

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1002

WAH CHANG,

Petitioner,

v.

PACIFICORP,

Respondent.

PACIFICORP'S RESPONSE TO WAH
CHANG'S REQUEST FOR OFFICIAL
NOTICE

PacifiCorp respectfully submits this response to Wah Chang's Request for Official Notice, filed December 3, 2008 (the "Request"). The Commission should deny Wah Chang's Request for several independent reasons:

- The evidentiary record in this proceeding is closed, as the Commission ruled at the November 12, 2008 oral argument;
- The proffered evidence is not relevant to any issue in this proceeding; and,
- The Commission has already rejected the argument for which this evidence is offered (that the Commission should not consider Wah Chang's assumption of risk in this proceeding).

Rather than making a valid evidentiary submission, Wah Chang improperly seeks to use this Request as another opportunity to re-argue its case to the Commission. The Commission should deny the Request.

1- PACIFICORP'S RESPONSE TO WAH CHANG'S REQUEST FOR OFFICIAL
NOTICE

A. The Evidentiary Record Is Closed

The first reason the Commission should deny Wah Chang's Request is that the evidentiary record in this case is closed. PacifiCorp proposed to introduce some documents in the record during the oral argument hearing on November 12, 2008. This request was denied on the basis that evidence is no longer admissible at this stage of the proceeding. *See* Exhibit 1 at 2 (evidentiary ruling of ALJ Power). This ruling applies equally to Wah Chang's Request to introduce additional evidence into the record at this time.

The evidentiary hearing in this proceeding was held in August 2007. Post-hearing briefs were filed in the fall of 2007, and all of ALJ Power's subsequent requests for information were fulfilled by PacifiCorp and Wah Chang. *See* Ruling of Feb. 7, 2008 and PacifiCorp's response of March 31, 2008; Ruling of June 26, 2008, PacifiCorp's response of July 30, 2008, and Wah Chang's responses of July 31, 2008 and Aug. 8, 2008; Wah Chang's Motion and exhibits filed Oct. 14, 2008 and Ruling of Oct. 20, 2008. The Commission heard oral argument on November 12, 2008, at which time ALJ Power, on behalf of the Commission, ruled that the record was closed. Wah Chang fails to recognize that at some point in every case the evidentiary record must be closed, so the case may be submitted to the Commission for a decision. If the record were not closed, the Commission would be faced with a moving target where any party could seek to introduce new evidence following submission of the case to the Commission, but prior to the time the Commission issues its order. Other parties would then request the opportunity to respond to such evidence especially where, as in this case, one party selectively offers documents and offers them out of context. The time for submitting evidence in this case has come and gone, as the Commission has already ruled. The Commission should deny the Request because the evidentiary record in this case is closed.

B. The Proffered Evidence Is Not Relevant

1. Legal standard

Wah Chang cites only OAR 860-014-0050 as the basis for its Request, providing that the Commission "may take official notice" of certain matters. Putting aside whether this is appropriate under OAR 860-014-0050, evidence must also be *relevant* to the issues in the case to be *admissible*, OAR 860-014-0045. The evidence that Wah Chang offers is not relevant to this case for several reasons.

2. Purpose for which Wah Chang offers the evidence.

The principal document Wah Chang offers is the Oregon Supreme Court's Order denying PacifiCorp's petition for a writ of mandamus in the lawsuit between Wah Chang and PacifiCorp pending in Linn County Circuit Court (the "Order"). Request, Ex. A. The subject of PacifiCorp's petition, and the background for the Order, was the Linn County Circuit Court's denial of PacifiCorp's motion to stay or abate that case until the Commission issues an order resolving the current proceeding. Wah Chang argues that the Order is relevant "to show that the contract and tort issues to be decided in the Linn County Action are different from the public utility rate issues to be decided in UM 1002." Request at 2. According to Wah Chang, the Order is relevant because it shows that the court, and not the Commission, should "decide issues such as whether Wah Chang contractually 'assumed the risk' of fraudulent market manipulation and whether Wah Chang must prove, as an element of its tort claim, a direct causal connection between PacifiCorp's participation in trading schemes and Wah Chang's rates." *Id.* at 2-3.

3. The evidence is not probative of anything.

A writ of mandamus is an extraordinary remedy that the Supreme Court will grant only if it finds that the circuit court committed a clear legal error for which there is no other adequate remedy, including appellate review. *State v. Burlison*, 342 Or. 697, 701, 160 P.2d 624 (2007). While PacifiCorp thinks it met that standard, the Supreme Court's Order denying the petition

certainly does not have the same effect as a decision affirming the Linn County court. The Order does not mean that the Supreme Court agrees with the Linn County court or that the Court will affirm the Linn County decision on appellate review. All it means is that the Supreme Court did not think that the Linn County court committed a clear legal error for which there is no other adequate remedy. The Order is not probative of anything else.

4. The evidence is not relevant to this case.

Even if the Order did mean that Supreme Court thought the trial court was right in denying PacifiCorp's motion to stay or abate the Linn County action, which it does not, there still is no relevance to the trial court's decision not to stay that case. Nothing in the Order or the other documents Wah Chang offers indicates the trial court's reasons for its decision. Even if the trial court decided that the claims in these two cases are different, as Wah Chang argues, that decision cannot be construed to mean that "assumption of risk" is not relevant to this case, or that Wah Chang is not required to prove some sort of causal connection between PacifiCorp's activities and the COB Index price in this case. The trial court's decision that the Commission does not have primary jurisdiction over the claims in Linn County does not have any bearing on whether the Commission may decide that assumption of risk and a causal connection are relevant considerations in its decision whether Wah Chang is entitled to the relief it seeks from the Commission. There is nothing in the Order that constrains the Commission's ability to determine the relevant factors and considerations it will apply in deciding Wah Chang's petition.

In addition, Wah Chang's Second Amended Complaint in the Linn County action (Request, Ex. C) is not relevant to anything in this case. As Wah Chang concedes, the Commission may take official notice only of the fact that the complaint was filed, not of the truth of the statements in the complaint. Request at 2. Wah Chang does not argue that the complaint has any independent relevance other than to show the nature of the claims Wah Chang made in that case. In addition, Wah Chang filed that complaint on Dec. 14, 2007 (Response, Ex. C at

14), and does not explain why it waited almost one year and until after the record was closed to offer this document to the Commission in this case.

C. The Commission Has Already Rejected the Argument for Which Wah Chang Offers This Evidence

The primary purpose for Wah Chang's offering this evidence at this time is to support its argument that the Commission should not consider Wah Chang's assumption of the risk of market fluctuations or market manipulation in deciding this case. Request at 2. Wah Chang is merely reiterating an argument it has already made to the Commission *and lost*.

In May 2007, Wah Chang filed a motion asking the Commission to exclude assumption of risk as an issue in this case. In a Ruling issued June 7, 2007, the Commission denied Wah Chang's motion, finding that this issue is relevant and appropriate for the Commission to consider in deciding this case. In view of the circuit court's decision that the Commission and the court have concurrent jurisdiction over this dispute, the Commission decided that "contract issues" such as assumption of the risk are relevant to the Commission's decision. Wah Chang had the option to seek certification of the Ruling to the Commission under OAR 860-014-0091, but chose not to do so. Accordingly, the Ruling is law of the case.

In any event, there is no good reason for the Commission to revisit ALJ Power's well reasoned decision that assumption of risk may be considered by the Commission, and there is no good reason for Wah Chang to be making that argument again now. Likewise, Wah Chang has already argued why it does not think it should be required to establish a causal link between PacifiCorp's conduct and the prices Wah Chang paid, and consideration of this proffered evidence adds nothing to that argument.

D. The Commission Should Not Defer to the Circuit Court

Although Wah Chang does not directly ask the Commission to stay a decision in this case until the Circuit Court action is resolved, Wah Chang seems to imply that request when it states that the Commission should "defer" to the circuit court and that the Linn County action is

scheduled for trial in July 2009. Request at 3. The Commission should decide this case without waiting for the Linn County action to be tried. Wah Chang chose to bring two cases, and has consistently defended its right to maintain both cases and to proceed in both cases simultaneously. Now that the Commission has held a hearing and heard oral argument, it should decide this case without waiting for a trial in the circuit court.

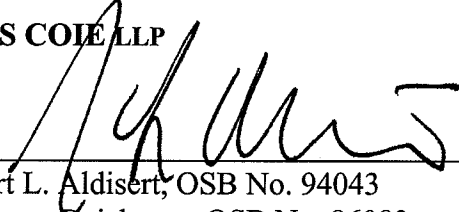
CONCLUSION

For the foregoing reasons, the Commission should deny Wah Chang's Request for Official Notice.

DATED: December 17, 2008.

PERKINS COIE LLP

By


Robert L. Aldisert, OSB No. 94043
Lawrence Reichman, OSB No. 86083
Christopher L. Garrett, OSB No. 03100

Attorneys for PacifiCorp

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1002

WAH CHANG,)
Petitioner,)
vs)
PACIFICORP,)
Respondent.)

November 12, 2008

- :-

APPEARANCES:

LANE POWELL
By Richard H. Williams
Attorney at Law
Appearing in behalf of the Petitioner

PERKINS, COIE
By Lawrence H. Reichman
Attorney at Law
Appearing in behalf of the Respondent

1 for PacifiCorp's other customers or for
2 PacifiCorp shareholders to bear the consequences
3 of Wah Chang's losing bets.

4 Before I conclude, I just want to offer,
5 I've got a couple pages of the articles that I
6 referred to where Wah Chang passed its energy
7 costs on. I'd be pleased to offer that in the
8 record if you'd like.

9 JUDGE POWER: Those are not admissible.
10 If you're trying to submit evidence at this stage
11 of the proceeding, the Commission will not
12 receive that.

13 MR. REICHMAN: They are in public record,
14 but that's fine, I'll hold onto them. Thank you.

15 JUDGE POWER: Mr. Williams?

16 MR. WILLIAMS: Thank you, Your Honor.
17 I'd like first to talk about the question that
18 Commissioner Savage asked and Commissioner Baum
19 asked, and that is, what does Wah Chang need to
20 prove and does it need to prove a causal
21 connection between -- a specific direct causal
22 connection between PacifiCorp's actions and the
23 high rates that it paid. I do not think we do
24 need to prove that. This is not a common law
25 tort case.

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing document, encaptioned PACIFICORP'S RESPONSE TO WAH CHANG'S REQUEST FOR OFFICIAL NOTICE by causing a copy to be sent via U.S. Mail and electronic mail to:

Richard H. Williams
Milo Petranovich
Lane Powell Spears Lubersky LLP
Suite 2100
601 S.W. Second Avenue
Portland, OR 97204
Email: williamsr@lanepowell.com
petranovichm@lanepowell.com

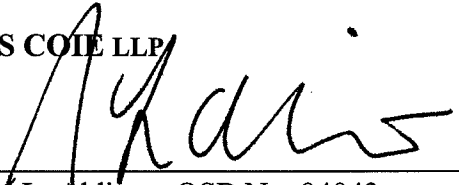
Paul Graham
Assistant Attorney General
Department of Justice
Regulated Utility & Business Section
1162 Court St. NE
Salem, OR 97301-4096
Email: paul.graham@state.or.us

Natalie Hocken
Vice President and Assistant General
Counsel
Pacific Power
825 NE Multnomah, Suite 2000
Portland, OR 97232
Email: natalie.hocken@pacificorp.com

DATED: December 17, 2008.

PERKINS COIE LLP

By


Robert L. Aldisert, OSB No. 94043
Lawrence Reichman, OSB No. 86083
Christopher L. Garrett, OSB No. 03100

Attorneys for PacifiCorp