

LANE POWELL PC

Richard H. Williams
(503) 778-2160
williamsr@lanepowell.com

February 23, 2005

Law Offices

VIA E-MAIL (PUC.FilingCenter@state.or.us)
ORIGINAL BY REGULAR MAIL

Public Utility Commission of Oregon
Attention: Filing Center
550 Capitol Street NE #215
PO Box 2148
Salem, OR 97308-2148

*Suite 2100
601 SW Second Avenue
Portland, Oregon
97204-3158*

Re: *Wah Chang, Petitioner v. PacifiCorp, Respondent*
Docket 1002

(503) 778-2100

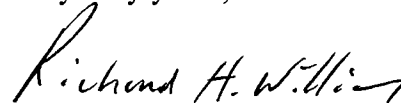
Dear Sir or Madam:

*Facsimile:
(503) 778-2200*

Enclosed for filing in the above-captioned proceeding is Wah Chang's Motion to Lift Stay of February 23, 2005. The original of this letter and the motion are being sent by regular mail.

www.lanepowell.com

Very truly yours,



Richard H. Williams

Enclosure
cc (w/enc): Service list *(via e-mail and regular mail)*

006854.0164/503918.1

*Anchorage, AK
Olympia, WA
Portland, OR
Seattle, WA
Vancouver, WA
London, England*

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF THE STATE OF OREGON**

UM 1002

Wah Chang,)	
)	
Petitioner,)	WAH CHANG'S MOTION
)	TO LIFT STAY
v.)	
)	
PacifiCorp,)	February 23, 2005
)	
Respondent.)	
_____)	

Motion

Petitioner, Wah Chang, moves for an order lifting the stay of these proceedings.

Discussion

By Ruling issued November 16, 2004, Administrative Law Judge Kirkpatrick granted PacifiCorp's motion to stay proceedings in this matter until the Marion County Circuit Court ruled on PacifiCorp's motion to terminate or limit. By order dated February 15, 2005, the court denied PacifiCorp's motion. Thus, the purpose of the stay has been satisfied. A conformed copy of the court's order is attached hereto as Attachment 1. A copy of the court's letter opinion dated February 3, 2005 is attached hereto as Attachment 2.

/ / /
/ / /
/ / /
/ / /

1 **Conclusion**

2 The Administrative Law Judge ought to lift the stay.

3 DATED: February 23, 2005.

4 LANE POWELL PC

5
6 By Richard H. Williams
7 Richard H. Williams, OSB No. 72284
8 williamsr@lanepowell.com

9 Attorneys for Wah Chang
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4 IN THE CIRCUIT COURT FOR THE STATE OF OREGON
5 FOR THE COUNTY OF MARION

FILED

FEB 15 2005

Marion County Circuit Court

6 WAH CHANG, a division of TDY Industries,
7 Inc., a California corporation,

8 Plaintiff,

9 vs.

10 THE PUBLIC UTILITY COMMISSION OF
11 OREGON,

12 Defendant,

13 and

14 PACIFICORP,

15 Intervenor.

Case No. 01C20598

ORDER DENYING INTERVENOR'S
MOTION TO TERMINATE OR
LIMIT

16 This matter came regularly before the court on December 10, 2004, on intervenor's
17 Motion to Terminate or Limit ORS 756.600 Proceeding before the Public Utility Commission,
18 the Honorable Don A. Dickey, Circuit Court Judge, presiding. Plaintiff, Wah Chang, appeared
19 through its counsel, Richard H. Williams. Defendant, Public Utility Commission of Oregon,
20 appeared through Assistant Attorney General Jason W. Jones. Intervenor, PacifiCorp, appeared
21 through its counsel, Lawrence H. Reichman and Jay A. Zollinger.
22

23 Based upon the pleadings, briefs and arguments of counsel, and for the reasons set forth
24 in the court's letter ruling dated February 3, 2005,
25
26

PAGE 1 - ORDER DENYING INTERVENOR'S MOTION TO TERMINATE OR LIMIT

LANE POWELL PC
SUITE 2100
601 SW SECOND AVENUE
PORTLAND, OREGON 97204-3158
(503) 778-2100

ATTACHMENT 1

006854.0164/501625.1

1 IT IS ORDERED that intervenor's Motion to Terminate or Limit ORS 756.600
2 Proceeding before the Public Utility Commission is denied.

3 Dated this 15th day of February, 2005.
4

5 151 Don A. Dickey
6 The Honorable Don A. Dickey
7 Judge of the Circuit Court

8 Presented by:

9 LANE POWELL PC

10 By Richard H. Williams
11 Richard H. Williams, OSB No. 72284

12 Attorneys for Plaintiff
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PAGE 2 - ORDER DENYING INTERVENOR'S MOTION TO TERMINATE OR LIMIT



CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
100 HIGH STREET NE
P.O. BOX 12889
SALEM, OREGON 97309-0869

RECEIVED
FEB 07 2005
LANE POWELL PC

Don A. Dickey
Circuit Court Judge
(503) 373-4445
Fax: (503) 588-7928

February 3, 2005

Richard Williams
Lane, Powell, Spears, Lubersky LLP
Suite 2100
601 SW Second Avenue
Portland, OR 97204-3158

Jason Jones
Assistant Attorney General
1162 Court Street NE
Salem, OR 97301

Jay A. Zollinger
Lawrence Reichman
Perkins Coie LLP
Suite 1500
1211 Southwest Fifth Avenue
Portland, OR 97204-3715

Re: Wah Chang v. PUC
Marion County Circuit Court Case No. 01C20598

Counsel:

This matter came before the Court for hearing on December 10, 2005, on the Intervenor's Motion to Terminate or Limit the Public Utility Commission's Proceeding. The Plaintiff appeared by and through Richard Williams, the Defendant appeared by and through Jason W. Jones and the Intervenor appeared by and through Jay A. Zollinger and Lawrence Reichman. After hearing oral argument of the parties, the matter was taken under advisement.

ISSUE

Whether this court should grant intervener PacifiCorp's motion to terminate or limit the PUC's proceeding?

ATTACHMENT 2

DISCUSSION

In December 2000, Wah Chang, filed a petition with the Public Utilities Commission (“the Commission”), asking the Commission to find that the rate set by its Commission-approved retail contract with PacifiCorp, the Master Electric Services Agreement (“MESA”), was unjust and unreasonable. *Wah Chang’s Memo in Opposition to PacifiCorp’s Motion to Terminate or Limit PUC Proceeding*, at 4 (“Wah Chang Memo”). The Commission denied Wah Chang’s petition. *Id.*, at 4.

Wah Chang filed a petition for judicial review with this court. While that case was pending, Wah Chang moved this court for an order permitting it to present additional evidence to the commission consisting of (i) evidence of manipulation of the Western wholesale electricity markets in the years 200-2001 and (ii) complaints filed by the intervener, PacifiCorp, with the Federal Energy Regulatory Commission. *Id.*, at 5; Zollinger Decl. Ex. 1. By letter opinion dated June 18, 2002 and order dated July 23, 2002, the court granted Wah Chang’s motion. *Zollinger Decl.*, Ex. 2&3.

In March 2003 the Commission held the case in abeyance pending investigations by the Oregon Attorney General and FERC. *Wah Chang Memo.*, at 6; *Zollinger Decl.*, Ex. 7. In January 2004, Wah Chang sought a Commission order reopening this proceeding and thus permitting discovery. The Commission granted Wah Chang’s motion, allowing Wah Chang to conduct discovery within the categorical parameters of the court’s order. *Wah Chang Memo*, at 8; *Zollinger Decl.*, Ex. 12.

PacifiCorp challenged the Commission’s decision and moved this court to limit or terminate the Proceedings at the Commission on the basis either preemption or that the Commission’s ruling exceeds the scope of ORS 756.600. This Court considers each argument in turn.

PREEMPTION

PacifiCorp argues that the Federal Power Act preempts the State’s authority to act. Express preemption of state law is compelled if “Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” *Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 849 (2003). Field preemption exists “if Congress evidences an intent to occupy a given field.” *Id.* Conflict preemption exists “if Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law....”

The Federal Power Act divides regulatory jurisdiction over electricity into two components: states have regulatory authority over intrastate retail sales of electricity, while federal government has exclusive jurisdiction over interstate, wholesale rates.” *In Re Wholesale Electricity Antitrust Litigation*, 244 F.Supp.2d 1072, 1076 (SD Cal 2003). The “interstate ‘transmission’ or ‘sale’ of

wholesale energy pursuant to a federal tariff - - not merely the 'rates' - - falls within FERC's exclusive jurisdiction." *Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 851 (2003). The Commission's activities cannot encroach in any way upon the substantive provisions of an area exclusively reserved to FERC.. *Lockyer*, at 852.

This issues in this case do not implicate any preemption concerns. The MESA involves an intrastate retail sale of electricity, so the State of Oregon, and not FERC, has authority to regulate it. In this case, the Commission is not encroaching upon FERC's authority in any way, it is simply determining whether to modify a retail rate due to wholesale market activities. The Commission proceeding will not subject PacifiCorp to incompatible demands.

Neither does the filed rate doctrine apply. This doctrine exists to prevent utilities or their customers from circumventing a filed rate by contracting for a different rate or seeking damages that in effect constituted a refund or surcharge. *See California v. FERC*, 383 F3d 1006, 1011-12 (9th Cir. 2004). The filed rate doctrine applies to FERC rates, so it necessarily applies to wholesale rates. This case applies specifically to retail rates under a contract and a modification of the retail rate under these contracts will have no effect on any wholesale transaction. The Commission proceeding does not violate the filed rate doctrine.

APPLICATION OF ORS 756.600

ORS 756.600 states in relevant part:

"(1) If, upon the trial of a suit, application is made to the court for leave to present additional evidence, it is shown to the satisfaction of the court that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the Public Utility Commission, the court may order that the additional evidence be taken by the commission and shall stay further proceedings in the suit for such time as the court considers appropriate.

(2) Upon taking such evidence the commission shall consider it and may alter, modify, amend or rescind the order in the proceeding or the findings of fact and conclusions of law with reference thereto

ORS 756.600(1) limits the Commission's consideration to the additional evidence which falls within the scope of the Circuit Court's ruling, specifically, that evidence which the judge has found both material and previously unavailable. This court's opinion letter on the issue characterized the proposed evidence as:

i) evidence of manipulation of the Western wholesale electricity markets in the years 2000-2001; and

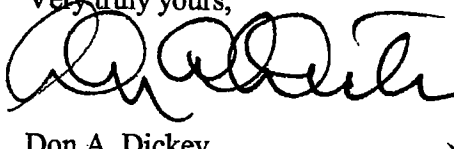
Messrs. Williams, Jones, Zollinger and Reichman
February 3, 2005
Case No. 01C20598
Page 5

to conduct discovery and hold a hearing, so long as the evidence considered falls within the scope of the Circuit Court's order. In this case, because the Circuit Court's opinion letter and order authorize cover such a broad spectrum of evidence, discovery is appropriate. For the above reasons, this court should deny intervenor PacifiCorp's motion.

CONCLUSION

The Intervenor's motion is denied. Richard Williams shall provide the appropriate form of Order within 20 days.

Very truly yours,

A handwritten signature in black ink, appearing to read "Don A. Dickey", written in a cursive style.

Don A. Dickey
Circuit Court Judge

DAD:kat
020305wahchanglr2

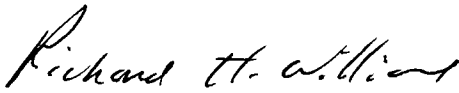
1 CERTIFICATE OF SERVICE

2 I certify that I have this day served the foregoing WAH CHANG'S MOTION TO LIFT
3 STAY upon all parties of record in this proceeding by delivering a copy in person or by mailing a
4 copy properly addressed with first class postage prepaid, or by electronic mail pursuant to
5 OAR 860-013-0070, to the following parties or attorneys of parties:

6

7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26	PAUL GRAHAM DEPARTMENT OF JUSTICE REGULATED UTILITY & BUSINESS SECTION 1162 COURT ST NE SALEM OR 97301-4096 paul.graham@state.or.us	LAWRENCE H. REICHMAN JAY A. ZOLLINGER PERKINS COIE LLP 1120 NW COUCH ST - 10 FL PORTLAND OR 97209-4128 lreichman@perkinscoie.com jzollinger@perkinscoie.com
	PAUL M WRIGLEY PACIFIC POWER & LIGHT 825 NE MULTNOMAH STE 800 PORTLAND OR 97232 paul.wrigley@pacifcorp.com	

DATED at Portland, Oregon, this 23rd day of February, 2005.


Richard H. Williams, OSB No. 72284
Of Counsel for Wah Chang, Petitioner

CERTIFICATE OF SERVICE