



1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
PHONE: 503.727.2000
FAX: 503.727.2222
www.perkinscoie.com

James M. Van Nostrand
PHONE: (503) 727-2162
FAX: (503) 346-2162
EMAIL: JVanNostrand@perkinscoie.com

July 18, 2007

VIA OVERNIGHT DELIVERY

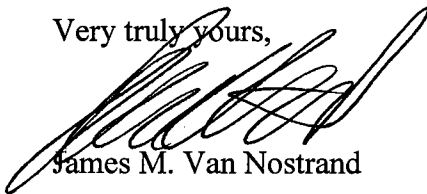
Public Utility Commission of Oregon
Attention: Filing Center
550 Capitol St NE #215
Salem OR 97301-2148

Re: *Docket UM 1002 – Wah Chang, Petitioner v. PacifiCorp, Respondent*
PacifiCorp's Motion to Strike

Dear Sir or Madam:

Enclosed for filing are the original and five (5) copies of PacifiCorp's Motion to Strike Portions of Wah Chang's Rebuttal Testimony or, in the Alternative, for Leave to Submit Limited Sur-Rebuttal Testimony.

Very truly yours,



James M. Van Nostrand

JMV:dma
Enclosures
cc: Service List
ALJ Patrick Power

24878-0008/LEGAL13406346.1

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Perkins Coie LLP and Affiliates

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1002

WAH CHANG,

Petitioner,

v.

PACIFICORP,

Respondent.

**PACIFICORP'S MOTION TO STRIKE
PORTIONS OF WAH CHANG'S
REBUTTAL TESTIMONY OR, IN THE
ALTERNATIVE, FOR LEAVE TO
SUBMIT LIMITED SUR-REBUTTAL
TESTIMONY**

I. INTRODUCTION

Based on the previous rulings by the Commission in this docket and the limited scope of this reopened proceeding, the issues to be addressed in this phase of the proceeding are relatively narrow: What evidence has Wah Chang introduced to show (1) that PacifiCorp actively engaged in fraud or some other unlawful conduct with the objective of affecting the prices that Wah Chang paid under the Master Electric Service Agreement ("MESA"), and (2) that such actions by PacifiCorp had a material effect on such prices? This case is not about whether the Western wholesale electricity markets were dysfunctional during portions of 2000-2001, or whether manipulation by market participants contributed to this dysfunction; the agency with jurisdiction over such matters – the Federal Energy Regulatory Commission ("FERC") – has already made these findings, and the Commission itself has previously expressed the view in these proceedings that "[a]dditional evidence that the California market may be dysfunctional is immaterial to the Commission's determination that the MESA rates are just and reasonable under Oregon law."¹ This case is also not about whether Enron in particular engaged in market manipulation to such an extent that parties contracting with Enron are entitled to relief; the agency (and courts) with

¹ *Wah Chang v. Oregon PUC*, Marion County Circuit Court Case No. 01C20598, Commission's Motion in Opposition to Plaintiff's Motion for Leave to Present Additional Evidence, (June 2, 2002) at 4.

1 jurisdiction over such matters have already made these findings. The fact that Enron has been
2 shown to have engaged in widespread market manipulation that contributed to the dysfunction in
3 the Western wholesale power markets during 2000-2001 – on which Wah Chang focuses much
4 of its testimony – is of no consequence in this proceeding. Rather, the burden on Wah Chang is
5 to demonstrate that *PacifiCorp* actively engaged in fraud or some other unlawful conduct, the
6 effect of which was to *materially affect the prices paid by Wah Chang under the MESA*. Very
7 little of the testimony submitted by Wah Chang addresses these issues.

8 Finally, in its rebuttal testimony submitted on July 6, 2007, Wah Chang submitted
9 evidence which seems to bear on the matters at issue: It introduced, for the first time, a study
10 which purports to show the impact of PacifiCorp trading activities at the California-Oregon
11 Border ("COB") on the Dow Jones COB Index which, in turn, was the basis for pricing under the
12 MESA during the relevant period. Based on underlying workpapers related to an earlier version
13 of this study,² it appears that this analysis was commenced in April 2006, over 15 months ago.³
14 Even though such an analysis was an element necessary to sustain Wah Chang's burden in this
15 proceeding, Wah Chang failed to include it in its direct case in December 2005. Wah Chang also
16 failed to supplement its direct case later, after the study had been completed. Instead, Wah
17 Chang waited until its rebuttal case – when PacifiCorp would have no opportunity to submit
18 responsive testimony – to finally share a critical piece of its prima facie case.

19 This is a fundamentally unfair tactic that would deny PacifiCorp its due process rights to
20 confront and respond to the testimony filed against it. PacifiCorp therefore moves to strike
21 portions of Wah Chang's rebuttal testimony consisting of the quantitative arguments based on a
22 study by Berne Martin Howard ("Howard Study") that purports to quantify the effect of
23 PacifiCorp's alleged actions on the market price for electricity, and therefore the prices that Wah
24

25 ² Workpapers provided by Wah Chang in response to PacifiCorp Request No. 94.

26 ³ The spreadsheet is entitled "20060415.xls," suggesting that it was created on April 15, 2006.
Regardless of when the study was created, however, it is an integral part of Wah Chang's prima facie case
and was required to be included in direct testimony or supplemental direct testimony.

1 Chang paid under the MESA.⁴ In the alternative, if the Commission declines to strike the
2 Howard Study, PacifiCorp requests leave to present limited sur-rebuttal testimony addressing the
3 Howard Study at the hearing scheduled to begin on August 1, 2007.⁵ PacifiCorp also
4 respectfully requests expedited treatment of this Motion, given that the hearings are scheduled to
5 commence within two weeks.

6 II. BACKGROUND

7 A. Claim Asserted by Wah Chang

8 Wah Chang and PacifiCorp entered into the MESA, a Commission-approved special
9 contract, in September 1997. When the parties were negotiating the MESA, Wah Chang wanted
10 a five-year, fixed-price contract; however, PacifiCorp was unwilling to agree to fixed prices for
11 five years because it would not accept the risk of prices rising above the fixed contract rates for
12 more than three years. *See* Commission Order No. 01-873 (the "Order") at 5. PacifiCorp would
13 agree to a five-year contract only if Wah Chang took the risk of such price increases for the last
14 two years. *Id.* Thus, the parties agreed in the MESA to rates for the first three years that were
15 fixed *below* the otherwise applicable tariff rate. For the last two years of the MESA, Wah Chang
16 agreed to pay rates based upon a market index, the daily average COB price as published in the
17 *Wall Street Journal* (the "Dow COB Index"). In this way, Wah Chang "knowingly assumed the
18 risk of market-based rates during the last two years of the contract." *Id.*

19 During the first three years of the MESA, Wah Chang paid PacifiCorp approximately
20 **\$6 million less** than it would have paid had it purchased electric service under the tariff. Wah
21 Chang began to pay PacifiCorp market-based rates on September 12, 2000, after the Western
22 energy crisis had commenced. Wah Chang filed its Petition for Relief in this matter on

23 ⁴ Specifically, PacifiCorp moves to strike pages 13 through 17 of Wah Chang Exhibit 1200
24 (Mr. Howard's rebuttal testimony), as well as Wah Chang Exhibit 1203.

25 ⁵ PacifiCorp proposes to offer the sur-rebuttal testimony through live testimony of its expert
26 witness, Dr. Charles Cicchetti. In order to provide Wah Chang with a reasonable opportunity to cross-
examine this testimony, PacifiCorp would be prepared to pre-file an outline of this testimony, and any
accompanying exhibits, prior to the hearings.

1 December 1, 2000, claiming that the market-based rates it was then paying under the MESA
2 were not just and reasonable. Specifically, Wah Chang claimed that the high prices in the Dow
3 COB Index at that time were the result of collusion or profiteering that had caused the California
4 wholesale electricity market to become dysfunctional. Order at 4. Wah Chang asked the
5 Commission to reset its rates for the last two years of the MESA at tariff rates. Notably, Wah
6 Chang did not propose that the *below-tariff rates* it paid for the first three years of the MESA
7 should be adjusted in any way. *Id.* at 3.

8 **B. The Commission's October 2001 Order**

9 The Commission held a hearing on Wah Chang's Petition in June 2001 and issued the
10 Order in October 2001. The Commission denied Wah Chang's Petition, concluding, after
11 considering all the evidence, that the rates Wah Chang was required to pay under the MESA
12 were not unjust or unreasonable. The Commission considered the following facts, among others:

- 13 • Wah Chang had a competitive alternative when it entered into the MESA;
- 14 • Wah Chang saved \$6 million during the first three years of the MESA;
- 15 • Wah Chang knowingly assumed the risk of price fluctuations during the last two
16 years of the MESA;
- 17 • Wah Chang could have agreed to include a price cap or collar in the MESA, but
18 chose not to do so because that would limit its gain if prices declined in the future;
- 19 • Wah Chang explored financial hedges when prices were rising in the fall of 2000, but
20 chose not to obtain one at that time because it thought that Dow COB Index prices
21 would decrease;
- 22 • Wah Chang was able, by the time of the hearing, to fix its energy costs at prices lower
23 than the rate it was asking the Commission to set by obtaining a financial hedge for
24 the summer of 2001;
- 25 • Electricity prices had stabilized and returned to their historic levels due, in part, to
26 actions of the FERC;
- Wah Chang recognized "substantial net revenue gains" by selling power into the
market in 2001 at prevailing market rates;
- Wah Chang had also mitigated its electricity costs by installing natural gas generators
that could produce approximately 80 percent of its electricity load, by the time of the
hearing, substantially reducing the impact of the MESA on Wah Chang's operations;

- 1 • Releasing Wah Chang from its obligations under the MESA created a "potential for
2 harm to other customers."

3 See Order at 3-8. In sum, the Commission found that Wah Chang had knowingly assumed the
4 risk of increases in the prices it paid under the MESA and concluded, after considering all of
5 these facts, that the rates in the MESA were not unjust or unreasonable. Order at 6.

6 One of the primary factors upon which the Commission relied in reaching its conclusion
7 that the MESA rates are just and reasonable is the Commission's policy of upholding
8 Commission-approved agreements that have been negotiated at arms' length:

9 It is our general policy that *only the most compelling circumstances*
10 justify retroactive modification of a Commission order adopting a fully
11 negotiated settlement agreement. Such circumstances might include facts
12 constituting mistake, fraud, impossibility, or some other *extraordinary*
13 basis for modifying an executed agreement.

14 Order at 6, *quoting* Order No. 95-857 (emphasis added). In reaching its decision, the
15 Commission thus decided that Wah Chang had not presented sufficient evidence of "compelling
16 circumstances" or an "extraordinary" basis that would justify modifying the negotiated and
17 Commission-approved MESA. *Id.*

18 The Commission also specifically considered and rejected arguments by Wah Chang that
19 the MESA prices had been affected by collusion and profiteering. "Wah Chang suggests that
20 collusion or profiteering caused the California electric wholesale market to become
21 dysfunctional." Order at 4. The Commission concluded, however, that potential collusion,
22 illegal trading practices, and market manipulation are irrelevant to whether the MESA rates are
23 just and reasonable:

24 Wah Chang has theories about the California electricity market and prices.
25 FERC and others also have theories. We will not try in this proceeding to
26 determine the causes for the price increases in the California wholesale
27 market.

28 Order at 7. Instead, the Commission based its decision that the rates in the MESA were not
29 unjust or unreasonable upon its consideration of numerous facts, as outlined above.

1 **C. Circuit Court Motion to Present Additional Evidence**

2 Wah Chang sought judicial review of the Order before the Circuit Court for Marion
3 County pursuant to *former* ORS 756.580. While that case was pending, in May 2002, Wah
4 Chang moved the court for leave to present additional evidence to the Commission pursuant to
5 *former* ORS 756.600. The two types of evidence Wah Chang sought leave to present were
6 (1) evidence of manipulation of the Western wholesale electricity markets in the years 2000-
7 2001, and (2) complaints filed by PacifiCorp with the FERC, in which PacifiCorp was seeking
8 relief from certain short-term contracts. *Former* ORS 756.600 permitted a party seeking judicial
9 review of a Commission order pursuant to *former* ORS 756.580 to move the Circuit Court for
10 leave to present additional evidence to the Commission while the appeal was pending if the
11 additional evidence is material and there were good and substantial reasons for not presenting the
12 evidence in the proceeding before the Commission.

13 The Commission and PacifiCorp opposed Wah Chang's motion before the Marion
14 County Circuit Court. The Commission argued that evidence of manipulation of the Western
15 wholesale electricity markets in the years 2000-2001 was "immaterial" to the Commission's
16 decision in this matter:

17 [Wah Chang] continues to argue that the Commission acted unlawfully
18 because it did not make a factual determination on whether the California
19 wholesale market was dysfunctional. The Commission's order is not
20 based on a factual finding that the California wholesale market is, or is
21 not, dysfunctional. ***Additional evidence that the California market may
be dysfunctional is immaterial to the Commission's determination that
the MESA rates are just and reasonable under Oregon law.***

22 Commission's Motion in Opposition to Plaintiff's Motion for Leave to Present Additional
23 Evidence at 4 (emphasis added).⁶

24 The Circuit Court granted Wah Chang's motion, but not because it disagreed with the
25 Commission's view that evidence of manipulation of the California wholesale market was

26 ⁶ *Wah Chang v. Oregon PUC*, Marion County Circuit Court Case No. 01C20598.

1 irrelevant to its decision. Rather, the Circuit Court granted Wah Chang's motion because the
2 court perceived that the Order was unclear about exactly *why* the Commission declined to
3 determine what caused energy prices in the western power markets to fluctuate in 2000 and
4 2001:

5 Although the commission stated that it declined to determine the theories
6 or causes of the price fluctuations[, it] is not clear whether they did so
7 because of the insufficiency of the evidence.

8 Letter Ruling dated June 18, 2002, at 2-3. Based on this perceived lack of clarity, the court
9 reasoned that if the Commission's Order was based on a lack of evidence, it should reopen its
10 record to accept such evidence. If, however, the Commission's Order was based on a conclusion
11 that "evidence of third party wrongdoing" would not alter the Commission's conclusions, then
12 the Commission could reject Wah Chang's proffered evidence altogether:

13 *Unless the Commission should rule that under no foreseeable*
14 *circumstances could such evidence obtain a different result here, the*
15 Commission should reopen its record to include such evidence and then
16 apply its rules and law in arriving at the correct application, here.

17 *Id.* at 3 (emphasis added).

18 In considering the nature of the current proceeding before the Commission, it is notable
19 that the Circuit Court's decision was *not* based upon a review of the Order pursuant to former
20 ORS 756.580, and thus is not in any respect a reversal or remand of the Order. Rather, it is
21 simply a direction to the Commission to reopen the record to take additional evidence and to
22 determine whether that evidence would change its decision. In addition, the court did not decide
23 that evidence of third party wrongdoing would be sufficient to grant Wah Chang relief from the
24 MESA: "Whether evidence of third party wrongdoing would be sufficient in *any* case before the
25 Commission to justify acceptance of facts in support of a potential change in the terms or
26 application of an executed and approved contract is uncertain." *Id.* (emphasis in original).

1 **D. Scope of Proceedings Before Commission**

2 The Order did not specify precisely what the Commission would consider to be "*the most*
3 *compelling circumstances*" or an "*extraordinary*" basis that would justify granting Wah Chang
4 relief from the MESA. Nevertheless, a few guideposts are clear.

- 5 • First, it is beyond dispute that general evidence of manipulation of the California
6 wholesale energy market is insufficient to grant Wah Chang relief. Wah Chang
7 presented such evidence through its expert witness in the original hearing. The
8 Commission decided, however, that regardless of the existence or cause of high prices
9 in the California wholesale market, the rates in the MESA were just and reasonable.
10 The Commission rejected Wah Chang's argument that the Commission should
11 narrowly focus on the events in California in 2000 and 2001. Instead, the
12 Commission based its decision on a review of *all* of the circumstances surrounding
13 the parties' MESA. For example, the Commission's decision was based, in part, on
14 the facts that Wah Chang saved \$6 million during the first three years of the MESA
15 and offset most of the higher prices that it paid pursuant to the MESA with sales of
16 electricity at the same high market rates that it now challenges.
- 17 • Second, the only evidence that could possibly justify granting the extraordinary
18 remedy of modifying an executed agreement is evidence proving that *PacifiCorp*
19 engaged in fraud or some other wrongful conduct, and that such conduct had a
20 material effect upon the prices that Wah Chang paid under the MESA. Order at 6.
21 Wah Chang conceded this point when it argued to the Commission that "under the
22 erroneously narrow standard applied by the Commission, Wah Chang is entitled to
23 relief if PacifiCorp engaged in fraud."⁷

24 The Commission confirmed this conclusion in its Order No. 03-153:

25 _____
26 ⁷ Wah Chang's Brief Regarding Hearing Scope, Schedule and Discovery, filed November 22,
2002, at 7.

1 We are not willing to say that under no circumstances could evidence
2 about the manipulation of the wholesale electricity market on which the
3 subject MESA rates were based change the Commission's determination
4 of this dispute. As an example, *it is theoretically possible that the*
5 *California wholesale electricity market became dysfunctional because of*
6 *PacifiCorp's manipulation, deceit, illegal conduct, and fraud in that*
7 *market.* The record does not show that to be the case, but the example
8 demonstrates that future evidence could reveal circumstances and conduct
9 we would not want to ignore.⁸

10 While the Commission discussed hypothetical evidence of PacifiCorp's wrongful conduct as an
11 "example" of evidence that might justify changing the Commission's decision in the Order, such
12 evidence, in fact, is the only type that could justify the extraordinary remedy of granting relief
13 from the MESA, as Wah Chang itself conceded. Wah Chang cannot make such a showing, as
14 FERC already concluded based upon its exhaustive investigation of PacifiCorp's and other
15 parties' conduct in connection with the Western energy crisis.

16 III. DISCUSSION

17 Until it filed its rebuttal testimony, Wah Chang had virtually ignored its burden in this
18 proceeding to prove harm from *PacifiCorp's* alleged conduct. Wah Chang's direct case,
19 submitted in December 2005, consists primarily of the testimony and exhibits of Mr. Robert
20 McCullough. Mr. McCullough's testimony is essentially a catalogue of misdeeds by an unrelated
21 party, Enron, that "gamed" the western energy markets. Among the flaws in Mr. McCullough's
22 testimony are that he fails to show the effect of any of these actions on the Dow COB Index – the
23 only price that is relevant to the MESA and, therefore, this proceeding. Furthermore, while
24 Mr. McCullough attempts to tar PacifiCorp with the Enron brush by identifying "suspect"
25 transactions to which PacifiCorp was a party (typically, buy-resell transactions in which
26 PacifiCorp earned a few dollars), Mr. McCullough fails in any respect to quantify the effect of
PacifiCorp's allegedly bad actions on the market price for electricity at COB. For example:

⁸ Order No. 03-153 at 2-3 (emphasis added).

- 1 • While Mr. McCullough claims that PacifiCorp "facilitated" Enron's "Fat Boy,"
2 "Ricochet" and "Death Star" schemes, he admits that the "40 to 50" instances in
3 which PacifiCorp participated in "Fat Boy" are so limited that they could be
4 attributable to a "computer error."⁹
- 5 • Mr. McCullough purports to show the impact on calendar year 2000 monthly prices
6 attributable to Fat Boy and Ricochet schemes.¹⁰ But this "analysis" shows the alleged
7 impact of these schemes by *all* market participants, not just PacifiCorp. That
8 PacifiCorp's role in these schemes was immaterial is confirmed by the FERC decision
9 cited in Mr. McCullough's rebuttal testimony, which lists several counter-parties to
10 Enron's Death Star and Ricochet transactions, and *does not identify PacifiCorp as*
11 *one such counter-party*.¹¹
- 12 • Mr. McCullough fails to address the result of FERC's investigation of PacifiCorp's
13 involvement in Ricochet, where PacifiCorp was assessed a nominal penalty (\$67,745)
14 as full settlement for all revenues for *all* of the "Wheel Out" activities, only one of
15 which was Ricochet.¹² Notably, these were found to be the "congestion" earnings
16 from this practice, *i.e.*, they were unrelated to wholesale *prices*.¹³ With respect to
17 Ricochet in particular, FERC Staff found no such transactions by PacifiCorp during
18 the relevant period.¹⁴

19 Mr. McCullough's rebuttal testimony is no more on point. He continues to cite Enron-related
20 litigation, and the relief that FERC and the Ninth Circuit have granted in circumstances where

21 ⁹ McCullough Deposition at 64:11-12, 102:17-21, cited at PacifiCorp/23, Cicchetti/74.

22 ¹⁰ Exhibit WC/80, McCullough/39.

23 ¹¹ 119 FERC ¶ 63,013, Docket EL03-180, Initial Decision, June 21, 2007. Paragraph 78 of the
24 Initial Decision discusses Death Star transactions, and concludes that Enron engaged in 585 Death Star
25 transactions between January 1, 2000 and June 21, 2001 producing estimated *congestion* revenues to
26 Enron of about \$2.1 million. Paragraph 79 of the Initial Decision identifies the counter-parties.
Paragraphs 99-102 of the Initial Decision discuss Ricochet, and paragraph 103 identifies the counter-
parties. In addition, paragraphs 111-118 of the Initial Decision describe how Enron "used its relationships
with other partners to its advantage and adversely impacted the western market," and identifies numerous
counter-parties; PacifiCorp is not mentioned.

¹² PacifiCorp/23, Cicchetti/67, citing *PacifiCorp*, 105 FERC ¶ 63,043 (Certification of Contested
Settlement)(Dec. 2003) and *PacifiCorp*, 106 FERC ¶ 61,235 (Order Approving Contested Settlement
Agreement)(Mar. 2004).

¹³ More recently, PacifiCorp entered into a \$27.975 million settlement at FERC, but this has
nothing to do with any alleged wrongdoing by PacifiCorp. The settlement simply resolves FERC's
potential liability in the refund case resulting from the FERC orders related to the California Refund
Proceeding that established a mitigated market clearing price. \$11.575 million of the settlement will be
paid by releasing funds currently held by the California Power Exchange. Docket No. EL03-163-000,
Order Approving Settlement (issued June 21, 2007).

¹⁴ PacifiCorp/23, Cicchetti/67.

1 market manipulation has been shown to be present. These circumstances have no bearing on this
2 case, however:

- 3 • Mr. McCullough cites extensively to the recent FERC decision in Enron Power
4 Marketing,¹⁵ which contains a thorough discussion of all the schemes in which Enron
5 was engaged, and identifies many of the counter-parties to Enron's schemes.
6 ***PacifiCorp is not mentioned even once throughout that entire order as a counter-***
7 ***party to any Enron schemes.*** Moreover, the basis for the relief granted in the case
8 was Enron's violation of its market-based rate authority. The MESA between Wah
9 Chang and PacifiCorp, however, is a retail contract, not a wholesale contract, and has
10 nothing to do with market-based rate authority. Rather, PacifiCorp and Wah Chang
11 agreed to use a specific index as the basis for pricing under the last two years of the
12 MESA.
- 13 • Mr. McCullough also cites a recent Ninth Circuit decision in which the court granted
14 relief to various buyers under wholesale contracts in the face of evidence of
15 widespread market manipulation.¹⁶ Unlike the MESA, however, these were contracts
16 entered into ***after*** the start of the Western energy crisis, and were signed based on
17 market-based rate authority granted by FERC. In contrast, the MESA was signed
18 three years before the start of the Western energy crisis and, as a retail contract, did
19 not rely upon FERC market-based rate authority but rather adopted the use of a
20 market-based index.

21 Nowhere in Mr. McCullough's testimony does he offer any response to the following points that
22 must be addressed if Wah Chang is to sustain its burden of proof:

- 23 • PacifiCorp was found by FERC¹⁷ to be a ***net buyer*** during the Western energy crisis.
24 As a net buyer "that frequently relied on the real-time market for power to serve this
25 [native] load,"¹⁸ PacifiCorp was a net loser during the Western energy crisis, and
26 incurred actual power costs that were \$786.7 million in excess of the level of power
costs included in rates during the period November 1, 2000 through September 9,

21 ¹⁵ 119 FERC ¶ 63,013, Docket EL03-180, Initial Decision, June 21, 2007.

22 ¹⁶ *PUD No. 1 v. FERC*, 471 F.3d 1053 (December 2006).

23 ¹⁷ Following its *Final Report on Price Manipulation in Western Markets*, issued in March 2003
24 in Docket No. PA02-2-000, FERC Staff conducted an investigation into the possibility of physical
25 withholding of electric generation from the California market during the period May 1, 2000 through
26 June 30, 2001. In *Staff's Initial Report on Physical Withholding by Generators Selling into the California
Market and Notification to Companies*, FERC Staff identified PacifiCorp as a "Net Purchaser," (*i.e.*, "if
the purchases and sales of these entities during the relevant time period are netted out, the entity will have
made more purchases than sales during that period.") *Initial Report at 3, fn. 4; Appendix to Initial Report.*

¹⁸ *Staff's Initial Report on Physical Withholding by Generators Selling into the California Market
and Notification to Companies at 3.*

1 2001.¹⁹ Under the deferral mechanism adopted by the Commission in Order
2 No. 01-420, PacifiCorp was authorized to recover approximately \$160 million of
these excess power costs from Oregon customers.²⁰

- 3 • PacifiCorp was *denied* relief at FERC when it filed a complaint under Section 206 of
4 the Federal Power Act to have the rates it was paying under certain short-term
5 contracts declared to be unjust and unreasonable, based on theories similar to those
6 advanced by Wah Chang here.²¹ As noted above, Wah Chang sought leave from
7 Marion County Circuit Court expressly for the purpose of presenting evidence
8 regarding the outcome of this complaint proceeding. In denying relief, FERC
determined that PacifiCorp "[s]imply found itself with contracts that had become
uneconomic with the passage of time."²² This determination – which obviously is
adverse to Wah Chang's theory in this case – presumably explains Wah Chang's
failure to offer the evidence it was expressly authorized to present.

9 In other words, Wah Chang's testimony completely fails to establish a causal link between
10 PacifiCorp's alleged actions and any damages allegedly suffered by Wah Chang due to any
11 impact on electricity prices as a result of PacifiCorp's actions.

12 Now – after PacifiCorp submitted its responsive testimony of Dr. Charles Cicchetti
13 emphasizing Wah Chang's failure to identify any effect of PacifiCorp's alleged actions – Wah
14 Chang finally produces the Howard Study in a last-ditch effort to present a viable theory of
15 causation. As PacifiCorp will demonstrate if given an opportunity, the Howard Study suffers
16 numerous methodological flaws. Indeed, Wah Chang presumably would have introduced the
17 Howard Study earlier if Wah Chang had any confidence in its methodology and its ability to
18 withstand scrutiny and analysis by opposing experts.

19
20
21 ¹⁹ Docket UM 995, Order No. 02-469 at 3.

22 ²⁰ *Id.* It should be noted that pursuant to the deferral approved in Docket UM 995, PacifiCorp
23 deferred the difference between the level of power costs recovered in rates and the actual power costs it
24 was incurring to serve customers during the deferral period. Inasmuch as the MESA permitted PacifiCorp
25 to recover its actual level of power costs, the power costs deferred for recovery under the UM 995
26 deferral mechanism were \$25.5 million less than if Wah Chang had been served under standard tariff
rates. PacifiCorp expressly reserves its rights to seek recovery through the UM 995 deferral mechanism
of any deficiency in power cost recovery that may arise if Wah Chang is granted relief in this proceeding.

²¹ *PacifiCorp v. Reliant Energy Services, Inc.*, 102 FERC ¶ 63,030 (June 2003).

²² *PacifiCorp v. Reliant Energy Services, Inc.*, 105 FERC ¶ 61,184, Order on Rehearing and
Clarification (Nov. 2003).

1 But the Commission should not even permit Wah Chang to introduce the Howard Study.
2 The portions of Wah Chang's rebuttal testimony that cite or rely upon the Howard Study are
3 improper because they present new evidence and arguments for the first time in rebuttal. Such
4 "sandbagging" tactics are inappropriate because they deprive the other side of an opportunity to
5 respond. The Commission has ruled that striking portions of a reply brief is a proper remedy in
6 such circumstances. *See, Re Pacific Power & Light dba PacifiCorp*, UE 170, Order No 06-172
7 (April 12, 2006), 2006 WL 1675377 * 3 (Or PUC) (striking an attachment to a reply brief
8 introduced after the close of evidence because it did not provide "an opportunity for rebuttal").

9 The Commission is hardly alone in rejecting evidence offered for the first time in a reply.
10 *See, e.g.*, ORAP 5.70(1)(b) ("A reply brief shall be confined to matters raised in the respondent's
11 brief or the answering brief of a cross-respondent[.]."); *Belgarde v Linn*, 205 Or App 433, 438,
12 134 P3d 1082, 1085 (Or App 2006) ("We do not consider arguments . . . raised for the first time
13 in a reply brief"); *Ailes v Portland Meadows, Inc.*, 312 Or 376, 380, 823 P2d 956, 958 (Or 1991);
14 *Robinson v. Omark Industries*, 291 Or 5, 7, 627 P2d 1263 (1981) (dismissing *sua sponte* the
15 petition for review because the issue on review had not been raised until the reply brief); *Hayes*
16 *Oyster Co v Dulcich*, 170 Or App 219, 237, 12 P3d 507, 518 (Or App 2000) (Plaintiff's argument
17 "comes too late" where made for first time in reply brief); *Chale v Allstate Life Ins Co*, 353 F3d
18 742, 750 (9th Cir 2003) (upholding district court's order striking portions of a reply brief that
19 contained newly presented facts).

20 Raising arguments for the first time in a reply is not merely unfair, it violates Due
21 Process. *See, e.g.*, *Sophanthavong v Palmateer*, 378 F3d 859, 872 (9th Cir 2004) ("The
22 unfairness of such a tactic is obvious. Opposing counsel is denied the opportunity to point to the
23 record to show that the new theory lacks legal or factual support"); *San Diego Watercrafts, Inc v*
24 *Wells Fargo Bank, NA*, 102 Cal App 4th 308, 316, 125 Cal Rptr 2d 499, 505 (Cal App 4 Dist,
25 2002) (holding that the trial court violated a party's due process rights when it considered
26

1 evidence first submitted in the reply brief); *Provenz v Miller*, 102 F3d 1478, 1483 (9th Cir 1996)
2 ("where new evidence is presented in a reply to a motion for summary judgment, the district
3 court should not consider the new evidence without giving the [non-]movant an opportunity to
4 respond") (quoting *Black v TIC Inv Corp*, 900 F2d 112, 116 (7th Cir 1990); *Fort Hall*
5 *Landowners Alliance, Inc v Bureau of Indian Affairs*, 2007 WL 2025230 (D Idaho, July 9, 2007)
6 ("[t]he purpose of this rule [not allowing new evidence in a reply brief] is obviously to prevent a
7 party from 'sandbagging' opponents by depriving them of their opportunity to respond").

8 Although Wah Chang apparently developed the Howard Study in the spring of 2006,²³ it
9 was not until filing its rebuttal testimony that Wah Chang finally introduced the Howard Study
10 and purported to quantify the effects of PacifiCorp's actions.²⁴ Wah Chang's "sandbagging" does
11 a disservice to the Commission by holding back any quantitative evidence of causation until the
12 final brief so that no responding analysis or argument could be developed. *See, e.g., U.S. v.*
13 *Caicedo-Llanos*, 960 F2d 158, 164 (DC Cir 1992) ("Considering an argument advanced for the
14 first time in a reply brief . . . is not only unfair to the appellee but also entails the risk of an
15 improvident or ill-advised opinion on the legal issues tendered. We do not sit, after all, as self-
16 directed boards of legal inquiry and research, but essentially as arbiters of legal questions
17 presented and argued by the parties before us") (internal quotations and citations omitted). Here,
18 the Commission sits not merely as an arbiter of a private dispute between two parties, but as a
19 guardian of the public interest. The Commission's ability to fulfill that function is inhibited
20 when one party manipulates the proceedings to prevent balanced argument and analysis.

22 ²³ PacifiCorp first learned of the existence of this analysis during the deposition of Mr.
23 McCullough on April 11, 2007, and requested a copy of any such study as Request No. 94 in PacifiCorp's
24 Fifth Set of Data Requests issued on May 1, 2007. A copy of the study was provided to PacifiCorp in
25 mid-May 2007, immediately prior to the filing of PacifiCorp's Reply Testimony. Based on the apparent
26 out-of-date, incomplete and unsophisticated nature of the study provided in the response to Request
No. 94, PacifiCorp had no reason to believe that Wah Chang would choose to offer it as part of its case,
and therefore did not address it in Reply Testimony.

²⁴ The study purports to show "inflating effects" on the Dow COB Index attributable to
PacifiCorp buy/resells at COB.

1 Striking the Howard Study and its related quantitative arguments from the rebuttal
2 testimony will protect PacifiCorp's due process rights and discourage litigants from holding back
3 evidence until the final round of testimony. In the alternative, allowing PacifiCorp an
4 opportunity to rebut the Study, by offering sur-rebuttal testimony at the hearing, will
5 accommodate both the Commission's interest in developing arguments and PacifiCorp's due
6 process right to respond.

7 **IV. CONCLUSION**

8 For the foregoing reasons, PacifiCorp requests that the Commission strike those portions
9 of Wah Chang's rebuttal testimony, identified above, that present, cite or rely upon the Howard
10 Study. In the alternative, PacifiCorp requests leave to present limited sur-rebuttal testimony
11 addressing the Howard Study at the hearing scheduled to begin on August 1, 2007. PacifiCorp
12 also respectfully requests expedited treatment of this Motion, given that the hearings are
13 scheduled to commence within two weeks.

14 DATED: July 18, 2007

15 **PERKINS COIE LLP**

16 By 

17 James M. Van Nostrand, OSB No. 794289
18 Christopher L. Garrett, OSB No. 031000

19 Attorneys for PacifiCorp

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CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing document, encaptioned PACIFICORP'S
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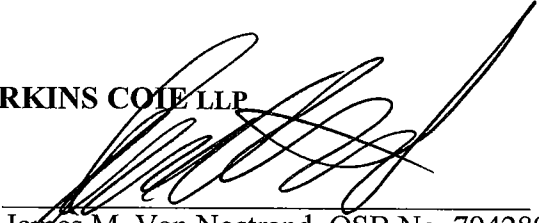
Richard H. Williams
Milo Petranovich
Lane Powell PC
Suite 2100
601 SW Second Avenue
Portland, OR 97204

Paul Graham (by U.S. Mail)
Assistant Attorney General
Regulated Utility & Business Section
1162 Court Street NE
Salem, OR 97301-4096

Natalie L. Hocken
Vice President and General Counsel
Pacific Power
825 NE Multnomah, Suite 2000
Portland, OR 97232

DATED: July 18, 2007.

PERKINS COIE LLP

By 
James M. Van Nostrand, OSB No. 794289
Christopher L. Garrett, OSB No. 031000

Attorneys for PacifiCorp