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5 BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

6 UM 1002

7
8 WAH CHANG,

9 Petitioner,

10 v.

11 PACIFICORP,

12 Respondent.

PACIFICORP'S RESPONSE TO WAH
CHANG'S MOTION TO EXCLUDE
INFORMATION FROM PROTECTIVE
ORDER

13 Oral Argument Requested

14 PacifiCorp respectfully submits this response to Wah Chang's Motion to Exclude
15 Information from Protective Order, filed on February 23, 2006 ("Motion to Exclude").

16 **INTRODUCTION**

17 Order No. 01-149, issuing the Protective Order in this case,¹ specifically notes that both
18 Wah Chang and PacifiCorp stated that the release of confidential information could
19 "disadvantage them in their commercial dealings with entities not participating in this
20 proceeding, resulting in monetary loss to them and their customers." Order No. 01-149 at 1.
21 That order further states that "[b]oth parties have taken stringent measures to safeguard the
22 confidentiality of information that may need to be disclosed in this proceeding." *Id.*

23 In reliance on the Protective Order, PacifiCorp produced an extraordinarily large volume
24 of confidential commercial information to Wah Chang without first requesting the Commission
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¹ Order No. 01-149 (issued February 2, 2001).

1 to preclude or limit the production based on grounds of relevance, burden or privilege.² Instead,
2 PacifiCorp proceeded with its production based upon its belief that it could rely upon the
3 provisions of the Protective Order to ensure that such information would not be produced to
4 persons who were not "qualified persons" and signatories to the Protective Order and that any
5 disputes would be resolved through Paragraph 15 of the Protective Order on a case-by-case basis.
6 After receiving the benefits provided by the Protective Order, Wah Chang now seeks to exclude
7 from the Protective Order over one hundred thousand pages of documents that Wah Chang does
8 not even need to present its case to the Commission.

9 Wah Chang's motion seeks to exclude from the Protective Order a total of 28 exhibits that
10 it pre-filed as part of its direct case on December 15, 2005. These exhibits include the equivalent
11 of over 110,000 pages of documents, plus additional electronic files. Moreover, of these 28
12 exhibits, Wah Chang never cites, let alone relies upon, 18 of these exhibits in its testimony; of
13 the remaining exhibits, Wah Chang relies on only limited portions.³

14 Furthermore, Wah Chang fails to meet its burden to show that wholesale declassification
15 of documents is appropriate. Instead, Wah Chang disclaims that any such burden exists and
16 incorrectly asserts that it is PacifiCorp's burden to show that wholesale declassification is
17 *inappropriate*. Wah Chang is also required under the Protective Order to establish that it has an
18 actual need to use this material in a manner that requires removal of the protection upon which
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21 ² Wah Chang has issued 15 sets of data requests to PacifiCorp from December 2000 through
22 November 2005, each with a response time of 10 business days, stating a total of 156 separate requests
23 (not counting subparts), which sought significant volumes of material. PacifiCorp has produced over
24 75,000 pages of material to Wah Chang, with over 70,000 such pages produced since discovery
25 recommenced in this proceeding in May 2005. PacifiCorp produced substantial additional information in
26 electronic form on eight (8) disks including data such as Excel spreadsheets and .wav files containing
recorded conversations. These disks add the equivalent of over 106,000 pages and additional electronic
files to PacifiCorp's overall production. Declaration of Susan K. Roberts, ¶ 3. In total, PacifiCorp has
produced in excess of 181,000 pages of material, plus additional electronic files that do not convert to
pages.

³ See Declaration of Susan K. Roberts, ¶ 6.

1 PacifiCorp relied in producing such a large volume of documents and information in a short time
2 period. Wah Chang fails to meet its burden on either of these two issues.

3 Wah Chang's invocation of the "public interest" to overcome the confidential nature of
4 the material is misplaced for several reasons. First, under Oregon law, the public interest is not a
5 relevant factor in determining whether to maintain the confidentiality of materials exchanged
6 during discovery.⁴ Second, while a public interest argument may be applicable when information
7 that is made part of a judicial *record*, that is not the situation here. Wah Chang has filed the
8 majority of its evidence subject to the Protective Order and the Commission has not yet accepted
9 as evidence in this case any of the material that Wah Chang has filed. While Wah Chang has
10 pre-filed this extraordinarily voluminous material obtained through discovery as proposed
11 "exhibits" in its direct case, this was done in violation of the Commission's rules. OAR 860-014-
12 0060 and 860-014-0065.

13 PacifiCorp believes that the Commission should not be required to address Wah Chang's
14 Motion to Exclude because the exhibits Wah Chang seeks to declassify should be stricken
15 pursuant to PacifiCorp's Motion to Strike filed contemporaneously herewith. Because Wah
16 Chang's Motion to Exclude focuses exclusively on its pre-filed exhibits and relies considerably
17 on the fact that it has pre-filed these exhibits, PacifiCorp believes that the Commission should
18 resolve PacifiCorp's Motion to Strike, and thus decide what may properly be offered in the
19 record, before addressing Wah Chang's Motion to Exclude material from the Protective Order.
20 Once the Commission has decided PacifiCorp's Motion to Strike, the nature of the exhibits
21 remaining will be clear. Further, after the Commission has decided PacifiCorp's Motion to
22 Strike, the parties should be given additional time to review any remaining or refiled exhibits to
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26 ⁴ *Citizens' Utility Bd. v. Oregon PUC*, 128 Or. App. 650, 660, 877 P.2d 116, 122 (1994).

1 address their confidential nature.⁵ Given the size of the exhibits as filed, it is unreasonable for
2 PacifiCorp to be required to review them in their entirety to identify all confidential material.⁶
3 That task will be more manageable after the Commission decides PacifiCorp's Motion to Strike.

4 **ARGUMENT**

5 **I. Wah Chang's Request Undermines the Reasonable Expectations of**
6 **PacifiCorp in Being Cooperative and Forthcoming in Discovery in Reliance**
7 **Upon the Commission's Standard Protective Order**

8 Wah Chang's motion undermines the spirit in which discovery has been conducted and
9 PacifiCorp's reasonable expectations in promptly providing Wah Chang access to extensive
10 proprietary and commercial information irrespective of relevancy or responsiveness, in reliance
11 upon the Protective Order. In responding to each of Wah Chang's 156 data requests, PacifiCorp
12 produced the documents and information requested by Wah Chang without requiring the
13 Commission to decide any discovery dispute regarding the relevance of Wah Chang's requests or
14 the burden on PacifiCorp to respond.

15 PacifiCorp agreed to produce many categories of voluminous, confidential business
16 records without delay and without requesting the Commission to decide PacifiCorp's potential
17 objections as to relevance or burden, all in reliance on the Protective Order. PacifiCorp would
18 not have proceeded in this way if it did not have the ability to rely on the protections afforded to
19 it by the Protective Order. If PacifiCorp knew that Wah Chang would seek to disclose publicly

21 ⁵ PacifiCorp did review and agree to release from the confidential designation several exhibits
22 with respect to which Wah Chang conferred before filing this motion, resulting in the stipulation that
23 Wah Chang filed with its motion. PacifiCorp was willing to review those exhibits because they were not
24 objectionable as are the other exhibits discussed in PacifiCorp's Motion to Strike, meaning that they were
cited in testimony and did not include irrelevant information, and thus PacifiCorp could review them
without an unreasonable burden.

25 ⁶ Paragraph 4 of the Protective Order requires parties, "[t]o the extent practicable," to designate
26 as confidential only the portions of documents that fall within ORCP 36(C)(7). Given the amount of
material that PacifiCorp produced in a short time, it was practicable only for PacifiCorp to designate
entire documents or files as confidential.

1 all of the information that PacifiCorp produced, it would have approached discovery in a manner
2 that sought to resolve discovery disputes on the front end, rather than relying on the Protective
3 Order. However, in an attempt to facilitate timely discovery, PacifiCorp did not exercise its right
4 to review and specifically object to producing documents *before* producing them, which would
5 have extended this proceeding by months, if not years. Wah Chang's Motion to Exclude is an
6 unreasonable attempt to punish PacifiCorp for being cooperative. *See Foltz v. State Farm Mut.*
7 *Auto. Ins. Co.*, 331 F.3d 1122, 1137 (9th Cir. 2003) ("Among the goals furthered by protective
8 orders is reducing conflict over discovery and facilitating the flow of information through
9 discovery. Where that has happened, changing the ground rules later is to be avoided because
10 protective orders that cannot be relied upon will not foster cooperation through discovery.").

11 In the leading case of *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 529
12 F.Supp. 866 (E.D. Pa. 1981) (discussed further in Section II below), the parties had agreed that
13 confidential information produced under a protective order would be viewed only by qualified
14 individuals and would be used only for the preparation for trial of the case, just as in this case.
15 On that basis, the court concluded that the parties "have relied on these provisions in producing
16 documents, and wholesale declassification would undermine their justified expectations.
17 Plaintiffs cannot now attempt to undo what they have willingly wrought; having made their bed,
18 they must sleep in it." 529 F. Supp. at 894.

19 In one circumstance, and in specific reliance on an agreement with Wah Chang,
20 PacifiCorp produced voluminous data without even undertaking a comprehensive review for
21 relevancy or privilege, in an attempt to facilitate the orderly and timely production of data. *See*
22 *Agreement Concerning Documents*, Ex. 1 hereto. In response to Wah Chang's data request no.
23 147, PacifiCorp produced 12 digital tapes that included thousands of recorded conversations of
24 PacifiCorp traders. PacifiCorp estimated that it would take 9,000 person hours to identify the
25 requested conversations on those tapes and to convert the data to a form that would enable
26 PacifiCorp to review them prior to producing them; additional time would have been required to

1 substantively review the conversations for relevancy and privilege. Instead of foregoing its
2 desire to review these tapes or waiting to receive production after that lengthy review occurred,
3 Wah Chang entered into a written agreement with PacifiCorp that provided, among other things,
4 that PacifiCorp's production of those tapes did not constitute a waiver of any privilege. *See id.*
5 Wah Chang also specifically agreed that

6 the tapes and all information derived from the tapes including, without
7 limitation, any audio recordings or transcriptions generated from the data
8 contained on the tapes, and any notes or summaries concerning the
9 information contained on the tapes, will not be disclosed to any person or
10 used in any way for purposes other than this litigation, and will be treated
11 in every other respect as CONFIDENTIAL pursuant to the protective order
12 in place in this matter.

13 *Id.* at 2.

14 Now, despite PacifiCorp's precautions and reliance on Wah Chang's agreement at the
15 time that the information "will not be disclosed to any person or used in any way for purposes
16 other than this litigation," which is the only reason PacifiCorp agreed to produce these
17 voluminous documents without Commission intervention, Wah Chang seeks to remove audio
18 files and transcripts of PacifiCorp's trader conversations from the protection of the Protective
19 Order. (These are Exhibits WC/903 and WC/904, including over 850 pages of information and
20 132 .wmv files.) Thus, with respect to these exhibits, Wah Chang's Motion to Exclude not only
21 violates PacifiCorp's reasonable expectations in being forthcoming in discovery in reliance upon
22 the Protective Order, it also violates Wah Chang's subsequent agreement with PacifiCorp.

23 The Commission is already addressing an apparent violation of a protective order in
24 Docket UM 1121 (Oregon Electric Utility Company's proposed acquisition of PGE). Such
25 breaches of confidentiality obligations are likely to have a chilling effect on the ability of parties
26 to Commission proceedings to be forthcoming in discovery in reliance on the terms of a
protective order. As the Commission recently noted, the inability of parties to rely upon
protective orders in discovery "might impair the work of the Commission." Order No. 06-033 at

1 5. A Commission order releasing voluminous data from the scope of the Protective Order in this
2 case is likely to further chill parties' willingness to engage in open discovery and will
3 undoubtedly make Commission proceedings more contentious.

4 **II. Wah Chang Makes No Showing of Need**

5 Wah Chang was able to receive a significant volume of PacifiCorp's confidential business
6 records in expedited fashion because the Protective Order was in place, and Wah Chang was able
7 to file its direct case under the Protective Order's parameters. Wah Chang now seeks
8 declassification of tens thousands of pages of documents without giving *any* reason why
9 declassification is necessary in order for Wah Chang to present its case.

10 The Protective Order, in providing a mechanism for appeal of a confidentiality
11 designation, clearly contemplates that the appealing party's "use" is somehow being inhibited by
12 the confidential designation.⁷ See Protective Order ¶ 15 ("[T]he party *desiring to use* the
13 information may move for exclusion of the information from the protection conferred by this
14 order.") (emphasis added). Thus, as the moving party, Wah Chang needs to show how its "use"
15 of the information is being affected by the confidential designation. Wah Chang has not
16 attempted to and cannot make such a showing. Wah Chang has successfully filed its direct case
17 pursuant to the Protective Order and will be able to file its rebuttal under the same conditions as
18 well.

19 Wah Chang's failure to show any need suggests that its motion has nothing to do with this
20 proceeding at all, but rather is intended for some other purpose. In particular, Wah Chang's
21 purported incentive to bring this motion to advance the "public interest" is unfounded. What
22 appears more likely is that Wah Chang seeks to try its case in the media and/or to enable its
23 consultant, Robert McCullough, to use PacifiCorp's records in other proceedings where he has
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26 ⁷ This could happen, for example, if a party wishes to disclose confidential information to a witness who is not a "qualified person" under the Protective Order.

1 been engaged. Mr. McCullough is consulting for the City of Portland in connection with its
2 investigation and desire to regulate the rates of Portland General Electric. PacifiCorp also serves
3 customers in the City of Portland and it is possible that Mr. McCullough seeks to use
4 PacifiCorp's confidential information, produced in this dispute with one of Mr. McCullough's
5 clients, to the advantage of this other client.⁸ However, the purpose of discovery is to provide
6 access to information that may aid a party in connection with the litigation in which the discovery
7 is taken; it is not to provide information for unrelated matters. In fact, paragraph 10 of the
8 Protective Order provides that all persons who receive access to confidential documents under
9 the Order "shall not use or disclose the confidential information for purposes of business or
10 competition, *or for any purpose other than the purposes of preparation for and conduct of this*
11 *proceeding*" (emphasis added). Wah Chang should be held to this requirement for the
12 confidential information it has received to date.

13 Wah Chang is not being disadvantaged by the documents at issue being designated
14 confidential and the Commission should deny Wah Chang's motion. Wah Chang has already
15 filed the challenged information under seal and has already incurred the burden of meeting its
16 obligations under the Protective Order. Should Wah Chang be concerned about any additional
17 burden in appropriately dealing with such material at the hearing, PacifiCorp is willing to discuss
18 an acceptable mechanism that minimizes any extra effort required to use the confidential material
19 in the hearing, but still maintains confidentiality for the information.

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21 _____
22 ⁸ A January 31, 2006 article in the Portland Tribune discussed the City of Portland's investigation
23 of PGE and Mr. McCullough's central role in that process. Ex. 2. A follow-up article of February 7,
24 2006, discusses similar accusations relating to PacifiCorp and the possibility of a City investigation
25 relating to PacifiCorp. See Attachment 3 to Wah Chang's Motion. It is a fair inference that the City
26 would engage Mr. McCullough to work on any investigation regarding PacifiCorp, if it has not done so
already. Indeed, Wah Chang references its desire to rebut a PacifiCorp statement in the February 7
article as a basis for declassifying the confidential information. This underscores Wah Chang's apparent
desire to try this case in the media and the relationship of this motion to Mr. McCullough's work for the
City.

1 **III. Wah Chang Fails To Carry Its Burden**

2 Wah Chang asserts, with no particularized analysis, that entire categories of PacifiCorp
3 documents, numbering in the tens of thousands, are unworthy of protection. Wah Chang then
4 asserts that it is *PacifiCorp's* burden to show that declassification of these documents is *not*
5 appropriate. Wah Chang is wrong. While it is true that the Protective Order places the burden
6 on the party resisting declassification of a document to show that the document qualifies for
7 protection, the analysis changes when a party seeks wholesale declassification.

8 The *Zenith* case, *supra*, is a leading case on the issue of declassifying information that
9 was designated confidential pursuant to a protective order. In *Zenith*, the court ruled that motions
10 for "wholesale declassification," such as Wah Chang presents here, raise "special problems." *Id.*
11 at 893. In that case, as in this case, the parties operated under a discovery provision that placed
12 the burden on the party resisting declassification of a document to show that the document was
13 deserving of protection. The plaintiffs subsequently moved to declassify a large volume of
14 documents at once. Like Wah Chang does here, the plaintiffs in *Zenith* argued that "defendants
15 must now meet their burden of showing good cause for the confidential designation of all the
16 documents just as if plaintiffs had challenged the classification of a single document." *Id.* The
17 court firmly rejected plaintiffs' approach:

18 Although PTO 35 provides that the failure of any party to challenge a
19 confidentiality designation contemporaneously shall not be deemed a
20 waiver of its right to challenge the propriety of such designation at any
21 time thereafter, this does not mean that a party may sit on its hands while
22 the mountain of discovery materials grows and then attempt to challenge
23 the protection of such material with the same ease with which it could
24 have raised an objection contemporaneously. A party seeking wholesale
declassification must first attempt to justify the investment of judicial and
private resources demanded by such an exercise. Thus, to this extent,
wholesale declassification shifts part of the burden to the party seeking
disclosure.

25 *Id.* at 893-94. Similarly, in this case, as the party seeking wholesale declassification of the
26 equivalent of over 110,000 pages of documents plus additional electronic files, Wah Chang has

1 the burden to justify the expenditure of resources required to address this motion. Wah Chang
2 does not rely on the vast majority of this information to support its direct case and has failed to
3 identify any justification for declassifying the information other than the "public interest," which
4 is inapplicable in this matter where the information is not part of a judicial record (as discussed
5 in Section V). Therefore, Wah Chang does not meet its burden.

6 **IV. The Material at Issue Is Confidential as Contemplated by the Protective**
7 **Order and the ORCP**

8 Because Wah Chang has not met its burden to show why the Commission should order
9 wholesale declassification of PacifiCorp's confidential information or how Wah Chang's need to
10 "use" this information is frustrated by the confidential designation, the Commission should deny
11 Wah Chang's motion. Further, as discussed in the Introduction, PacifiCorp believes that before
12 the Commission considers any request by Wah Chang to declassify confidential material, the
13 Commission should first strike the irrelevant material filed by Wah Chang, as requested in
14 PacifiCorp's Motion to Strike. After the Commission determines what material may properly be
15 made part of the record, PacifiCorp should then be afforded the necessary time to review those
16 remaining documents to determine what, if any, portions PacifiCorp believes may be declassified
17 and why the other portions should remain confidential. PacifiCorp should not be required to
18 address that issue based upon the voluminous documents that are currently the subject of Wah
19 Chang's motion.

20 Notwithstanding and without waiving its request that the Commission follow this
21 procedure, PacifiCorp believes that the Commission has sufficient information to deny Wah
22 Chang's motion. The Protective Order protects "trade secret or other confidential research,
23 development, or commercial information." Protective Order, ¶ 2. There can be no serious
24 dispute that the documents PacifiCorp has designated confidential are at least "commercial
25 information" that is entitled to protection under the Protective Order. Since Wah Chang cannot
26 seriously dispute this, it invokes the "public interest" and asks the Commission to apply a

1 balancing test. As discussed in Section V, the public interest is not a relevant factor in this
2 argument. Since Wah Chang cannot dispute that this information is entitled to protection, the
3 Commission should deny Wah Chang's motion.

4 Although PacifiCorp believes the above argument is sufficient to decide the Motion to
5 Exclude, we will generally discuss the confidential documents at issue. Wah Chang groups the
6 documents into seven groups and PacifiCorp will approach them in the same manner. *See*
7 Memorandum in Support of Wah Chang's Motion to Exclude Information From Protective Order
8 ("Memo in Support") at 4.

9 **A. Direct Testimony of Robert McCullough (WC/800)**

10 A determination as to the confidentiality of Mr. McCullough's direct testimony largely
11 depends upon a determination of confidentiality as to the underlying exhibits that the testimony
12 quotes, paraphrases, and relies upon. Because the exhibits submitted with the direct testimony
13 were filed in violation of the Commission's rules -- OAR 860-014-0045, 860-014-0060, and 860-
14 014-0065 -- and PacifiCorp's Motion to Strike requests that the Commission strike all or portions
15 of Mr. McCullough's testimony, undertaking the exercise of determining what information in the
16 direct testimony should be confidential will be facilitated once the Commission issues a decision
17 on PacifiCorp's Motion to Strike.

18 One additional comment regarding this testimony is in order. As discussed in
19 PacifiCorp's Motion to Strike, Mr. McCullough's testimony is replete with speculation regarding
20 PacifiCorp's knowledge and motives, as well as regarding facts that Mr. McCullough speculates
21 are true but as to which he has no evidence. It is this rampant speculation that Wah Chang
22 claims "connects the dots" with regard to PacifiCorp's behavior. Memo in Support at 2.
23 PacifiCorp believes that this aspect of Mr. McCullough's testimony is improper lay or expert
24 testimony and should be stricken for reasons discussed in PacifiCorp's Motion to Strike.
25 Allowing such speculative and unsubstantiated testimony to be publicly disclosed could be
26 unnecessarily injurious to PacifiCorp's reputation.

1 **B. PacifiCorp Emails (WC/849 and WC/1121)**

2 Neither of these exhibits is cited in Mr. McCullough's testimony and thus their relevance
3 is not established. They should be stricken, as argued in PacifiCorp's Motion to Strike. This is a
4 perfect example of the overbreadth of Wah Chang's direct case filing.

5 **C. Audio Files and Transcripts of Trader Conversations (WC/902,
6 WC/903, WC/904 and WC/856)**

7 Wah Chang does not rely on the entirety of these exhibits in its testimony and, thus, has
8 filed them in violation of the Commission's rules. These exhibits include over 900 pages plus an
9 additional 381 electronic files.⁹ These exhibits should be stricken, as argued in PacifiCorp's
10 Motion to Strike.

11 Moreover, these documents reveal PacifiCorp's real-time balancing strategy, including the
12 names of its counterparties, volume and pricing information, and the extent to which PacifiCorp
13 relies upon buying and selling of electric power in real-time to balance its system. PacifiCorp's
14 ability to supply power at the least cost for the benefit of its customers could be compromised by
15 the public release of this information. For these reasons, this information is confidential
16 commercial information and should not be made public.

17 **D. Records of PacifiCorp's Short-Term Transactions (WC/805, WC/842,
18 WC/850, WC/905, WC/906, and WC/907)**

19 Wah Chang does not rely on the bulk of these exhibits in its testimony and has filed them
20 in violation of the Commission's rules. These exhibits should be stricken, as argued in
21 PacifiCorp's Motion to Strike.

22 These records contain extensive detail regarding PacifiCorp's real-time transactions. For
23 example, Exhibit WC/905 is PacifiCorp's entire response to data request no. 155. It contains
24 approximately 453 pages of Excel spreadsheets. Exhibit WC/906 is PacifiCorp's entire response
25 to data request no. 99. It contains approximately 98,828 pages of Excel spreadsheets. Exhibit

26 ⁹ See Declaration of Susan K. Roberts, ¶ 9.

1 WC/907 is PacifiCorp's entire response to data request no. 92. It contains 8,321 pages of trading
2 "blotters."¹⁰ These documents reveal PacifiCorp's real-time balancing strategy, including the
3 names its counterparties, volume and pricing information, and the extent to which PacifiCorp
4 relies upon buying and selling in real-time to balance its system. Even though this data is several
5 years old, competitors could extrapolate information and patterns that could be used to deduce
6 PacifiCorp's confidential power procurement activities. PacifiCorp's ability to supply power at
7 the least cost for the benefit of its customers could be compromised by the public release of this
8 information. For these reasons, this information is confidential commercial information and
9 should not be made public.

10 Wah Chang's argument that this information is "stale" also falls flat. Memo in Support at
11 5-6. In fact, Wah Chang cites Mr. McCullough *himself* as authority that the information is stale.
12 *See* Memo in Support at 6 ("[o]bviously, the data no longer has any commercial significance").
13 However, as the court found in *Zenith*: "While at first blush one might doubt that harm could be
14 caused by the disclosure of stale information, there is sense in the argument, which defendants
15 urge, that old business data may be extrapolated and interpreted to reveal a business' current
16 strategy, strengths, and weaknesses. It would appear that, in the hands of an able and shrewd
17 competitor, old data could indeed be used for competitive purposes." 529 F. Supp. at 891.
18 Given the volume and level of detail included in the documents produced by PacifiCorp to Wah
19 Chang, this is precisely the type of proprietary and commercial information that a competitor
20 could use to extrapolate PacifiCorp's current business strategy and potential positions in the
21 market. PacifiCorp's business has not changed significantly from 2000-2001 to today and
22 therefore, what may be considered "stale" to Wah Chang, is not considered stale to PacifiCorp.

23 Wah Chang also critically overstates the extent to which this information has been made
24 public in connection with FERC proceedings. *See* Memo in Support at 6. With the exception of
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26 ¹⁰ *See* Declaration of Susan K. Roberts, ¶ 7.

1 WC/849, the documents that are the subject of Wah Chang's motion have not been submitted to
2 the FERC in the same form. Furthermore, FERC reporting requires only the reporting of *sales*
3 data, not purchase data, and the *sales* data reported to FERC is submitted in a substantially
4 different form and level of detail. Wah Chang's Motion to Exclude clearly acknowledges this
5 point with its citation to a FERC link providing for "WSCC_ *Sellers*_Data_Monthly." Memo in
6 Support at 6 (emphasis added). Based on Wah Chang's misplaced assumptions, Wah Chang then
7 concludes that because transaction data is publicly available, "these documents are not
8 confidential." This conclusion does not logically follow and should be rejected.

9 **E. PacifiCorp's Response to Information Requests From FERC and**
10 **Oregon Department of Justice (WC/849, WC/902, WC/1118,**
11 **WC/1119, and WC/1127)**

12 Wah Chang does not cite to any of these exhibits in its pre-filed testimony. These
13 exhibits should be stricken, as argued in PacifiCorp's Motion to Strike.

14 **F. Deposition Transcripts and Exhibits (WC/1000 through 1010)**

15 It bears mention that of these 11 deposition transcripts, seven are not cited at all in Mr.
16 McCullough's testimony and should not be part of the record in this proceeding, as argued in
17 PacifiCorp's Motion to Strike. Moreover, Mr. McCullough relies upon only limited portions of
18 the other four transcripts.

19 Offering the eleven full deposition transcripts at this time also violates the Commission's
20 rules. OAR 860-014-0065(6) provides:

21 Unless received in evidence by the Commission or ALJ, no portion of a
22 deposition may constitute a part of the record in the proceeding. A party
23 may object at the hearing in the proceeding to receiving in evidence any
24 portion of the deposition. Upon request, the party examining the deponent
25 must provide the Commission or ALJ a transcribed copy of any deposition
26 taken in the proceeding.

27 This rule effectively prohibits a party from seeking to make any portion of a deposition transcript
28 part of the record until the hearing. Thus, it is improper for Wah Chang to have offered entire
29 deposition transcripts as exhibits in its direct case. Rather, the Commission's rules contemplate

1 that portions of such transcripts may be offered only at the hearing, in connection with cross-
2 examination of a witness.

3 For these reasons, the Commission should delay a decision on Wah Chang's motion to
4 exclude until the Commission has had the opportunity to decide PacifiCorp's Motion to Strike.
5 Moreover, given the volume of this information (over 1,300 pages)¹¹, PacifiCorp should be given
6 an additional opportunity to review any documents or files remaining after the Commission
7 decides PacifiCorp's Motion to Strike to address confidentiality issues.

8 The 11 depositions taken of PacifiCorp employees in this case were thorough and far-
9 ranging and concern various aspects of PacifiCorp's business, including its resource procurement
10 activities, risk management strategies, corporate organization, and other confidential information.
11 They also include some confidential and irrelevant personal employee information. PacifiCorp's
12 ability to operate its business most effectively and to supply power at the least cost for the benefit
13 of its customers could be compromised by the public release of this information. For these
14 reasons, this information is highly sensitive proprietary and commercial information and should
15 not be made public.

16 **G. Other Exhibits (WC/1108, WC/1122, and WC/1123)**

17 Wah Chang does not cite to any of these exhibits in its pre-filed testimony. These
18 exhibits should be stricken, as argued in PacifiCorp's Motion to Strike.

19 Moreover, Exhibit WC/1122 includes highly sensitive information regarding the business
20 strategy for PacifiCorp and PPM Energy, which is a PacifiCorp affiliate but not even a party to
21 this proceeding. This exhibit includes a memorandum regarding PacifiCorp's and PPM's trading
22 philosophies and detailed minutes from meetings of PacifiCorp's "Risk Forum," which addressed
23 high-level trading strategy and other risk issues. These documents include highly confidential
24 discussions regarding PacifiCorp's trading strategy which is proprietary to PacifiCorp and
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26 ¹¹ See Declaration of Susan K. Roberts, ¶ 8.

1 competitively sensitive. PacifiCorp's ability to supply power at the least cost for the benefit of its
2 customers could be compromised by the public release of this information. Additionally,
3 competitively sensitive information of PPM, which is not even a party to this case and will cease
4 to be an affiliate of PacifiCorp's, is entitled to strict protection. For these reasons, this
5 information is confidential commercial information and should not be made public.

6 **V. Wah Chang's Reliance on the "Public Interest" Is Misplaced and Premature**

7 The second part of Wah Chang's argument is that even if the material in question is
8 confidential, it should still be de-classified because "the public interest" requires it. Wah Chang
9 is jumping the gun. There is no public interest in disclosure of materials that parties exchange
10 during discovery. The public interest may be implicated if, and when, the materials become part
11 of the *judicial record*. This point was established in the very case cited by Wah Chang:

12 We reject CUB's contention that there is a third prong to the test for
13 determining whether to issue a protective order, which would require a
14 balancing of the public's interest in disclosure against the potential harm.
15 . . . Although that may be a relevant factor in determining whether
16 material that has become a part of a judicial record should remain subject
17 to a protective order, . . . it has no bearing on the determination as to
18 whether materials that are sought to be discovered should be subject to a
19 protective order.

20 *Citizens' Utility Bd. v. Oregon PUC*, 128 Or. App. 650, 660, 877 P.2d 116, 122 (1994) (internal
21 citation omitted). *See also Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 529 F.Supp.
22 866, 898 (E.D. Pa. 1981) ("the public has no common law right to inspect materials that are
23 produced in discovery but are not placed in the custody of the court").¹²

24 Wah Chang appears to argue that the confidential material is now part of the public
25 record because it has been filed by Wah Chang as "exhibits" and placed in the custody of the
26 Commission. This argument should be firmly rejected. The fact that Wah Chang has *attempted*

26 ¹² Similarly, ORS 192.501, the statute relied upon by Wah Chang, applies to *public records*, not
materials that have been exchanged in discovery.

1 to make the material part of the record is not decisive, as the Commission has not decided
2 whether to accept it into evidence in this proceeding (and PacifiCorp contends the Commission
3 should not do so). Where discovery materials are submitted but the adjudicator has not yet
4 decided whether to accept them, they are not yet part of the record. *See, e.g., Herald Ass'n, Inc.*
5 *v. Judicial Conduct Bd.*, 544 A.2d 596, 598 (Vt. 1988) (merely sending discovery materials to an
6 agency did not constitute filing "until the Board ruled on whether to accept the discovery
7 materials"). Clearly, none of the deposition transcripts (WC/1000-1010) are "part of the record"
8 until the Commission or ALJ accepts them in evidence. OAR 860-014-0065(6).

9 It would be illogical and inequitable to allow a party to turn discovery material into a
10 "public record" simply by filing it with an administrative body in violation of an express rule that
11 precludes such filing. The Commission has not yet accepted this material as evidence in this
12 proceeding. Furthermore, PacifiCorp has moved to strike much of this material because Wah
13 Chang has not actually relied upon more than 99 percent of its exhibit materials. *See*
14 *PacifiCorp's Motion to Strike.*

15 Wah Chang effectively seeks to bootstrap a public interest argument based upon its
16 overbroad and improper filing of exhibits. There appears to be no other purpose for the patently
17 overbroad filing by Wah Chang or any reason that documents that are not relevant in this matter
18 must be disclosed to the public. Given the complete lack of any stated need on the part of Wah
19 Chang to use PacifiCorp's confidential information in a manner that is prevented by the
20 Protective Order, and given that Wah Chang does not even use the overwhelming majority of
21 what it filed, it simply appears that Wah Chang made its patently overbroad filing in order to
22 support its motion to exclude. In other words, once it had prefiled this information, Wah Chang
23 could attempt to argue that it is a public record. However, PacifiCorp should not be punished for
24 its forthcoming, prompt cooperation in the discovery process, which it did in considerable
25 reliance on the Protective Order.

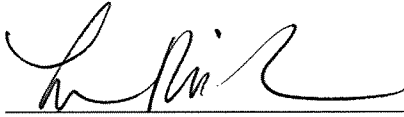
1 In short, Wah Chang cannot invoke the "public interest" in the openness of Commission
2 proceedings as a basis for de-classification of confidential documents unless and until those
3 documents have actually become part of the evidentiary record in this case.

4 **CONCLUSION**

5 For the foregoing reasons, Wah Chang's Motion to Exclude materials from the Protective
6 Order should be denied. At a minimum, the Commission should postpone a decision on Wah
7 Chang's motion until it has ruled on PacifiCorp's Motion to Strike. Finally, PacifiCorp should be
8 afforded the necessary time after the Commission's decision on PacifiCorp's Motion to Strike to
9 review those remaining documents to determine which, if any, portions PacifiCorp believes may
10 be declassified and why the other portions should remain confidential.

11 DATED: March 16, 2006.

12 **PERKINS COIE LLP**

13
14 By 
15 Lawrence H. Reichman, OSB No. 86083
16 Christopher L. Garrett, OSB No. 03100

17 Attorneys for PacifiCorp
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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1002

Wah Chang,

Petitioner,

v.

PacifiCorp,

Respondent.

AGREEMENT CONCERNING
DOCUMENTS PRODUCED IN
RESPONSE TO PETITIONER'S
ELEVENTH DATA REQUEST
(Request No. 147)

Wah Chang, and each of its attorneys, experts, agents, and other individuals who review any data storage tapes that PacifiCorp produces in response to Wah Chang's Eleventh Data Request, or any information derived from those tapes, (collectively, "Wah Chang") hereby agree as follows:

(1) Wah Chang will not review, record in audio format, transcribe, or otherwise use, any data contained on the tapes other than the data that corresponds to the trader conversations on the dates referenced in Data Request No. 147, provided, however, that the foregoing does not preclude Wah Chang from making a data request for the other data contained on the tapes. PacifiCorp's response to any such request would also be subject to this Agreement; (2) the production of the data storage tapes does not constitute a waiver of any privilege, including the

1 attorney-client privilege and the work product doctrine, that might otherwise protect the
2 information contained on the tapes from discovery; (3) Wah Chang will promptly provide
3 PacifiCorp with any data or information discovered when reviewing the tapes that Wah Chang's
4 attorneys recognize as being protected from disclosure by the attorney-client privilege or the
5 work-product doctrine; (4) to give PacifiCorp an opportunity to assert any relevant evidentiary
6 privilege, Wah Chang will provide PacifiCorp with any data or information discovered on the
7 tapes that Wah Chang intends to submit to the Public Utility Commission (the "PUC"), and will
8 do so not fewer than ten Commission business days before Wah Chang submits that data or
9 information to the PUC. If, within five Commission business days of receiving this data or
10 information from Wah Chang, PacifiCorp asserts in good faith that any of the data or information
11 is protected from discovery by the attorney-client privilege, the work-product doctrine, or any
12 other privilege recognized by Oregon law, PacifiCorp will promptly bring such issue before the
13 Commission and Wah Chang will not submit the data or information to the PUC unless and until
14 the PUC overrules PacifiCorp's assertion of privilege; (5) the tapes and all information derived
15 from the data on the tapes including, without limitation, any audio recordings or transcriptions
16 generated from the data contained on the tapes, and any notes or summaries concerning the
17 information contained on the tapes, will not be disclosed to any person or used in any way for
18 purposes other than this litigation, and will be treated in every other respect as CONFIDENTIAL
19 pursuant to the protective order in place in this matter; (6) Wah Chang will destroy all privileged
20 notes, summaries, and other documents concerning the information contained on the tapes and
21 return to counsel for PacifiCorp the tapes and all information derived from the data on the tapes
22 including, without limitation, any audio recordings or transcriptions generated with the data
23 contained on the tapes, and any non-privileged notes or summaries concerning the information
24 contained on the tapes, within two weeks after the hearing that is currently scheduled to take
25 place in this matter on April 25-27, 2006; provided, however, that Wah Chang shall have until
26 two weeks after entry of a final order or judgment not subject to appeal or further review to

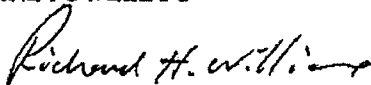
Page 2 - AGREEMENT CONCERNING DOCUMENTS.

1 destroy all privileged documents and return all non-privileged documents relating to information
2 on the tapes that is made part of the record in these proceedings before the PUC. PacifiCorp
3 will, until two weeks after entry of such a final order or judgment, maintain all tapes and other
4 documents that Wah Chang returns to PacifiCorp following the hearing; and (7) Wah Chang
5 shall not allow anyone, including its attorneys and experts, to review the tapes or any
6 information derived from the data on the tapes unless the individuals seeking to review the tapes
7 or information first provide counsel for PacifiCorp with a signed, written statement
8 acknowledging their consent to be bound by each of these terms, as applicable.

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It is so Agreed:

LANE POWELL PC



Richard H. Williams, OSB No. 72284
Attorneys for Petitioner

The undersigned consent to be bound by the foregoing terms, as applicable.

Signature: 
Printed Name: James H. DeShazo
Date: 10/10/05

Signature: _____
Printed Name: _____
Date: _____

Signature: _____
Printed Name: _____
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Printed Name: _____
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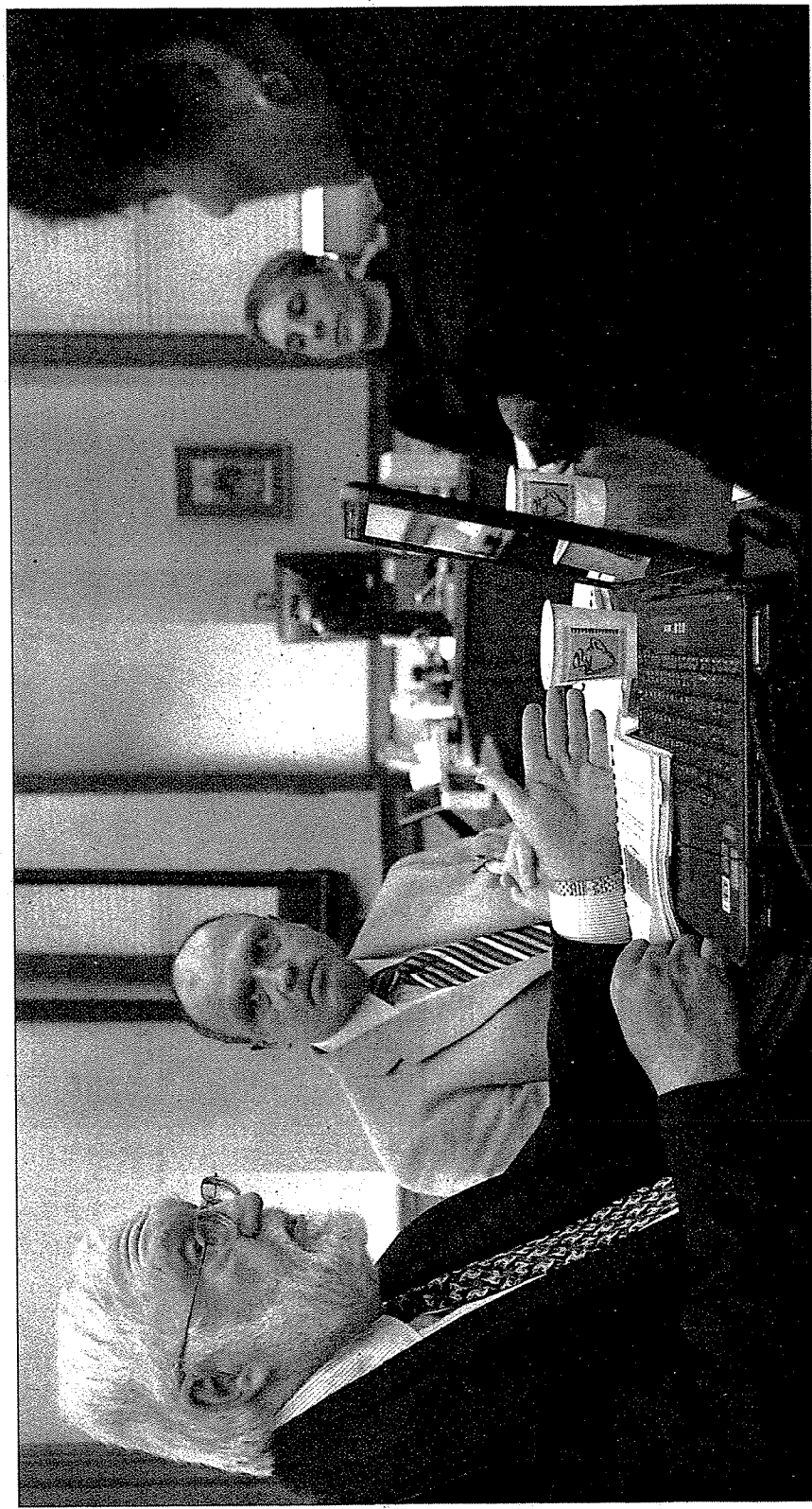
TRIUMPH

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PUBLISHED EACH TUESDAY & FRIDAY

TUESDAY, JANUARY 31, 2006

Hunch becomes a hunt



TRIBUNE PHOTOS: L.E. BASKOW

New City Hall consultant — and former PGE executive — Robert McCullough (left) meets with (from second from left) Commissioner Randy Leonard, chief of staff Ty Kovatch and lawyer Ann Fisher. On orders to look into PGE's role in the Enron Corp. scandal, the utility's nonpayment of county taxes and subsequent rate hikes for local consumers, McCullough has collected about 42 million documents for review.

BACKSTORY ● Suspicious, city hires big gun to pry into PGE

Story by Nick Budnick • Photos by L.E. Baskow

Before white-haired Portland consultant Robert McCullough showed



New City Hall consultant — and former PGE executive — Robert McCullough (left) meets with (from second from left) Commissioner Randy Leonard, chief of staff Ty Kovatch and lawyer Ann Fisher: On orders to look into PGE's role in the Enron Corp. scandal, the utility's nonpayment of county taxes and subsequent rate hikes for local consumers, McCullough has collected about 12 million documents for review.

BACKSTORY • Suspicious, city hires big gun to pry into PGE

Story by Nick Budnick • Photos by L.E. Baskow

Before white-haired Portland consultant Robert McCullough showed up at City Hall for his job interview in January, he'd envisioned potential pitfalls, but not this one — the self-described "6-3 rotund Irishman" wiped out on the lobby's wet marble floor.

Called to the scene, city Commissioner Randy Leonard says his first thought was: "Oh my God, we killed our consultant."

"I had a bleeding skull, and my knee was the size of a basketball," McCullough says. "I had a choice to work for the city — or sue it."

It was an inauspicious beginning for the man whom the City Council is counting on to support a politically risky, never-before-tried gamble — to find enough evidence to single-handedly reduce the electricity rates charged Portlanders by Portland General Electric, the utility that provides power to 1.5 million Oregonians.

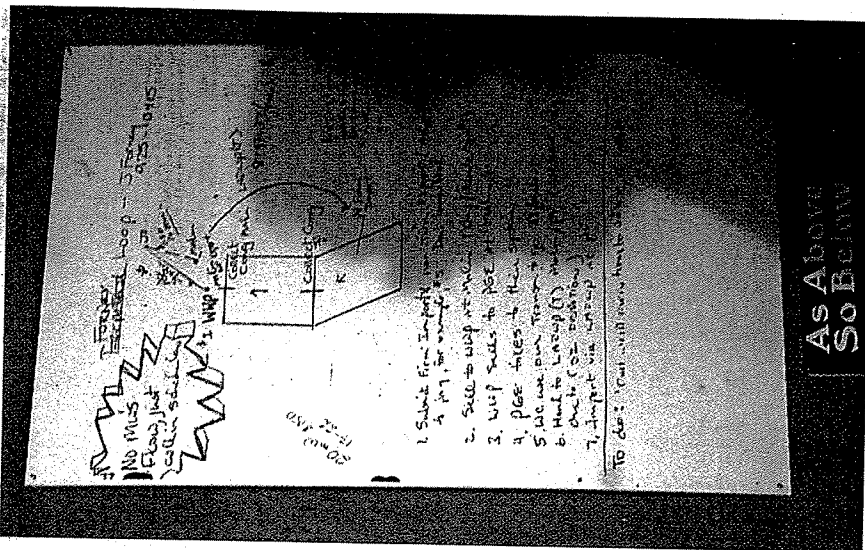
Tapping a stash of \$700,000 that was left over from the city's failed effort to buy PGE, the city has hired McCullough, a \$350-an-hour former PGE executive, to sift through mounds of data. The goal: to see if the company's involvement with improper Enron Corp. energy shenanigans has fueled a lasting power-rate hangover for Portlanders. If they find the evidence, Leonard has vowed to bring PGE rates down, using a long-forgotten city ordinance that surfaced only recently.

As for compromising with PGE, Leonard says if there's proof of fraud or deceit, forget it: "There will be no settlement."

PGE Associate General Counsel Jay Dudley thinks Portland is wasting its time with McCullough, citing an internal 2002 investigation into the questionable transactions that were followed up on by the Federal Energy Regulatory Commission. "At the end of the day we found no evidence that our traders engaged in activities that hurt the power markets," he says. "We had no knowledge of what was going on."

The area McCullough is tackling is one where certainty is hard to find. In a dozen cases of alleged market manipulation that McCullough's worked on, he says his side won about half the time. Most of the outcomes he considers victories were settlements that he says he cannot discuss

See McCULLOUGH / Page 4



As Above
So Below

One of the documents at McCullough's disposal details Enron Corp.'s infamous "Forney Perpetual Loop." Servers loaded with documents fill a house near Reed College, which also showcases utility memorabilia (left).

Schools group mute on tax poll

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From page 1

because of confidentiality agreements. So whether McCullough can deliver for Portland is an open question — despite an intellect that even his critics agree is formidable.

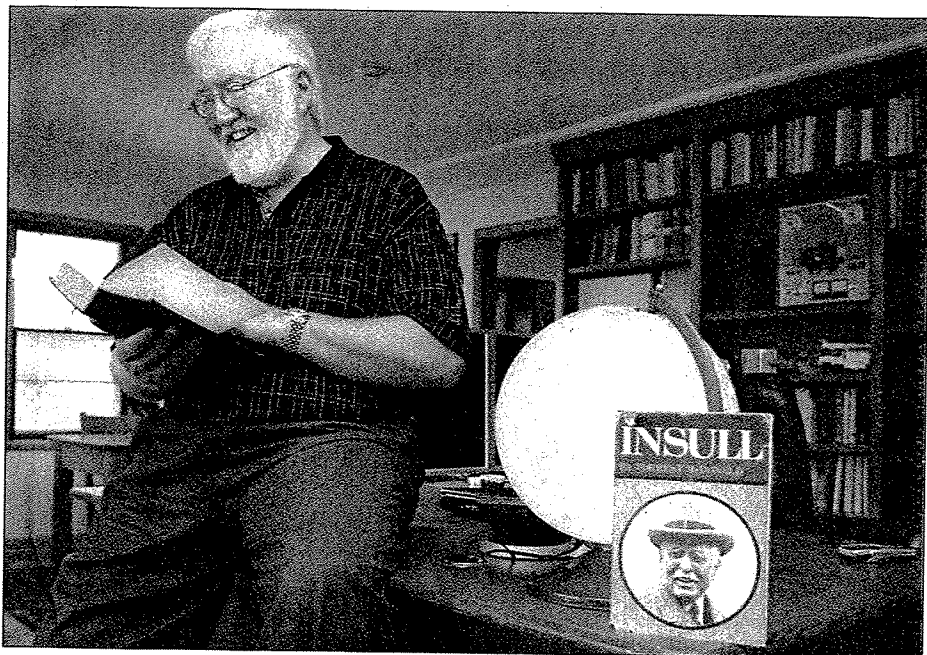
"Many consider him godlike," says Jerry Leone, the former manager of the Public Power Council. "There are others, I believe, who consider Robert the devil incarnate."

Millions of documents filed

McCullough's lair is a white one-story house on Southeast Woodstock Boulevard near Reed College, filled with polished wood, warmly colored rugs, stacks of federal energy reports and such utility industry esoterica as a statue of Reddy Kilowatt, the utilities' perky 1920s-era answer to Mickey Mouse.

But what gets your attention are the computer screens. There are flat-screen Samsung monitors everywhere. Most desks have three, allowing McCullough's crew of brainy Reed undergraduates and recent graduates to compare multiple sets of data at once. In the basement sit rows of dark minimonoliths, computer servers packed with evidence. "We have 12 million Enron documents stored on these computers," McCullough says. "We often get calls from prosecutors, the FBI and the press saying, 'Can you find us something?' ... Literally we can search the whole thing in 17 seconds."

Among the documents are references to McCullough, such as an Enron e-mail sarcastically referring to him as "the Robin Hood



TRIBUNE PHOTO: L.E. BASKOV

Robert McCullough knows the utility industry in and out, collecting books and lore about its players. A favorite tome in his library profiles Sam Insull, president of Chicago Edison Co. in the early 1900s and a brazen businessman.

of the Pacific Northwest."

Indeed, the Enron scandal seems to have given McCullough his true calling — as well as a financial windfall thanks to the subsequent litigation it spawned.

McCullough was a PGE executive until 1991, then co-founded an energy-marketing business, which failed. He became a consultant, working for Indian tribes, aluminum companies and steel mills, as well as underdog local utilities fighting voracious larger counterparts. He even worked for PGE, which by then had become an Enron subsidiary, as recently as 1998.

Then, on May 22, 2000, wholesale energy prices across the West shot up by a factor of 10 or more, sparking what became known as the California energy crisis. According to the Enron book, "Conspiracy of Pools" by Kurt Eichenwald, McCullough was among the first to suspect what was going on. Sitting in the lobby of the Ritz-Carlton Montreal Hotel, chatting on his cell phone with Seattle public utility officials, he challenged their complacency, saying, "Why are prices so high if there's not a lot of demand?"

Industry officials blamed it on a variety of factors, including the weather — you name it. Portland energy attorney Dan Meek speaks with awe of the trade-press article in which he says McCullough was the first to "systematically destroy" the denials that someone had been gaming the system to drive up rates and pocket massive profits. Meek says, "He is, I think, the outstanding expert on Western en-

ergy market manipulation."

PGE was a way in

The California energy crisis had its roots in Portland. Enron's 1997 purchase of PGE gave Enron "entree to California's power grid and a copy of the utility industry's secret playbook," wrote Fortune magazine reporters Bethany McLean and Peter Elkind in their book, "The Smartest Guys in the Room."

McCullough, for his part, likens the Enron-PGE relationship to Dr. Evil and his "Mini-me" in the movie "Austin Powers." Enron, he says, took advantage of the dark corners of utility deregulation: "They were mugging people where there were no streetlights."

And one of the biggest victims was the Northwest — in fact, Enron drew the bulk of its profits here, says Eric Christensen, associate general counsel for Snohomish Public Utility District in Washington, which has been the leader in suing Enron for reimbursement of its escalated rates.

Christensen says that when his utility obtained Enron's company data and e-mails from the federal government, McCullough was "instrumental" in finding seams federal regulators had missed. "He uncovered the fact that they were using five different sets of accounting books. ... He uncovered shocking evidence about the amount of profits that Enron was taking out of the Northwest."

"We consider him a hero," says

Will Patton, a Seattle assistant city attorney who's been working with McCullough on that city's effort to secure refunds for customers. "Enron probably has a dartboard with his profile on it."

McCullough's critics accuse him of arrogance and overconfidence, according to his friend and former partner, Marty Howard.

"It has been said of Robert that he is often wrong, but never in doubt," Howard says. "The truth of the matter is he is not wrong that often, but he has a lot of confidence."

Indeed, McCullough shuns the usual dry econo-speak. In a memo characterizing PGE's response to the 2002 FERC investigation, McCullough wrote that "the documents describe a utility operating at the bare edge of everyday competence."

His bold statements have made him a media darling, quoted in newspapers coast to coast. But they also chafe his more staid peers.

"I think sometimes he might be a little bit hyperbolic in his opinions, stronger maybe than they should be," says retired energy consultant Merrill Schultz, who worked with McCullough in the Northwest utilities' power pool for more than a decade.

"I think Robert is supremely confident of his ability," says Ken Cannon, former head of Industrial Consumers of Northwest

BACK STORY

An in-depth look at Portland's people and places

See PGE/ Page 5

Don't spend

PGE: Utility says e-mails misinterpreted

From page 4

Utilities. "Sometimes that's not always borne out in a court of law."

In 2002, a federal administrative law judge ripped McCullough's testimony, siding with Enron's Harvard experts and accusing the Portland consultant of shoddy research in support of Snohomish's case, calling his testimony "flawed" and "discredited."

McCullough acknowledges, "We got our asses kicked ... we were totally outgunned." But years later, he notes, an exhaustive FERC review found that, in fact, his hypothesis was correct and the Harvard professors were wrong.

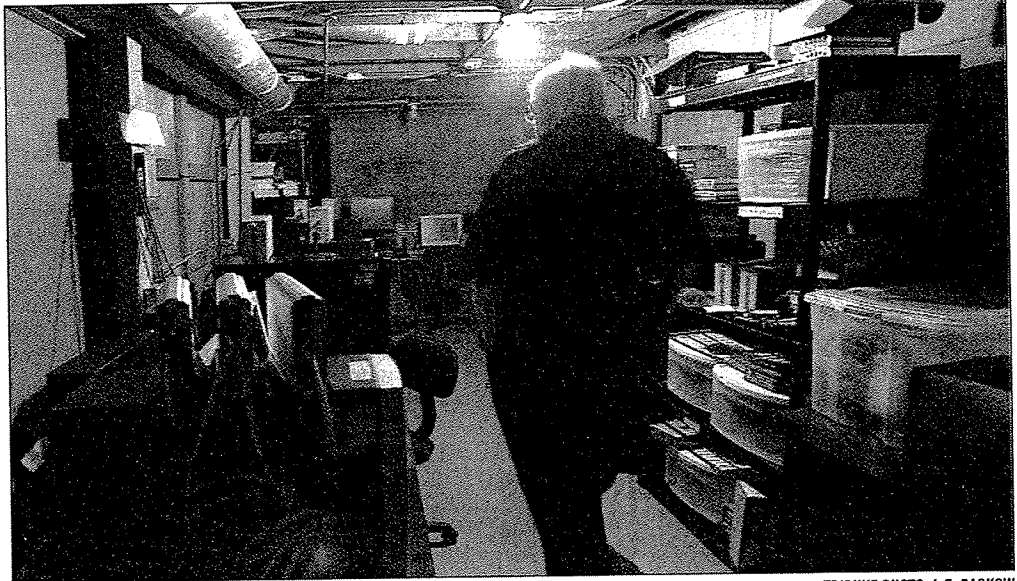
It takes lots of cash to win

Cannon suggests the city should watch over its contract with McCullough, which grants him a maximum of \$95,000, to keep him on task. "If you look at some of the other investigations that he helped in the past, you can run up some mighty large bills, because it's very, very data intensive," he said. "Robert's not cheap, I think that's for sure."

Christensen says that Snohomish has paid McCullough \$2 million to \$3 million in the last four years, in a case that is pending at the 9th U.S. Circuit Court of Appeals. Thanks to McCullough's Reed-spawned employees' willingness to work for low pay, Christensen says, "he runs a very low-overhead operation. So I think we've gotten a better bang for the buck than the bad guys have."

In the industry, McCullough is known for his luxurious tastes. At the large annual Christmas party he and his wife host, he answers the door in a top hat and tuxedo tails; guests are feted with fine champagne and gourmet catering from Caprial's Bistro. A buy-American kind of guy, he drives a black, new Cadillac; in winter he can be seen wearing a large fur coat made from Hudson Bay beavers that his Canadian clients, the Cree Indians, killed and ate.

All of which is why the Cree tribe's French-Canadian attorney, Robert Mainville, can't help but start laughing when asked to describe McCullough. "In Canada, we're left-wing, eh? I think of him



TRIBUNE PHOTO: L.E. BASKOW

Servers line the basement of a Southeast Portland house where Robert McCullough and his team scrutinize data and millions of documents, looking for evidence of improper dealings by PGE. The information trove is so extensive that prosecutors, the FBI and the media have relied on it.

as a conservative Republican."

McCullough says he is a "Teddy Roosevelt Republican," referring to the president who first became alarmed at the illegal and monopolistic dealings of Sam Insull. That's the Western energy magnate who founded PGE's predecessor, Portland Electric, seven decades ago — only to have his business empire crumble amid scandals and criminal charges, leading to utility reforms that lasted until the '90s and deregulation. Then, with Enron, history repeated itself.

Leaked papers set off search

Now it's PGE's dealings that are at issue.

Last year, a lawsuit filed by energy attorney Meek against PGE uncovered documents that some interpreted as showing that the utility, while an Enron subsidiary, had boosted profits while failing to pay Multnomah County taxes. Though sealed, they found their way to Willamette Week and subsequently The Oregonian.

PGE has denied the allegations, saying the e-mails have been misinterpreted. But Portland was still smarting from Enron's rejection of its bid to buy PGE in bankruptcy court in an attempt to bring down rates. So, following years of

negative headlines about PGE, including that the utility had failed to pay state and federal taxes, the latest allegations struck a nerve.

Commissioners Erik Sten and Leonard set off to probe the tax issue, and also to see if PGE's dealings with Enron — schemes with names like "Death Star" and "Ricochet" — had led to higher, unjustified rates charged to Portlanders.

Maury Galbraith, an Oregon Public Utility Commission economist, echoed other economists who told the Tribune that PGE's denials notwithstanding, it's plausible, even probable, that the deals PGE engaged in did, in fact, help inflate the market. The question that's more difficult to show is by how much — let alone whether McCullough and his colleagues can prove it. Galbraith thinks the deals probably had a small impact on rates.

McCullough, however, says that while comparing PGE's records to Enron in a preliminary scan, he and his team have found "anomalies" that suggest the questionable deals may be more extensive than anyone has yet realized.

Determining the truth, he says, will depend on whether PGE supplies more information — and even then it won't be easy.

"The fact of the matter is, proving white-collar crime is astonishingly difficult," McCullough says.

Critics, such as Melinda Davison, an attorney who represents PGE's industrial customers, says she thinks the city should instead be putting McCullough to work helping her at the state Public Utility Commission in an upcoming rate hearing, thus helping all PGE customers see their rates reduced, not just Portland's. "We would welcome their assistance in looking at all aspects of PGE's rates to make sure that they are fair, just and reasonable."

Leonard says appealing to the PUC is pointless because state regulators have left PGE off the hook in the past. "If I was PGE, I would say the same thing, because they've been able to get away with some of these issues ... without the PUC catching them."

Citing PGE's 2001 rate hike of 51 percent for businesses, Leonard says the city has a duty to figure out if it's being ripped off. And, he says, the guy he met under such unusual circumstances three weeks ago is just the guy to do it.

"He's brilliant," Leonard says. "More than once I've thought, 'How did we not know about this guy before we hired him?' It's amazing."

nickbudnick@portlandtribune.com

**BACK
STORY**

V

1 **CERTIFICATE OF SERVICE**

2 I certify that I have this day served the foregoing document, encaptioned PACIFICORP'S
3 RESPONSE TO WAH CHANG'S MOTION TO EXCLUDE INFORMATION FROM
4 PROTECTIVE ORDER, by causing a copy to be sent via U.S. Mail and electronic mail to:

5 Richard H. Williams
6 Milo Petranovich
7 Lane Powell Spears Lubersky LLP
8 Suite 2100
9 601 S.W. Second Avenue
10 Portland, OR 97204
11 Email: williamsr@lanepowell.com
12 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

11 DATED: March 16, 2006.

12 **PERKINS COIE LLP**

13
14 By 

15 _____
16 Lawrence H. Reichman, OSB No. 86083
17 Chris Garrett, OSB No. 03100

18 Attorneys for PacifiCorp
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