregon Court of Appeals — included as
17 Attachment A to Wah Chang's Motion — have any effect on this Commission's jurisdiction to
18 apply ordinary contract principles. For several years, Wah Chang has pursued simultaneous,
19 wholly independent actions at the Commission and in the civil courts. Wah Chang did not ask
20 the Court of Appeals to constrain the Commission in any way, and the Court of Appeals did not
21 do so. Further, although Wah Chang implies that the Court of Appeals somehow decided the
22 "assumption of risk" issue in Wah Chang's favor, the Court of Appeals did no such thing. The
23 Court of Appeals merely affirmed the trial court's ruling that there may be material issues of fact
24 concerning the allocation of risk in the MESA. It is thus entirely possible that PacifiCorp will
25 ultimately prevail in the civil case on the ground that Wah Chang got exactly what it bargained
26 for. PacifiCorp should be permitted to make that argument here, as well.

1 In short, having chosen to prosecute PacifiCorp in two separate forums, Wah Chang is
2 not entitled to dictate what legal defenses PacifiCorp may assert in each forum. Wah Chang's
3 motion should be denied.

4 DISCUSSION

5 **A. The Commission May Apply Common Law Contract Principles In Deciding 6 Whether the Parties' Private Contract Rates are Just and Reasonable.**

7 Under ORS 757.230, the Commission may authorize classifications or schedules of rates
8 applicable to individual customers or groups of customers. In evaluating the classifications or
9 schedules contemplated by this statute, OAR 860-022-0035 provides the Commission with
10 guidance as to how it should treat special contracts:

11 Energy and telecommunications utilities within Oregon entering into
12 special contracts with certain customers prescribing and providing rates,
13 services, and practices not covered by or permitted in the general tariffs,
14 schedules, and rules filed by such utilities are in legal effect tariffs and are
15 subject to supervision, regulation, and control as such.

16 This rule also provides that rates contained in special contracts are classified as rate
17 schedules.¹ Accordingly, the Commission is not only *authorized* to permit special contracts
18 between utilities and customers, it is *required* to supervise, regulate, and control special contracts
19 as filed tariffs.² Just as with rate schedules under a tariff, the Commission is charged with

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21 ¹ See OAR 860-022-0035, which provides, in relevant part: "All special agreements designating
22 service to be furnished at rates other than those shown in tariffs now on file in the Commission's office
23 shall be classified as rate schedules."

24 ² See Northwest Natural Gas Company, Dockets UG 71, UG 75, Order No. 89-1358 (Oct. 13,
25 1989) ("NNG filed the special contracts pursuant to OAR 860-22-035 and ORS 757.230. The former
26 makes special contracts subject to the same regulatory control as NNG's general tariff.")

1 ensuring that the rates contained within a special contract are just and reasonable.³ In carrying
2 out this responsibility, the Commission is empowered to interpret the tariff (or special contract).⁴

3 Wah Chang cites no authority for its assertion that, in evaluating whether the rates under
4 the MESA were just and reasonable, the Commission should not consider all of the terms within
5 a special contract just as it would a filed tariff, including terms related to the allocation of the
6 risk of market price volatility. Indeed, the Commission expressly considered this very issue
7 when it denied Wah Chang's petition for relief from the MESA in 2001.⁵ In that order, the
8 Commission noted that its "policy has been to uphold agreements negotiated by parties' at arm's
9 length," and further expressed its "serious reluctance" to modify agreements executed and
10 approved by the Commission.⁶ The Commission based its denial of Wah Chang's request for
11 relief from the MESA on the fact that "Wah Chang knowingly assumed the full impact of future
12 price changes in the belief that prices would decline. It must also accept the risk of future price
13 increases."⁷

14 Accordingly, there is clear precedent in this very proceeding allowing for the
15 consideration of such common law contract principles as "assumption of the risk" as part of the
16 Commission's overall "just and reasonable" analysis. Wah Chang has not provided any
17 compelling reason why the Commission should now artificially circumscribe its own analysis.

19 ³ ORS 757.210(1)(a) provides: "Whenever any public utility files with the Public Utility
20 Commission any rate or schedule of rates stating or establishing a new rate or schedule of rates or
21 increasing an existing rate or schedule of rates, the commission may, either upon written complaint or
22 upon the commission's own initiative, after reasonable notice, conduct a hearing to determine whether the
rate or schedule is fair, just and reasonable."

23 ⁴ See, e.g., *Northwest Natural Gas Company v. Oregon Steel Mills*, Docket UM 367, Order No.
91-736 (June 06, 1991) ("ORS 756.040(2) authorizes the Commission to 'do all things necessary and
24 convenient' in regulating public utilities. The task of interpreting tariffs falls within its general regulatory
powers.").

25 ⁵ *Wah Chang v. PacifiCorp*, Docket UM 1002, Order No. 01-873 (Oct. 15, 2001).

26 ⁶ *Id.*

⁷ *Id.*

1 **B. The Commission Cannot Decide This Case Without Considering The Parties'**
2 **Reasonable Contract Expectations.**

3 It is not surprising that Wah Chang seeks to remove the "assumption of risk" issue from
4 the purview of the Commission. In its October 15, 2001 order denying Wah Chang's petition for
5 relief, the Commission stated the following:

6 Wah Chang could have reduced its risk for future price changes by
7 agreeing to a price cap or collar when the MESA was negotiated. Wah
8 Chang declined, apparently because to do so would limit its gain if prices
9 decreased in the future. A natural consequence of that decision is the
10 assumption of potential price changes, up or down. *Wah Chang*
knowingly assumed the full impact of future price changes in the belief
that prices would decline. It must also accept the risk of future price
increases.

11 * * *

12 This is not a case in which the parties failed to understand the meaning of
13 the contract. Wah Chang, PacifiCorp, and the Commission clearly
14 understood that the MESA provided for market-based rates for the last two
15 years of the contract's term. Wah Chang and PacifiCorp knew that the risk
16 for price changes during the final two years of the contract was Wah
17 Chang's. MESA rates favored Wah Chang during the first three years of
18 the contract term. Since September 2000 the MESA rates have generally
favored PacifiCorp. We do not know which party will be favored during
the remainder of the contract term. Business decisions made about the
future are inherently risky. We are not persuaded to now impose our will
on the parties and revise the rates they negotiated.

19 Order No. 01-873 at 6-8 (emphasis added). Thus, Wah Chang's clear assumption of market risk
20 was central to the Commission's rationale in denying Wah Chang's petition for relief.

21 The Commission subsequently reopened these proceedings in order to consider new
22 evidence of market manipulation. Thus, the Commission will once again decide whether the
23 MESA rates are "just and reasonable," this time in light of additional evidence that Wah Chang
24 has offered relating to alleged manipulation of the western energy markets during the time that
25 the MESA was in force.

1 But the Commission's determination of "just and reasonable" will not — and cannot
2 possibly — be made in a vacuum. That determination must be made the same way it was made
3 in the Commission's October 2001 order — by examining the parties' agreement, which
4 expressly provided that Wah Chang would pay floating market rates during the final two years of
5 the contract. Wah Chang will argue, once again, that it did not bargain for the risk that the
6 market rates would go as high as they did. PacifiCorp will argue, once again, that Wah Chang
7 did precisely that when it agreed to pay a floating rate, with no cap, in a newly deregulated
8 market. Either way, there is no legal basis for Wah Chang's request that the Commission decide
9 whether the MESA rates were "just and reasonable" without examining the risks that Wah Chang
10 willingly accepted when it entered into that contract.

11 In short, Wah Chang is entitled to argue that it did not assume the risk that market rates
12 would reach the levels that they reached. But Wah Chang is not entitled to prevent the
13 Commission from even considering that issue.

14 **C. The April 2007 Decision of the Court of Appeals Has No Effect on This Proceeding.**

15 In the parallel action that Wah Chang initiated in the Linn County Circuit Court,
16 PacifiCorp won summary judgment on Wah Chang's claim for rescission of the MESA. Wah
17 Chang then moved pursuant to ORCP 71 to vacate that judgment and reopen the case in light of
18 the same "new evidence" of market manipulation that Wah Chang has brought before the
19 Commission. The trial court agreed to reopen the case on the ground that the new evidence
20 would "probably change the result," namely, the grant of summary judgment in PacifiCorp's
21 favor. PacifiCorp appealed that ORCP 71 ruling to the Court of Appeals, arguing that the new
22 evidence should not have affected the summary judgment ruling as a matter of law. The Court of
23 Appeals disagreed, ruling that the trial court was justified in concluding that the new evidence
24 raised material issues of fact that would have rendered summary judgment inappropriate.

25 This procedural history is completely irrelevant to the issues before the Commission, and
26 it certainly provides no basis for Wah Chang's extraordinary request that PacifiCorp be precluded

1 from fully defending itself here. All that has happened in the civil case is that the trial court has
2 ruled (and the Court of Appeals has agreed) that there may be material issues of fact regarding
3 the MESA's allocation of risk to Wah Chang. Thus, the "assumption of risk" issue has not been
4 decided adversely to PacifiCorp. PacifiCorp will continue to raise this defense in the civil case,
5 and it may ultimately prevail on this ground.

6 Wah Chang's giant leap is to suggest that because the Court of Appeals agreed that there
7 may be factual issues regarding the allocation of risk, the trial court alone should consider those
8 issues. But there is no language in the Court of Appeals opinion suggesting that the trial court
9 has exclusive jurisdiction to consider those issues. Wah Chang's assertion that "the Commission
10 should *not* consider such issues, because their resolution is plainly for the circuit court" (Motion
11 at 3) is a fiction unsupported by any language in the Court of Appeals decision, much less any
12 general rule of law. Wah Chang cannot simultaneously pursue these dual actions *and* seek to
13 preclude PacifiCorp from raising legitimate defenses to Wah Chang's claims.

14 In short, that the trial court will adjudicate common law contract issues is of no
15 consequence at all to this proceeding. It is Wah Chang that has chosen to pursue twin avenues of
16 relief. PacifiCorp, therefore, is entitled to defend itself in both forums. Wah Chang's motion is
17 without any legal merit and should be denied.

18 CONCLUSION

19 For the foregoing reasons, PacifiCorp respectfully requests that the Commission deny
20 Wah Chang's motion to exclude "assumption of risk" as an issue.

21 DATED: June 4, 2007

PERKINS COIE LLP

22
23 By 

James M. Van Nostrand, OSB No. 794289
Christopher L. Garrett, OSB No. 03100

24 Attorneys for PacifiCorp
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CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing document, encaptioned PACIFICORP'S
RESPONSE TO WAH CHANG'S MOTION TO EXCLUDE "ASSUMPTION OF RISK" AS
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