BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1002

WAH CHANG, Petitioner, v. PACIFICORP, Respondent.	PACIFICORP'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE PETITIONER'S DIRECT TESTIMONY AND EXHIBITS

INTRODUCTION

Wah Chang completely ignores most of the key points PacifiCorp makes in its opening brief. For example, Wah Chang does not respond in any way to PacifiCorp's observation that Wah Chang's only witness, Robert McCullough, lacks personal knowledge of the "facts" about which he purports to testify. Similarly, Wah Chang fails to respond to PacifiCorp's observation that OAR 860-014-0060 specifically requires a party to "plainly designate" the relevant portions of its exhibits, and specifically precludes a party from "encumbering the record" with volumes of extraneous material.

The arguments Wah Chang does make misstate case law and mischaracterize PacifiCorp's arguments. To cite just a few examples, Wah Chang misstates the case law that precludes an expert witness from offering opinions about someone's state of mind. Wah Chang also accuses PacifiCorp of relying on non-controlling Oregon law regarding the admissibility of evidence when, in fact, PacifiCorp establishes that Wah Chang failed to satisfy the Commission's

criteria of admissibility—PacifiCorp has plainly presented Oregon's evidentiary rules as guidelines and "well-reasoned markers" to assist the Commission.

In short, Wah Chang offers no legitimate excuse for its decision to rely exclusively on factual testimony from a witness with no relevant knowledge or its decision to submit volumes of documents with no explanation of their relevance or statement of how they purportedly support Wah Chang's claims. Wah Chang should be required in this docket to comply with the most basic tenets of evidence. Consistent with these basic tenets, PacifiCorp's motion to strike should be granted.

DISCUSSION

I. WAH CHANG DOES NOT ADEQUATELY ADDRESS THE DEFECTS IN ROBERT MCCULLOUGH'S TESTIMONY

A. Wah Chang Ignores Robert McCullough's Lack Of Personal Knowledge

The first point PacifiCorp made in its opening brief was that Mr. McCullough has no personal knowledge of the facts about which he purports to testify. He describes transactions in which he obviously played no role and conversations in which he did not participate, describing all of them as if he were present, and often purporting to identify the intent and purpose of the speaker, which he could not possibly know. His testimony thus fails the fundamental evidentiary test of competency. *See* PacifiCorp's Opening Brief ("Opening Br.") at 5-7.

Although Wah Chang's brief includes a section titled "Robert McCullough's Testimony is Admissible" (Opp. at 4-10), Wah Chang ignores the issue of Mr. McCullough's competency to present the "facts" in his written testimony, focusing instead on the separate and independent issue of his improper opinion testimony regarding PacifiCorp's state of mind (discussed in Section B below). By failing to grapple with the problem of Mr. McCullough's competency as a fact witness, Wah Chang appears to rest its argument on its reminder to the Commission that we

are not in court and that the Commission is not bound by the civil rules of evidence.[1] Nonetheless, the Commission is a trier of fact in an adjudicatory proceeding. As such, the Commission should require that witnesses have some personal knowledge of the facts, not because this principle happens to be codified at ORE 602, but because it is a foundational principle of evidence.

Under the Commission's rules, evidence is admissible "if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." OAR 860-014-0045(1). Wah Chang argues that "Oregon courts have consistently interpreted [this standard] to allow evidence of the type PacifiCorp seeks to exclude here," but Wah Chang offers no authority to support its proposition. Moreover, Wah Chang makes no attempt to persuade the Commission that a reasonably prudent person in the conduct of her serious affairs would accept, as a party's entire "factual" presentation, the testimony of a consultant who indisputably has no first-hand knowledge of the transactions that he purports to describe, who did not participate in the conversations that he characterizes, and who has never met the individuals whose minds he purports to read. Wah Chang has, in short, provided no rebuttal to PacifiCorp's demonstration that Mr. McCullough's factual testimony is improper and should be stricken.

B. Robert McCullough's Speculation About PacifiCorp's State of Mind Is Not Helpful And Should Not Be Admitted

Instead of addressing the most fundamental problem with Mr. McCullough's testimony, Wah Chang spends more than one-third of its brief defending four particular statements by

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[1] As noted above, Wah Chang mischaracterizes PacifiCorp's argument on this point. PacifiCorp does not contend that the admissibility of Mr. McCullough's Testimony is "controlled" by the Oregon Rules of Evidence. (Opp. at 4.) In fact, PacifiCorp has clearly stated that admissibility of evidence in this proceeding is governed by OAR 860-014-0045(1), but also has noted that the Commission has previously sought guidance in the "well-reasoned markers" provided by the Oregon rules concerning how evidence should be presented in order to safeguard the judicial system. (Opening Br. at 4.) One of the well-reasoned markers that Wah Chang would have the Commission ignore is that of witness competence—the foundational principle that a witness' factual testimony should be limited to subjects about which the witness has first-hand knowledge.

Mr. McCullough regarding PacifiCorp's alleged state of mind. Wah Chang's defense of these statements fails.

First, Mr. McCullough's assertions that PacifiCorp's management "took a casual attitude" and "was reckless in a dangerous market" are of no value to a trier of fact. (Opp. at 6.) Even assuming for purposes of this motion that the facts are as Mr. McCullough describes them, there is no value to Mr. McCullough's characterizing the evidence in this fashion. His statements should be excluded under *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992) (discussed further below).

Second, Wah Chang offers no defense of Mr. McCullough's speculation that PacifiCorp traders may have been motivated to engage in certain transactions by the hope of receiving a bonus. In fact, Wah Chang effectively concedes that this is bare speculation by describing the statement as no better than "one possible explanation" of the alleged activities. (Opp. at 6-8.) Wah Chang does not demonstrate—or even assert—that this "one possible explanation" is any more likely than any other possible explanation. Rank speculation does not "assist the trier of fact to understand the evidence or to determine a fact in issue." *Salas*, 980 F.2d at 305.

Third, Wah Chang incorrectly applies the *Salas* case to defend Mr. McCullough's assertion that PacifiCorp traders "should have immediately recognized" the alleged unusual nature of a transaction. Relying on *Salas*, Wah Chang argues that this state-of-mind evidence is permissible because it flows from other aspects of Mr. McCullough's testimony. (Opp. at 8.) The *Salas* case, however, says precisely the opposite. In that case, the court permitted certain expert testimony but drew the line to *exclude* the type of state-of-mind opinions being offered here:

> As an expert in the field of hostage negotiation, Dr. Greenstone can properly offer evidence on effective methods and explain to a jury faults in the methods employed by a police force. On the other hand, Dr. Greenstone *is not in a better position than a juror to conclude whether*

> *Carpenter's actions demonstrated such a lack of concern for Hermosillo's safety as to constitute deliberate indifference or conscious disregard.*[2]

Put simply, "[t]he trial judge ought to insist that a proffered expert bring to the jury more than the lawyers can offer in argument." *Salas*, 980 F.2d at 305 (internal citation omitted).

Here, regardless of whether the Commission chooses to admit other portions of Mr. McCullough's testimony, there is no value in Mr. McCullough's conclusions regarding PacifiCorp's alleged "recklessness" or "casual disregard," or in his conclusions about what PacifiCorp's traders "should have immediately recognized." These statements require no expertise and offer the fact-finder nothing more than what Wah Chang's lawyers "can offer in argument." *Salas*, 980 F.2d at 305.

Finally, for the same reasons, Wah Chang is incorrect in its defense of Mr. McCullough's statement impugning the credibility of another witness. (Opp. at 8-9.) Regardless of whether Mr. McCullough is permitted to testify regarding "common industry practice" or offer opinions in opposition to a PacifiCorp witness's testimony, he is not permitted to take the additional step of offering conclusions about witness credibility. Instead, it is the exclusive role of the fact-finder to make such determinations. *Salas*, 980 F.2d at 305.[3]

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[2] 980 F.2d at 305 (emphasis added). *See also Taylor v. Watters,* 655 F. Supp. 801, 805 (E.D. Mich. 1987) (concluding that an expert's testimony that officials' conduct was reckless and conscience-shocking was not admissible).

[3] Neither of the cases cited by Wah Chang to support its introduction of state-of-mind testimony is apposite. In the 1950 case of *U.S. v. Hiss*, psychiatric testimony was admitted in light of the rule that the "existence of insanity or mental derangement is admissible for the purpose of discrediting a witness." 88 F. Supp. 559 (S.D.N.Y. 1950). The case does not stand for Wah Chang's proposition that an expert may opine in conclusory terms that another witness is "not credible." The other case cited by Wah Chang, *Haley v. Pan American World Airways, Inc.*, 746 F.2d 311 (5th Cir. 1984), is distinguishable on its facts. In that case, the issue was whether sufficient evidence existed to support a finding that a crash victim suffered conscious "pre-impact" fear before his death. The Fifth Circuit found that although "[n]o one indeed will ever know" what went through the victim's mind, sufficient evidence supported an inference that he had been conscious of the impending disaster. *Id.* at 316. As an aside, the court declined to find an abuse of discretion in the trial court's admission of expert testimony regarding the "physiological effects associated with the awareness of immediate danger," leading to a conclusion that airplane passengers would have been in a state of panic immediately prior to impact. *Id.*

In short, Mr. McCullough's various suppositions about individuals' credibility and state of mind are improper. Contrary to Wah Chang's assertion, however, PacifiCorp does not argue that Mr. McCullough's entire testimony should be stricken on the basis of the four improper statements described above. Opp. at 9. Rather, PacifiCorp submits that Mr. McCullough's testimony should be stricken because it is so filled with unsupported *factual* assertions—again, a point that Wah Chang utterly ignores. *See* Opening Br. at 7. Given the pervasiveness of Mr. McCullough's testimony about facts of which he knows nothing, the Commission cannot practically separate the testimony that may be admissible from the testimony that is not.

II. MATERIAL THAT WAH CHANG DOES NOT USE SHOULD NOT BE PART OF THE RECORD

PacifiCorp's opening brief demonstrated that Wah Chang has improperly attempted to offer 31 exhibits that are not cited anywhere, and for which no showing of relevance is made. Opening Br. at 10. Another 31 exhibits are improperly offered in their totality even though only minute portions are cited, and despite the Commission's express rules requiring the party offering an exhibit to "plainly designate" the relevant material in the exhibit and to not "encumber the record" with irrelevant material. Opening Br. at 11-12; OAR 860-014-0060(2).

Wah Chang does not even respond to many of PacifiCorp's valid points. Wah Chang does not respond, for example, to PacifiCorp's analysis of the requirement in OAR 860-014-0060 that a party "plainly designate" the relevant material in any exhibit. Nor does Wah Chang address the fact that it has submitted entire deposition transcripts in violation of OAR 860-014-0065(6), without giving PacifiCorp the opportunity to seek resolution of its objections to deposition questions based on form, foundation, or privilege. Opening Br. at 14. Nor does Wah Chang respond to PacifiCorp's observation that the over inclusion of material in the record increases the likelihood of delay and confusion of issues, again in violation of the Commission's procedural rules. Opening Br. at 14-15.

When Wah Chang does finally respond to the points PacifiCorp has raised, Wah Chang acknowledges that it has no intention of using many of the exhibits it has submitted.[4] With respect to other exhibits, Wah Chang offers only cursory explanations, in an appendix to its Opposition, of how those exhibits are purportedly relevant. Crucially missing, however, is an explanation of why Wah Chang fails to *cite* any of this "relevant" material, or why this material needs to encumber the record if Wah Chang has no intention of using it.

Only two results can be achieved by the inclusion in the record of material that Wah Chang does not use in its direct case. First, were Wah Chang allowed to load the record, Wah Chang's burden to present its case in an orderly fashion shifts onto the Commission, which would be forced to sift through all of the evidence in this matter and discern what is meaningful and probative. Because Wah Chang does not discuss this allegedly "relevant" evidence, the Commission has no way to make sense of it except by combing the thousands of pages of data that Wah Chang has submitted. This extraordinary and burdensome request is not contemplated by the Commission's rules. Wah Chang's approach is also prejudicial to PacifiCorp by shifting the burden to PacifiCorp to anticipate arguments that Wah Chang does not make today, but which may be imbedded in the documents of record to be used at any time.[5]

The second possible result of filing volumes of uncited material is to give Wah Chang additional ammunition for a future attack on an adverse result in this proceeding. If the Commission rules unfavorably to Wah Chang, Wah Chang presumably will seek appellate

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[4] In addition to the many exhibits that Wah Chang acknowledges in its Opposition that it does not intend to offer, Wah Chang has separately advised PacifiCorp that it may be willing to consider withdrawing Exhibit 906—a CD containing the equivalent of 98,828 pages of information. The fact that Wah Chang has voluntarily agreed to withdraw almost 100,000 pages of the information that it submitted confirms that many of the materials Wah Chang has submitted do not belong in the record.

[5] Wah Chang asserts that a tribunal "is not likely to be impressed" by a future argument based on evidence that is not discussed in testimony or at the hearing. (Opp. at 10) This will not stop Wah Chang from making such arguments, however, nor will it relieve PacifiCorp of the burden and cost of responding to such arguments before they are made.

review, during which the Commission's ruling will be reviewed under the substantial evidence standard based on the totality of the record. Wah Chang presumably intends to make every argument that may be helpful in order to avoid final defeat, using any evidence that exists in the record. That is why the record should be properly created in the first instance, consistent with the Commission's rules and with procedural due process and fair play.

III. WAH CHANG'S RELIANCE ON HEARSAY IS IMPROPER

Wah Chang defends its use of hearsay exhibits on the ground that these exhibits were part of the record in investigations by state and federal regulators and therefore should be deemed reliable.[6] Opp. at 12-13. Wah Chang overlooks the very different context of these investigatory proceedings, in which regulators considered hearsay evidence as part of a much greater body of evidence. Those regulators were able to consider the hearsay in the light of other, possibly conflicting evidence, directly examine the creators of the evidence, and weigh the hearsay appropriately.

The fact that some of Wah Chang's hearsay exhibits were part of the record in regulatory proceedings says nothing about how they were used, let alone how FERC or other regulators may have judged the reliability of the specific documents submitted by Wah Chang. Thus, categorical acceptance of hearsay in this proceeding merely because it was "part of the record" in other proceedings is neither reasonable nor fair. This is particularly true because Wah Chang has chosen to present its entire case, including all of the hearsay material, through the testimony of a single hired consultant with no first-hand knowledge of *any of these events*, including the hearsay (creating a multiple hearsay problem). Because of this unorthodox approach, PacifiCorp has no reasonable opportunity to establish the circumstances surrounding the creation of these

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[6] Wah Chang also suggests that this Commission has explicitly invited the use of this type of testimony. Opp. at 13. Wah Chang misreads the Commission's ruling. The Commission's language quoted by Wah Chang merely acknowledges that relevant evidence may emerge from the FERC investigation. *See* language from Order No. 03-153 (March 13, 2003), quoted in Opp. at 13. Nothing in that language can fairly be read to endorse the use of hearsay.

hearsay documents or to adduce any additional or potentially contradictory evidence from the documents' creators.[7]

IV. CONCLUSION

For the foregoing reasons and the reasons set forth in its opening brief, PacifiCorp respectfully requests: (1) that the Commission strike the entirety of Mr. McCullough's testimony; (2) that the Commission strike the 31 exhibits that Mr. McCullough does not reference to support his testimony; (3) with respect to the 31 other lengthy exhibits that Wah Chang cites only in minuscule part, that the Commission strike those exhibits from the record and order Wah Chang to refile only the cited excerpts of those exhibits, consistent with the Commission's rules; and (4) that the Commission strike the 61 hearsay and otherwise unreliable exhibits and the portions of Mr. McCullough's testimony that quote these exhibits.

DATED: April 21, 2006.

PERKINS COIE LLP

By ______________________________
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[7] Wah Chang purports to authenticate the documents by having Mr. McCullough testify to the fact that they were used in various regulatory investigations. This is of no value in enabling the Commission to evaluate the creation of the documents in the first instance.

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing document, encaptioned PACIFICORP'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE PETITIONER'S DIRECT TESTIMONY AND EXHIBITS, by causing a copy to be sent via U.S. Mail and electronic mail to:

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DATED: April 21, 2006.

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