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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1002

WAH CHANG,

Petitioner,

v.

PACIFICORP,

Respondent.

**POST-HEARING REPLY BRIEF OF
PACIFICORP**

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I. INTRODUCTION

Wah Chang's Post-Hearing Opening Brief in this proceeding confirms that, in this re-opened phase of this seven-year proceeding, Wah Chang has failed to exercise its court-ordered opportunity to demonstrate a basis for granting the relief it requests. In its Brief, Wah Chang:

- Fails to articulate any legal theory or identify any controlling legal precedent under which it is entitled to the one-sided relief it is requesting in this proceeding (*i.e.*, its request for relief from the Master Electric Service Agreement ("MESA") for only those months in which the MESA prices exceeded the tariff rates, while keeping its "winnings" from (1) the months in which prices were lower under the MESA, and (2) its affiliate's huge profits from selling into the same "dysfunctional" markets).

Wah Chang continues to cite irrelevant precedent involving (1) wholesale transactions under the Federal Power Act (*e.g.*, *Snohomish PUD v. FERC*¹), (2) the Commission's implementation for the Klamath Irrigators of a specific governing

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¹ *Calpine Energy Services, LP v Public Utility Dist. No 1 of Snohomish County*, 471 F3d 1053 (9th Cir 2006), ("*Snohomish PUD*") cert. granted, --- S.Ct. ---, 2007 WL 1339437, 75 USLW 3610, 76 USLW 3019 (Sep 25, 2007) (No. 06-1462).

1 statute in Oregon (Order Nos. 05-726, 05-1202 and 06-172 from Docket UE 171),
2 and (3) the Commission's unsuccessful arguments to the Federal Energy Regulatory
3 Commission ("FERC") in a case in which PacifiCorp was denied any relief under the
4 same theories that Wah Chang is advancing in this case.

- 5 • Continues to advance arguments that are not substantiated by the record evidence
6 developed in this proceeding. In numerous instances, Wah Chang reiterates its initial
7 theories and speculation, in utter disregard of the evidence that has been developed on
8 the issue which disproves or contradicts the contention. It is as if PacifiCorp's
9 responsive testimony does not exist, or the evidentiary hearings never occurred. Wah
10 Chang simply proceeds with its initial contentions irrespective of the contrary
11 evidence now included in the record. Similarly, Wah Chang cites the conclusory
12 statements of its expert witness as "proof" of a fact, when they amount to no more
13 than conjecture or assumption. In other instances, Wah Chang exaggerates the
14 testimony of its expert witness by attributing to him statements that simply do not
15 exist in the record.
- 16 • Fails to demonstrate any nexus between the wrongdoing of others (*i.e.*, Enron)
17 discussed at length in its testimony and in its Brief and the harms allegedly suffered
18 by Wah Chang under the MESA for which PacifiCorp should be held responsible.
19 Notwithstanding the considerable evidence on the record showing how the Enron
20 schemes did *not* affect the California-Oregon Border ("COB") prices upon which the
21 MESA pricing was based – but rather were designed to manipulate the CalPX and
22 CAISO markets and to collect congestion relief payments – Wah Chang continues to
23 focus on these irrelevant Enron schemes.
- 24 • Mischaracterizes the relationship between this proceeding and Wah Chang's
25 companion civil court proceeding in Linn County Circuit Court. In its Opening Brief,
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1 Wah Chang urges that the Commission "defer consideration" of contract issues for
2 resolution by Linn County Circuit Court. This would conveniently allow Wah Chang
3 to pick and choose what legal defenses PacifiCorp may raise in the two forums in
4 which Wah Chang has elected to proceed. There is no basis for Wah Chang's
5 argument, which would eviscerate the *Mobile-Sierra* principles that govern the
6 review of a Commission-approved special contract.

- 7 • Resorts to reliance on an inapposite theory – spoliation of evidence – to make up for
8 Wah Chang's failure to produce the evidence that it had a court-ordered opportunity
9 to present. Wah Chang spends fully one-fifth of its Brief reiterating the same
10 baseless allegations regarding "willful suppression" of evidence by PacifiCorp.
11 Rather than arguing its case based on the limited relevant evidence Wah Chang was
12 able to marshal, or acknowledging and addressing the opposing testimony advanced
13 by PacifiCorp, Wah Chang resorts to a procedural gimmick to have the Commission
14 simply "infer" the findings that it was unable to prove. Just as Wah Chang was
15 unable to make the necessary showing to support its requested relief, however, it
16 similarly fails to demonstrate the applicability of its spoliation theory to the
17 circumstances of this case. There was no "willful suppression" of evidence, nor is
18 there any basis otherwise to make the extraordinary findings requested by Wah
19 Chang.

20 This Reply Brief will discuss these points in turn below.

21 II. DISCUSSION

22 A. Wah Chang Fails to Cite Any Legal Theory or Controlling Legal Precedent that 23 Supports Its Claim for Relief in this Proceeding.

24 Although Wah Chang's Opening Brief offers a glimpse at a number of possible theories
25 that relate to its claim for relief, it fails to articulate any basis for granting relief (1) to a non-
26 "victim" of the Western energy crisis, (2) attributable to the wrongdoing of others (rather than

1 the respondent in this case, PacifiCorp), and (3) in a circumstance where any relief granted to it
2 would be recoverable from PacifiCorp's other Oregon customers and thus contrary to the broader
3 public interest.

4 **1. Prices Under the MESA Are Presumed to Be Just and Reasonable, and**
5 **Enforcing the MESA Would Not Be Contrary to the Public Interest.**

6 Wah Chang claims that under the Commission's statutory obligation to set "just and
7 reasonable" rates,² the Commission has the authority to invalidate the MESA for the selective
8 periods identified by Wah Chang under its novel "lower of cost or market" demand for relief. In
9 support of this argument, however, Wah Chang simultaneously argues that (1) the *Mobile-Sierra*
10 doctrine does not apply, while (2) relying heavily on a discussion from a recent Ninth Circuit
11 case – *Snohomish PUD* – which interprets the *Mobile-Sierra* doctrine in a way that permits relief
12 to be granted to a "victim" of the Western energy crisis, *Snohomish PUD*.³ For the reasons
13 discussed in PacifiCorp's Opening Brief and in Section II.A.2 below, *Snohomish PUD* has no
14 bearing on the legal issues in this proceeding.

15 Wah Chang's first tactic is to suggest that *Mobile-Sierra* "has no basis in Oregon law."
16 This is simply not correct. As PacifiCorp explained in its Opening Brief, the Commission has
17 previously applied *Mobile-Sierra* principles – including in this very docket, when the
18 Commission denied Wah Chang's petition because it found that Wah Chang had freely entered
19 into a contract in which it assumed the risk of higher market rates. Wah Chang appears to
20 concede as much in its brief. Furthermore, Oregon courts have adopted what has been

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22 ² Wah Chang Opening Brief at 4-6.

23 ³ Unlike the MESA, however, the contracts at issue in *Snohomish PUD* were *wholesale* agreements
24 negotiated and signed during the Western energy crisis, and were executed under the market-based rate
25 authority granted by FERC. In contrast, the MESA was signed three years before the start of the Western
26 energy crisis and, as a retail contract, did not rely upon FERC market-based rate authority but rather
adopted the use of a market-based index. Moreover, in contrast to FERC's use of market-based authority
– under which FERC does *not* approve the specific contracts in advance, but rather approves an entity's
ability to charge market-based rates – the MESA was *specifically approved* by the Commission. Finally,
as discussed further below, the grounds on which the Ninth Circuit found the *Mobile-Sierra* doctrine
inapplicable in *Snohomish PUD* are not present with respect to the MESA.

1 recognized as an "Oregon analog" of *Mobile-Sierra*.⁴ Numerous other states' regulators have
2 expressly adopted similar principles, as discussed in PacifiCorp's Opening Brief.

3 Furthermore, Wah Chang's reasoning for why *Mobile-Sierra* should not apply makes no
4 sense. Wah Chang observes that the purpose of applying that doctrine to federal wholesale
5 electricity contracts is to protect ultimate retail consumers. Thus, Wah Chang argues that the
6 doctrine does not apply to arguments that rates are "too high," and argues further that the
7 doctrine does not apply to retail contracts at all. Wah Chang's argument misconstrues the
8 language of *Snohomish PUD* on which Wah Chang relies. The Ninth Circuit did *not* hold, as
9 Wah Chang implies, that the *Mobile-Sierra* doctrine does not apply to "high rate" cases. The
10 Court simply held that the doctrinal analysis of what is in the "public interest" changes somewhat
11 depending on whether the case is a "high rate" case or a "low rate" case.⁵ Wah Chang still has
12 the burden to show that the "public interest" requires granting Wah Chang relief from the MESA,
13 which it cannot do.

14 Wah Chang's suggestion that the *Mobile-Sierra* doctrine does not even apply to retail
15 contracts is similarly misguided. As noted above, the Commission has already applied the
16 doctrine in this docket. And there is every reason why the doctrine *should* apply here just as it
17 does to wholesale contracts. The policy rationale behind *Mobile-Sierra* – namely, holding
18 private parties to their contracts in the absence of an overriding public interest – applies with the
19 same or greater force to a situation like this, where a party to a retail contract seeks relief that
20 would have the effect of raising rates for other retail consumers. Wah Chang's implicit argument
21 that the ratepaying public has an interest in wholesale contracts, but none whatsoever in retail
22 contracts, is arbitrary and senseless.

23 In short, the Commission's October 2001 Order in this proceeding, without referring to
24 *Mobile-Sierra* by name, makes clear that *Mobile-Sierra*-type principles are to be applied when

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26 ⁴ See *Oregon Trail Elec Consumers Coop, Inc. v. Co-Gen Co*, 168 Or App 466, 478, 7 P3d 594 (2000).

⁵ See 471 F.3d at 1087-1089.

1 the Commission is asked to disturb privately negotiated, and Commission-approved, contract
2 rates for electricity between sophisticated parties.⁶ The market rates that Wah Chang paid under
3 the MESA are presumptively "just and reasonable" because Wah Chang *agreed* to them in a
4 contract that was (1) freely negotiated by the parties and (2) carefully reviewed and approved by
5 the Commission. Under *Mobile-Sierra*, the presumption that the MESA rates are just and
6 reasonable can be overcome only by showing that enforcing the contract would be contrary to
7 the public interest.⁷ As demonstrated in PacifiCorp's Opening Brief, Wah Chang cannot make
8 this showing because the ratepaying public *benefited* from the MESA.⁸

9 **2. Snohomish PUD and the Commission's Orders in the Klamath-Related**
10 **Proceedings Do Not Alter the *Mobile-Sierra* Analysis That Should Be Applied**
11 **Here.**

12 Wah Chang argues that the Commission previously "erred" in applying *Mobile-Sierra*-
13 type principles to the MESA. Wah Chang relies, once again, on *Snohomish PUD* for the
14 proposition that holding parties to the terms of their contracts is an abdication of the regulator's
15 statutory duty to evaluate the ongoing reasonableness of a rate. The critical difference in
16 *Snohomish PUD*, however, was that the private contract rates had *not been reviewed* in advance
17 by FERC. The Ninth Circuit held that *Mobile-Sierra* deference did not apply to a contract that
18 had not received advance regulatory review before it went into effect. This situation is, of

19 ⁶ Order No. 01-873 at 6.

20 ⁷ In its order reopening this proceeding, the Commission noted that "it is theoretically possible that the
21 California wholesale electricity market became dysfunctional because of PacifiCorp's manipulation,
22 deceit, illegal conduct, and fraud in that market. The record does not show that to be the case, but the
23 example demonstrates that future evidence could reveal circumstances and conduct we would not want to
24 ignore." Thus, while the Commission did not expressly reference the *Mobile-Sierra* "public interest"
25 rationale, the language that the Commission did use is consistent with the "public interest" exception to
26 the enforcement of contract rates.

⁸ Wah Chang advances a theory for the first time in its Opening Brief that it is entitled to relief under
ORS 756.040 because PacifiCorp allegedly engaged in "unjust practices" in allegedly "carrying out
fraudulent and manipulative trading schemes that increased Wah Chang's prices." Wah Chang Opening
Brief at 4. There is no support for finding that the "unjust practices" language of ORS 756.040 is
applicable here, or that it provides an independent ground for Wah Chang's claims. Wah Chang fails to
support its novel "unjust practices" argument with any precedent, an understandable omission given that
this proposed test lacks any foundation. Wah Chang appears to derive its "unjust practices" argument
from the language of "just and reasonable" standard employed by the Commission in reviewing rates.

1 course, entirely different because the PUC *did* review and approve the MESA rates. *Snohomish*
2 *PUD* neither held nor implied that *Mobile-Sierra* principles do not continue to apply to contracts
3 that are reviewed and approved in advance. Thus, contrary to Wah Chang's argument, the
4 Commission was correct in applying such principles to Wah Chang's petition in this docket.

5 Wah Chang's Opening Brief also relies upon the Commission's orders in the Klamath-
6 related proceeding as support for its position in this case.⁹ As noted by Wah Chang, the
7 Commission in Order No. 05-726 confirmed that it had an obligation to review the
8 appropriateness of rates under special contracts and, upon a proper showing, to modify them.¹⁰
9 In making this finding, however, the Commission cited *American Can v. Davis*,¹¹ which has been
10 referred to by the Oregon Court of Appeals as the Oregon "analog" of *Mobile-Sierra*.¹² For
11 reasons stated above and in PacifiCorp's Opening Brief, Wah Chang is not entitled to relief under
12 the *Mobile-Sierra* doctrine, and nothing in the Commission's orders in the Klamath-related
13 proceedings does anything to change that analysis. In fact, if anything, the Klamath-related
14 orders suggest that Wah Chang is less likely to obtain relief in this proceeding.

15 In the Klamath cases, the Commission was considering a 50-year old agreement that was
16 expiring by its own terms, and the issue was the determination of an appropriate successor rate.¹³
17 Under the agreement, the rates charged by PacifiCorp were less than one-tenth of the rates paid
18 by other similarly situated customers (*i.e.*, irrigators), which resulted in PacifiCorp's other
19 customers subsidizing the Klamath Basin irrigators by approximately \$10 million per year.¹⁴
20 There was no question that the Klamath Basin irrigators needed to be transitioned to generally
21 applicable cost-based tariff rates.¹⁵ In doing so, the Commission implemented the rate mitigation

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23 ⁹ *Id.* at 7-8.

¹⁰ Order No. 05-726 at 4.

24 ¹¹ 28 Or App 207, *rev den* 278 Or 393 (1977).

¹² *Oregon Trail Elec Consumers Coop, Inc. v. Co-Gen Co*, 168 Or App 466, 478, 7 P3d 594 (2000).

25 ¹³ Order No. 05-726 at 1.

¹⁴ Order No. 06-172 at 9.

26 ¹⁵ Order No. 06-172 at 17.

1 provisions of specific legislation (Senate Bill 81) to provide for a seven-year transition to cost-
2 based rates, which resulted in a 34 percent rate increase in the Klamath Basin irrigators' rates.¹⁶
3 This rate increase began to remove the subsidy that was otherwise being borne by PacifiCorp's
4 other Oregon customers, a result that is consistent with the public interest standard under
5 *American Can* and *Mobile-Sierra*.

6 No such public interest considerations are at play in the case of Wah Chang and its
7 MESA, however. Rather than **removing** a subsidy in favor of one customer group (the Klamath
8 Basin irrigators) that formerly was being borne by PacifiCorp's other Oregon customers – as was
9 the case in the Klamath-related proceedings – Wah Chang, if successful in this proceeding,
10 would **shift** the revenue requirement responsibility for millions of dollars away from itself and
11 **towards** PacifiCorp's Oregon customers.¹⁷ While such an outcome would be consistent with
12 Wah Chang's individual interest, it would be contrary to the broader public interest upon which
13 the *Mobile-Sierra* doctrine is based.

14 Moreover, Wah Chang suggests that because the Commission declined to find in the
15 Klamath-related orders that PacifiCorp had "assumed the risk" of the rates under the agreements,
16 the Commission should similarly not "elevate 'assumption of risk' principles" to deny relief to
17 Wah Chang in this proceeding.¹⁸ In the Klamath proceedings, however, there was no suggestion
18 that PacifiCorp had assumed the risks when it entered into the discounted power agreements in
19 1956. Rather, PacifiCorp provided discounted power for the drainage and irrigation of land in
20 the Klamath Basin in exchange for which PacifiCorp received the right to regulate the flow of
21 water to its hydroelectric plants located on the Klamath River.¹⁹ The issue was setting a just and
22 reasonable rate upon the expiration of the agreements. In Wah Chang's case, however, the
23 MESA provided it with below-tariff rates for the first three years, and the Commission found that

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¹⁶ Order No. 06-172 at 1-2.

25 ¹⁷ See PacifiCorp's Opening Brief at 13-16.

26 ¹⁸ Wah Chang Opening Brief at 8.

¹⁹ Order No. 06-172 at 1.

1 Wah Chang knowingly assumed the risk of price fluctuations during the last two years of the
2 MESA. According to Order No. 01-873:

3 "This is not a case in which the parties failed to understand the
4 meaning of the contract. Wah Chang, PacifiCorp, and the
5 Commission clearly understood that the MESA provided for
6 market-based rates for the last two years of the contract's term.
7 Wah Chang and PacifiCorp knew that the risk for price changes
8 during the final two years of the contract was Wah Chang's."²⁰

9 Assumption of risk was thus a significant factor in the analysis of the circumstances associated
10 with the MESA, and properly so. In contrast, assumption of risk was completely irrelevant to the
11 circumstances at issue in the Klamath-related proceedings. Thus the point urged in Wah Chang's
12 Opening Brief regarding the Commission's failure to cite assumption of risk in the Klamath
13 orders is without merit.

14 **3. Wah Chang Mischaracterizes the Relationship Between the Issues to Be**
15 **Resolved in this Proceeding Versus the Matters to be Resolved in Wah**
16 **Chang's Civil Proceeding in Linn County Circuit Court.**

17 Wah Chang next rehashes its argument, already rejected once, that if the Commission
18 considers contract principles to be "relevant," it should defer any consideration of those issues
19 for the Circuit Court. It is unsurprising that Wah Chang continues to want to remove contract
20 principles from the purview of the Commission, as the Commission has repeatedly ruled
21 adversely to Wah Chang on those issues. But that does not make Wah Chang right.

22 This issue was addressed at length in PacifiCorp's Opening Brief, in the parties' briefing
23 on Wah Chang's earlier motion seeking to prevent the Commission from considering Wah
24 Chang's "assumption of risk" as an issue in this docket, and in the Commission's Order denying
25 that motion, and need not be repeated here.²¹ In its earlier briefing, PacifiCorp explained why,
26 under *Mobile-Sierra* principles, the Commission is authorized to and must consider the parties'

²⁰ Order No. 01-873 at 8.

²¹ See PacifiCorp's Response to Wah Chang's Motion to Exclude "Assumption of Risk" as an Issue (June 4, 2007); see Judge Power's Ruling Denying Motion of Wah Chang to Exclude "Assumption of Risk" as an Issue (June 7, 2007).

1 plain contract language and expectations when it is asked to evaluate the "justness and
2 reasonableness" of a Commission-approved special contract. Upholding privately negotiated
3 contract rates is what *Mobile-Sierra* is all about. Wah Chang's argument that the Commission
4 should take no interest in the fact that Wah Chang *signed a contract* would eviscerate the
5 *Mobile-Sierra* doctrine (which is no doubt Wah Chang's hope).

6 Under *Mobile-Sierra*, contract rates are presumptively "just and reasonable" and therefore
7 must be enforced in the absence of an overriding "public interest" that requires something else.
8 The Commission literally cannot apply *Mobile-Sierra* review without considering precisely those
9 "contract issues" that Wah Chang wants to reserve for the exclusive consideration of the Circuit
10 Court. Wah Chang's answer to that problem, of course, is to argue that *Mobile-Sierra* does not
11 even apply, which is flatly incorrect for the reasons discussed in Section II.A.2 above.

12 Wah Chang also suggests that rulings by the Circuit Court and Court of Appeals have
13 established that contract issues are to be decided exclusively by those courts, not the
14 Commission. Neither of those courts has said any such thing. As Wah Chang acknowledges, the
15 Circuit Court has held that the court and the Commission have concurrent jurisdiction over this
16 matter. It is illogical and impractical for Wah Chang to propose that the Commission has
17 jurisdiction over Wah Chang's petition for relief yet may not apply its normal analytical tools in
18 evaluating that petition.

19 **4. PacifiCorp Was Denied Relief at FERC Advancing Similar Theories as**
20 **Argued by Wah Chang Here.**

21 Wah Chang argues in its Opening Brief that the Commission "ought not tolerate prices
22 paid by Wah Chang that were excessive due to market dysfunction and manipulation, just as it
23 told FERC not to 'tolerate prices [paid by PacifiCorp] that were excessive due to market
24 dysfunction and manipulation.'"²² In support of this position, Wah Chang cites the Commission's

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²² Wah Chang Opening Brief at 3.

1 letter to FERC²³ in PacifiCorp's complaint proceeding at FERC under Section 206 of the Federal
2 Power Act to have the rates PacifiCorp was paying under certain short-term contracts declared to
3 be unjust and unreasonable.²⁴ As noted by Wah Chang, the theories advanced by PacifiCorp in
4 that case were very similar to Wah Chang's arguments in this case. PacifiCorp was *denied* relief
5 at FERC, however. In denying relief, FERC determined that PacifiCorp "[s]imply found itself
6 with contracts that had become uneconomic with the passage of time."²⁵ The theories advanced
7 by Wah Chang should similarly be rejected in this case, and for the further reason that Wah
8 Chang is seeking only *selective* relief from its contract; Wah Chang wants to keep its "winnings"
9 while making PacifiCorp's other customers pay for its losses.

10 **B. The Arguments Advanced by Wah Chang in Its Opening Brief are Either**
11 **Contradicted or Unsupported by the Record Evidence.**

12 Wah Chang's Opening Brief includes several statements that are in direct conflict with
13 the record evidence in this proceeding. In other cases, the statements find no support in the
14 record evidence, or simply exaggerate the testimony of Wah Chang's expert witness,
15 Mr. McCullough, beyond Mr. McCullough's actual statements on the record. In yet another
16 category of creative advocacy, the conclusory observations of Mr. McCullough are cited as
17 evidence when, in fact, they are merely opinions that are outside the scope of proper expert
18 testimony. In any case, the inclusion of these statements indicates that Wah Chang continues to
19 maintain its initial theories and speculation, irrespective of whether these positions were rebutted
20 or controverted.

21 **1. Statements in Wah Chang's Opening Brief That Are Either Contradicted or**
22 **Unsupported by the Record Evidence.**

23 Wah Chang's selective disregard of the record evidence includes the following
24 statements, and the contradictory record evidence:

25 ²³ Exhibit WC/1103.

26 ²⁴ *PacifiCorp v. Reliant Energy Services, Inc.*, 102 FERC ¶ 63,030 (June 2003).

²⁵ *PacifiCorp v. Reliant Energy Services, Inc.*, 105 FERC ¶ 61,184, Order on Rehearing and Clarification (Nov. 2003).

1 **Statement:** PacifiCorp engaged in hundreds of non-transmission buy/resell transactions which
2 are "sham" transactions that "have no legitimate business purpose."²⁶

3 **Evidence:** The evidence directly contradicts this contention. Mr. McCullough admits in his
4 direct testimony that non-transmission buy/resells can have legitimate business
5 purposes, citing the situation of financial sleeves, where a seller insists on a
6 credit-worthy middleman as an example of a legitimate business purpose.²⁷

7 Mr. McCullough also describes the situation where traders exchange energy at
8 different locations as being a legitimate purpose for a buy/resell transaction as he
9 defines it. Dr. Cicchetti's reply testimony cites other examples of legitimate
10 business purposes for buy/resell agreements. Among these are the possibility of
11 testing the interest of other participants in the market and creating an audit trail to
12 support an end-of-day mark-to-market valuation.²⁸

13 **Statement:** "[F]at boys significantly inflated PX prices because energy that would have been
14 available to meet loads at the PX was withdrawn and applied to imaginary loads.
15 Mr. McCullough estimated the effect of ricochets and fat boys on PX prices and
16 graphically showed their substantial effect."²⁹

17 **Evidence:** While Mr. McCullough claims that PacifiCorp "facilitated" Enron's "Fat Boy"
18 scheme, he admits that the "40 to 50" instances in which PacifiCorp participated
19 in "Fat Boy" are so limited that they could be attributable to a "computer error."³⁰

21 ²⁶ Wah Chang Opening Brief at 3, 15, 17, 20.

22 ²⁷ *Id.* at 65. In such an instance, power would be transferred to one entity and then immediately
23 transferred to a different entity, with the middleman receiving a fee for acting as the go-between.

24 ²⁸ Exhibit/PacifiCorp/23, Cicchetti/59. Most trading companies have risk limitations that restrict traders.
25 The units measured are revenue (price X quantity) and the portfolio is valued using a net present value
26 method. At the end of each day, a trader's portfolio is revalued based on current market conditions using
forward prices. This requires a trader's risk manager to determine an appropriate market price to "mark"
the trader's open positions to market in order to evaluate whether the trader's portfolio value is within the
designated risk parameters and to calculate the trader's daily profit or loss, if any.

²⁹ Wah Chang Opening Brief at 14.

³⁰ McCullough Deposition at 64:11-12, 102:17-21, cited at PacifiCorp/23, Cicchetti/74.

1 Mr. McCullough's prefiled testimony acknowledges that "PacifiCorp schedules
2 were *small* compared to major perpetrators of Fat Boys, such as Powerex."³¹

3 According to Mr. McCullough's deposition testimony:

4 "There is some evidence of Fat Boy, but as I said, the scale
5 is not significant enough to believe that it was an ongoing
6 process. Could be as easily a computer error as an attempt
7 to profit."³²

8 As for Mr. McCullough graphically showing their "substantial effect," the graph
9 in his direct testimony showed the effect of *both* Fat Boy and Ricochet schemes,
10 and shows the alleged impact of these schemes by *all* market participants, not just
11 PacifiCorp.³³ That PacifiCorp's role in these schemes was immaterial is
12 confirmed by the FERC decision cited in Mr. McCullough's rebuttal testimony,
13 which lists several counter-parties to Enron's Death Star and Ricochet
14 transactions, and *does not identify PacifiCorp as one such counter-party*.³⁴

15 **Statement:** "[T]he PacifiCorp managers did little or nothing to follow up on [the directive
16 regarding non-transmission buy/resells], and the traders ignored it . . ."³⁵

17 **Evidence:** Wah Chang has disregarded the sworn testimony in the record and created a false
18 impression of noncompliance by PacifiCorp's traders. In fact, the evidence shows
19 that Mr. Watters' instructions with respect to buy/resell transactions were largely
20 followed by PacifiCorp's traders.

21 ³¹ Exhibit WC/800, McCullough/42.

22 ³² McCullough Deposition at 102:17-21.

23 ³³ Exhibit WC/800, McCullough/39.

24 ³⁴ 119 FERC ¶ 63,013, Docket EL03-180, Initial Decision, June 21, 2007. Paragraph 78 of the Initial
25 Decision discusses Death Star transactions, and concludes that Enron engaged in 585 Death Star
26 transactions between January 1, 2000 and June 21, 2001 producing estimated *congestion* revenues to
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.

³⁵ Wah Chang Opening Brief at 3.

1 As Mr. Watters testified during his deposition, when the issue of
2 "buy/resell transactions at a single point" came to his attention in mid-
3 November 2000, he developed a plan whereby PacifiCorp "could still go about
4 conducting our business but not being a part of these transactions." As
5 Mr. Watters described this plan:

6 "[W]e would no longer do bundled transactions but that we
7 would separate out the legs of these buys and the sells, and
8 that we would only buy power at what we were willing to
9 pay for power according to our resource instructions, and
 we would only sell power at the price that we would
 normally sell the power at."³⁶

10 Dr. Cicchetti testified during the hearing that he analyzed the buy/resell
11 transactions completed after these instructions were given, and concluded that the
12 instructions were largely carried out by PacifiCorp's traders.³⁷ Thus, rather than
13 showing traders continuing to engage in a forbidden activity, the record in fact
14 establishes that Mr. Watters' instructions were followed by the PacifiCorp traders.

15 **Statement:** "The traders were motivated by bonuses."³⁸

16 **Evidence:** This statement is objectionable for the reasons stated in the section that follows.
17 In addition, the evidence in the record does not support this statement. In fact, a
18 question and answer from Mr. McCullough's direct testimony makes it clear that
19 this statement is based on pure speculation:

20 Q. Why would PacifiCorp have participated in such a
21 manipulation?

22 A. ... One *possible* explanation is that PacifiCorp traders
23 were awarded bonuses based in part on the revenues from
 the trading group's transactions.³⁹

24 _____

25 ³⁶ Tr. 56:16-22.

26 ³⁷ See PacifiCorp Opening Brief at 31-33; Tr. 119:24 – 121:9.

³⁸ Wah Chang Opening Brief at 21.

³⁹ Exhibit WC/800, McCullough/14 (emphasis added).

1 In other words, what Mr. McCullough conjectured may be a *possible* explanation
2 for PacifiCorp's trading activities has become, through advocacy, an apparent fact.
3 The record does not substantiate it as a fact, however; it remains a speculative
4 statement by Mr. McCullough

5 **2. Statements in Wah Chang's Opening Brief That Are Supported Only by**
6 **Improper Expert Testimony.**

7 Wah Chang's Opening Brief includes several statement that are supported only by the
8 testimony of Mr. McCullough on matters that are not proper subjects of expert testimony, such
9 as the alleged state of mind and credibility of PacifiCorp's employees and witnesses. These
10 statements include the following:

11 **Statement:** "PacifiCorp's management was reckless in a dangerous market."⁴⁰

12 "[T]he PacifiCorp traders knew they were participating in manipulating
13 schemes."⁴¹

14 "[T]he trader tape transcripts show that the traders knew they were participating
15 in phony transactions."⁴²

16 **a. Legal Standard**

17 Although the Commission has not specifically adopted the Oregon Rules of Evidence
18 ("ORE"), the Commission routinely applies those rules, and the cases that have addressed them,
19 in rendering its decisions. *See, e.g.*, Order No. 04-379 (applying Oregon Rule of Evidence 503).
20 Particularly in technical areas, such as attorney-client privilege and expert testimony, the ORE
21 provide guidelines and well reasoned markers for the Commission to apply in considering
22 evidentiary obligations.

23 ⁴⁰ Wah Chang Opening Brief at 26, citing McCullough at WC/800, McCullough/2:12-21.

24 ⁴¹ Wah Chang Opening Brief at 20, citing McCullough at WC/800, McCullough/47:17-19 ("[b]ased on
25 my knowledge of the industry and on the direct evidence in this case, it is unbelievable that PacifiCorp
26 traders did not know they were participating in Enron's gaming").

⁴² Wah Chang Opening Brief at 20, citing McCullough at WC/800, McCullough/45:10-12 ("[t]he trader
conversations make it clear that they were engaging in obvious non-transmission buy/resell transactions
designed to avoid ISO rules").

1 ORE Rule 602, regarding fact witness testimony, and Rule 703, regarding expert
2 testimony, are particularly instructive regarding the defects in Mr. McCullough's testimony.
3 Rule 602 requires that a witness have personal knowledge of the facts about which he or she is
4 testifying.⁴³ The personal knowledge requirement for fact testimony is not affected by
5 Mr. McCullough's status as a proposed expert. Although an expert witness may base an opinion
6 on facts as to which he has no personal knowledge, an expert witness may not serve to introduce
7 such facts into the record. If the underlying facts are to be admitted into the record, that must be
8 done by a competent witness.⁴⁴ Rule 703, for its part, requires that expert opinion be limited to
9 that which will "assist the trier of fact to understand the evidence or to determine a fact in issue."
10 Thus, expert testimony may not simply tell the fact-finder what conclusion to reach.⁴⁵

11 **b. Wah Chang Cannot Rely on Testimony Offered by Mr. McCullough**
12 **Regarding Facts of Which He has No Personal Knowledge.**

13 As an expert witness, Mr. McCullough offers opinions as to the quality of PacifiCorp's
14 management, and the knowledge and motivations of PacifiCorp and its employees (e.g., "At a
15 minimum, PacifiCorp's management was reckless in a dangerous market" (WC/800,
16 McCullough/2), and "PacifiCorp profited from a fraudulent scheme that they knew was

18 _____
19 ⁴³ See Rule 602 ("Subject to the provisions of [Rule 703], a witness may not testify to a matter unless
20 evidence is introduced sufficient to support a finding that the witness has personal knowledge of the
21 matter.") "Personal knowledge," for this purpose, means that the witness actually "perceived" or
22 "observed" the fact. See 1981 Conference Committee Commentary to Rule 602 ("This rule would . . .
23 prevent a witness from testifying to the subject matter of [a] hearsay statement, as the witness has no
24 personal knowledge of it.").

25 ⁴⁴ *McCathern v. Toyota Motor Corp.*, 332 Or. 59, 70, 23 P.3d 320, 327 (Or. 2001) ("[Rule] 703 does not
26 render otherwise inadmissible evidence admissible merely because it was the basis for the expert's
opinion.").

⁴⁵ *United States v. Whitted*, 11 F.3d 782, 785 (8th Cir. 1993)(expert opinion that merely tells the fact-
finder what conclusion to reach is not "helpful"). It is also improper for an expert to opine on the state of
mind a party or the credibility of witnesses. See *Weinstein's Federal Evidence*, § 702.03[3] (Joseph M.
McClaughlin, ed., Matthew Bender 2d ed. 1997)(state of mind of one of the parties and credibility of
witness are not amenable to expert testimony) and § 702.06[1] ("The courts have jealously guarded the
fact-finder's exclusive power to determine credibility issues against the attempted intrusion of expert
witnesses.").

1 fraudulent" (WC/800, McCullough/115)). (The impropriety of some of these matters as the
2 subject of expert testimony is addressed in the following section.)

3 Thus, Mr. McCullough presents *both* factual evidence *and* opines as to the conclusions
4 the Commission should draw from the evidence, and Wah Chang cites these statements
5 extensively in its Opening Brief as evidentiary support for the positions it is taking. In offering
6 factual evidence, Mr. McCullough should be held to the ordinary standards of witness
7 competence; that is, he must have personal knowledge of the facts about which he is testifying.
8 *See* Rule 602. Mr. McCullough is not allowed to introduce evidence simply because he is an
9 expert who may have relied on such evidence. *See* Rule 703. Much of Mr. McCullough's
10 testimony is a statement of facts that are beyond his personal knowledge. Wah Chang uses
11 Mr. McCullough to inject into the record, under the guise of "expert opinion," evidence that Wah
12 Chang is not entitled to present, and then relies on this "evidence" in its Opening Brief. This
13 should not be permitted.⁴⁶

14 c. **Wah Chang Cannot Rely on Expert Opinions Expressed by**
15 **Mr. McCullough as to PacifiCorp's Alleged State of Mind or**
16 **Mr. McCullough's Recommendations to the Commission as to What**
Conclusions It Should Reach.

17 If Mr. McCullough's testimony is considered as expert testimony, Mr. McCullough's
18 testimony is improper because it addresses the alleged state of mind and credibility of
19 PacifiCorp's employees and witnesses and tells the Commission what conclusions it should reach
20 in this case. As discussed above, courts do not permit experts simply to tell the finder of fact
21 what conclusions should be reached. Mr. McCullough does precisely that, and there is no
22

23 _____
24 ⁴⁶ *See McCathern v. Toyota Motor Corp.*, 332 Or. 59, 70, 23 P.3d 320, 327 (Or. 2001) ("[Rule] 703 does
25 not render otherwise inadmissible evidence admissible merely because it was the basis for the expert's
26 opinion."); *Maklakiewicz v. Berton* 652 So.2d 1208, 1209 (Fla. Ct. App. 1995) ("Although an expert
witness is entitled to render an opinion premised on inadmissible evidence when the facts and data are the
type reasonably relied on by experts on the subject, the witness may not serve merely as a conduit for the
presentation of inadmissible evidence.").

1 pretense to the contrary. See WC/800, McCullough/148 ("Q: What conclusions should the
2 hearing officer draw from your testimony?").

3 Mr. McCullough also opines (or simply speculates) throughout his testimony as to the
4 motives and states of mind of PacifiCorp's employees. For example, at page 2 he asserts that
5 PacifiCorp was "reckless" and that its management had a "casual attitude." At page 14 he offers
6 sheer speculation as to what PacifiCorp's employees' motives might have been for participating
7 in certain transactions. Also at page 14 he opines that PacifiCorp traders "should have
8 immediately recognized" that something unusual was going on. None of this is a proper subject
9 of expert testimony, and Wah Chang's reliance on these statements in its Opening Brief as
10 providing evidentiary support for its position is misplaced. See, e.g., *Salas v. Carpenter*, 980
11 F.2d 299, 305 (5th Cir. 1992)(expert opinion regarding state of mind is not admissible as not
12 helpful to fact-finder); *Weinstein's Federal Evidence*, § 702.03[3]. Mr. McCullough also
13 purports to opine on the credibility of other PacifiCorp employees and witnesses (e.g., page 143),
14 which is improper. See *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973); *Weinstein's*
15 *Federal Evidence*, § 702.06[1] ("The courts have jealously guarded the fact-finder's exclusive
16 power to determine credibility issues against the attempted intrusion of expert witnesses.").

17 **C. Wah Chang Fails to Demonstrate Any Nexus Between the Relief It is Requesting**
18 **and the Alleged Misconduct of PacifiCorp.**

19 Wah Chang's Opening Brief continues to itemize and discuss the various Enron schemes
20 as though these games were shown to be relevant to the issues in this proceeding. In fact, the
21 record establishes that the majority of gaming behavior that Mr. McCullough discusses is not
22 likely to have had any effect on the Dow COB Index on which pricing under the MESA is based.
23 Thus, there is no connection between PacifiCorp's alleged misconduct (or the misconduct of
24 third parties) and the relief Wah Chang is requesting with respect to selective re-pricing of the
25 MESA.
26

1 The schemes discussed in Wah Chang's Opening Brief, and the record evidence
2 demonstrating their irrelevance, are as follows:

- 3 • **Physical Withholding.** Wah Chang starts its discussion of schemes by describing
4 the practice of market participants "to shut down a generating plant for a short time to
5 force the ISO to declare an emergency, driving up prices to a level that more than
6 made up for the lost income."⁴⁷ In particular, Wah Chang notes that Reliant "was
7 indicted on federal criminal charges for this conduct."⁴⁸ This practice is completely
8 irrelevant to PacifiCorp or to the issues in this proceeding. While Mr. McCullough
9 cited a 100-MW reduction in PacifiCorp's Hermiston generating unit in January 2001
10 as an "odd" action by PacifiCorp that "may have had a legitimate purpose," he offered
11 no evidence to substantiate the event as an example of physical withholding.⁴⁹
12 Dr. Cicchetti's reply testimony provides an explanation for the event that overcomes
13 Mr. McCullough's speculation.⁵⁰ Moreover, FERC investigated the practice of
14 physical withholding, and dismissed PacifiCorp from the investigation, citing
15 PacifiCorp's net buyer status which provided PacifiCorp with neither the opportunity
16 nor the incentive to withhold capacity from the market.⁵¹ As stated by Dr. Cicchetti,
17 "[o]ne does not conspire to drive up prices in a market where one is purchasing
18 substantially more than one is selling."⁵²
- 19 • **Ricochet.** Wah Chang's Opening Brief also contains a discussion of Ricochet.⁵³ For
20 the reasons described at pages 27-28 of PacifiCorp's Opening Brief, Wah Chang has
21
22

23 ⁴⁷ Wah Chang Opening Brief at 13.

24 ⁴⁸ *Id.*

25 ⁴⁹ Exhibit WC/800, McCullough/37.

26 ⁵⁰ Exhibit PacifiCorp/23, Cicchetti/62.

⁵¹ *Id.* at 63.

⁵² *Id.*

⁵³ Wah Chang Opening Brief at 13.

1 not demonstrated that these transactions are relevant to the relief it seeks in this
2 proceeding.

3 • **Fat Boy.** Wah Chang's Opening Brief also contains a discussion of Ricochet.⁵⁴ For
4 the reasons described at page 27 of PacifiCorp's Opening Brief and in Section II.B.1
5 above in this Reply Brief, Wah Chang has not demonstrated that these transactions
6 are relevant to the relief it seeks in this proceeding.

7 • **Death Star.** Wah Chang's Opening Brief also contains a discussion of Death Star.⁵⁵
8 Death Stars were facilitated through non-transmission buy/resells. As discussed in
9 PacifiCorp's Opening Brief at pages 28-36, the record is clear that non-transmission
10 buy/resells had no impact whatsoever on the prices paid by Wah Chang under the
11 MESA, because they were not transactions reported to Dow Jones.

12 • **Red Congo.** Wah Chang's Opening Brief also contains a discussion of Red Congo.⁵⁶
13 Red Congos also were facilitated through non-transmission buy/resells. As discussed
14 in PacifiCorp's Opening Brief at pages 28-36, the record is clear that non-
15 transmission buy/resells had no impact whatsoever on the prices paid by Wah Chang
16 under the MESA, because they were not transactions reported to Dow Jones.

17 Thus the hundreds of pages of testimony and exhibits filed by Wah Chang in this
18 proceeding, and summarized in its Opening Brief, largely document and analyze the
19 machinations of irrelevant power transactions. As described in PacifiCorp's Opening Brief, the
20 transactions are largely irrelevant because: (1) they involved irrelevant parties, focusing
21 primarily on Enron's well-documented market manipulation activities, rather than focusing on
22 the particular activities of PacifiCorp; (2) they involved manipulation of irrelevant markets, such
23 as the CAISO markets, rather than examining the impact on the Dow COB Index on which the
24

25 ⁵⁴ *Id.*

26 ⁵⁵ *Id.* at 18.

⁵⁶ *Id.* at 18-19.

1 MESA pricing was based, or (3) they involved both irrelevant parties and irrelevant markets.
2 Where Wah Chang did attempt to offer evidence focusing in particular on PacifiCorp's conduct
3 and whether it had any impact on the Dow COB Index, the evidence failed to demonstrate any
4 nexus between the relatively small number of allegedly "suspect" PacifiCorp transactions and the
5 Dow COB Index.

6 **D. Wah Chang Relies Heavily on an Inapposite Spoliation Theory to Make Up for Its**
7 **Failure of Proof in this Proceeding.**

8 Despite over seven years of litigation, Wah Chang has failed to introduce evidence to
9 support its claims, prompting Wah Chang to ask the Commission to "infer" the necessary facts
10 because some audio recordings of energy traders are allegedly missing. Wah Chang relies on the
11 civil litigation theory of spoliation of evidence in requesting this extraordinary relief. Wah
12 Chang's "Motion for Finding" is pending, and Wah Chang has repeated its spoliation arguments
13 in its Opening Brief.⁵⁷ PacifiCorp believes that it has fully responded to Wah Chang's spoliation
14 arguments in its own Opening Brief and in the response that it filed to Wah Chang's "Motion for
15 Finding." Accordingly, those arguments will not be repeated here.

16 Apart from the inapplicability of the spoliation theory to the circumstances of this case,
17 Wah Chang's contention suffers from the further infirmity that it is based on pure speculation.
18 Wah Chang claims that the missing audiotapes are from "important periods in May, June and
19 July 2000,"⁵⁸ which Wah Chang claims are "critical periods of the 2000-2001 western market
20 crisis."⁵⁹ According to Wah Chang, "[t]he Commission cannot ignore that the period to which
21 the tapes would speak is a critical one," since May 22, 2000 was the first Stage 2 emergency
22 declared by the ISO and on June 6, 2000, Portland General Electric ("PGE") stopped
23 participating in certain transactions with Enron.⁶⁰ Wah Chang submits that "[t]he Commission

24 _____
25 ⁵⁷ Wah Chang Opening Brief at 26-32.

26 ⁵⁸ *Id.* at 3.

⁵⁹ *Id.* at 26.

⁶⁰ *Id.* at 31.

1 must presume that the tapes from this critical period would have shed a sharp spotlight on
2 PacifiCorp's role in Enron's games."⁶¹

3 The evidence does not support Wah Chang's theory, however, that PacifiCorp stepped
4 into PGE's shoes in facilitating the Enron transactions. While Wah Chang speculates that the
5 tapes would confirm PacifiCorp's heightened trading activities during this ten-week critical
6 period, the record shows that, in fact, *there were fewer non-transmission buy-resells by*
7 *PacifiCorp during this period than at other relevant times during the Western energy crisis.*
8 Included as Attachment 1 is a declaration from PacifiCorp's expert witness, Dr. Charles
9 Cicchetti, regarding his analysis of the PacifiCorp data provided to Wah Chang in response to
10 Data Request No. 203. Dr. Cicchetti's analysis shows that PacifiCorp performed *fewer* non-
11 transmission buy/resells during the "critical" ten-week period in May, June and July 2000 than
12 during the other relevant times, as identified in the transactions data set. Thus, the known facts
13 do not bear out Wah Chang's speculation about PacifiCorp possibly playing an increased role
14 facilitating Enron transactions during this "important" period. If anything, the known facts
15 confirm the immateriality associated with the tapes being "missing." Based on the volume of
16 transactions, there is no reason to believe that focusing a "sharp spotlight" on this particular time
17 period would produce anything of consequence.

18 III. CONCLUSION

19 For the reasons stated in its Opening Brief and in this Reply Brief, PacifiCorp
20 respectfully urges the Commission to confirm its October 2001 order, and to deny Wah Chang
21 relief in this proceeding. Wah Chang has failed to offer any evidence of "*the most compelling*
22 *circumstances*" or an "*extraordinary basis*" that would justify modifying an executed agreement,
23 the MESA.⁶² The only argument on this point in Wah Chang's Opening Brief is that "the
24 undisputed market manipulation during the relevant period surely constitutes compelling

25 _____
⁶¹ *Id.* at 32.

26 ⁶² Order No. 01-873 at 6.

1 circumstances warranting an order granting Wah Chang's petition."⁶³ The Commission has
2 previously found, however, that general evidence of manipulation of the California wholesale
3 market does not provide a basis for granting the relief Wah Chang seeks:

4 "Additional evidence that the California market may be
5 dysfunctional is immaterial to the Commission's determination that
6 the MESA rates are just and reasonable under Oregon law."⁶⁴

7 The deficiency in Wah Chang's evidentiary showing is compounded by the extraordinary relief
8 that Wah Chang is seeking in this proceeding – *i.e.*, a one-sided reformation of a special contract
9 to enable it to retain the "upside" of the contract and shed itself of the "downside."

10 Wah Chang has failed to take advantage of its court-ordered opportunity to provide
11 additional evidence to demonstrate circumstances that would warrant the opportunistic
12 reformation of the MESA that it seeks. For the reasons stated in PacifiCorp's Opening Brief and
13 in this Reply Brief, this proceeding should be terminated.

14 DATED: November 12, 2007

PERKINS COIE LLP

15
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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25 ⁶³ Wah Chang Opening Brief at 7.

26 ⁶⁴ *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.

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1002

WAH CHANG,)
)
Petitioner,)
)
v.)
)
PACIFICORP,)
)
Respondent.)
_____)

DECLARATION OF CHARLES J.
CICCHETTI IN SUPPORT OF
PACIFICORP'S POST HEARING
BRIEF

I, Charles J. Cicchetti, hereby declare:

1. I am an expert witness appearing for PacifiCorp in this proceeding. I have previously submitted pre-filed Reply Testimony (Exhibit PacifiCorp/23) and Supplemental Reply Testimony (Exhibit PacifiCorp/33, with Jeffrey A. Dubin, Ph.D.) and provided live testimony during the Commission hearings in this matter. PacifiCorp filed my *curriculum vitae* previously as Exhibits PacifiCorp/24-26.
2. I provide this Affidavit in support of PacifiCorp's Post-Hearing Reply Brief in this proceeding. Specifically, I discuss the matter of the "missing" trader audio tapes based upon the availability of additional data I received after the Public Hearings in this proceeding. Wah Chang claims that the missing audiotapes are from "important periods in May, June and July 2000,"¹ which Wah Chang claims

¹ *Id.* at 3.

1 are "critical periods of the 2000-2001 western market crisis."² According to Wah
2 Chang, "[t]he Commission cannot ignore that the period to which the tapes would
3 speak is a critical one," since May 22, 2000 was the first Stage 2 emergency
4 declared by the ISO and on June 6, 2000, Portland General Electric ("PGE")
5 stopped participating in certain transactions with Enron.³ Wah Chang submits
6 that "[t]he Commission must presume that the tapes from this critical period
7 would have shed a sharp spotlight on PacifiCorp's role in Enron's games."⁴

8 3. I continue to believe that without some tape recording or written transcript no one
9 can do anything more than speculate about past conversations. Furthermore, no
10 one except, perhaps, the participants in any prior conversations, knows what was
11 said during conversations that were either not recorded or where those recordings
12 and transcripts are missing and no longer available.

13 4. Using the new data and my concerns related to Wah Chang's speculation and
14 recommendations to the Commission, I examined the trades between PacifiCorp
15 and Enron during the ten weeks in 2000 for which audiotapes or transcripts are
16 not available, as well as the time periods just before, during, and after the weeks
17 with the missing audiotapes.⁵ I also focus my attention initially at the California-
18 Oregon Border ("COB") because that is the trading hub most relevant to the Wah
19 Chang Master Electric Service Agreement ("MESA") and the market that each
20 expert has most intensely analyzed in this proceeding. Finally, I focus on pre-
21 November 2000 Buy/Resells because PacifiCorp's Mr. Watters directed

² *Id.* at 26.

³ *Id.* at 31.

⁴ *Id.* at 32.

⁵ I also analyzed other time periods, other locations, and other trading partners as addressed below. As explained, the conclusions I express do not change with time, place, or trading partner.

1 PacifiCorp traders to cease trading Buy/Resells at prices below market in
2 November 2000.

3 5. Table 1 shows what I found to be particularly important for the Commission to
4 consider in evaluating Wah Chang's speculative statements and strong inferences
5 of wrong doing.

TABLE 1 SUM OF BUY/RESELL TRANSACTION COUNT AND MWHs BY WEEK ¹			
Week Start Date	Week End Date	Count: Enron At COB	MWHs: Enron At COB
4/4/2000	4/10/2000	0	0
4/11/2000	4/17/2000	0	0
4/18/2000	4/24/2000	1	90
4/25/2000	5/1/2000	0	0
5/2/2000	5/8/2000	0	0
5/9/2000	5/15/2000	0	0
5/16/2000	5/22/2000	1	300
5/23/2000	5/29/2000	16	1,160
5/30/2000	6/5/2000	1	17
6/6/2000	6/12/2000	0	0
6/13/2000	6/19/2000	10	646
6/20/2000	6/26/2000	10	494
6/27/2000 ²	7/3/2000	5	208
7/4/2000	7/10/2000	37	1,782
7/11/2000	7/17/2000	14	590
7/18/2000	7/24/2000	9	633
7/25/2000	7/31/2000	7	568
8/1/2000	8/7/2000	24	1,676
8/8/2000	8/14/2000	18	1,660
8/15/2000	8/21/2000	30	2,861
8/22/2000	8/28/2000	15	1,549
8/29/2000	9/4/2000	23	3,222
9/5/2000	9/11/2000	47	4,087
9/12/2000	9/18/2000	23	1,848
9/19/2000	9/25/2000	43	2,358
9/26/2000	10/2/2000	45	2,743
10/3/2000	10/9/2000	23	1,371
10/10/2000	10/16/2000	14	1,279
10/17/2000	10/23/2000	13	634
10/24/2000	10/30/2000	8	205
10/31/2000	11/6/2000	10	259
Weekly Avg of No Tapes/Transcript Period ³ :		6.03	374.01
Weekly Avg of All Other Days:		17.96	1,317.15
¹ Weeks with missing trader tapes/transcripts are shaded.			
² June 27-28, 2000 are also days with no trader tapes/transcripts.			
³ Average includes transactions on June 27-28, 2000.			

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During the ten weeks (which are shaded in Table 1) with missing audiotapes/transcripts, there were an average of about six (6.03) Buy/Resell transactions and the average weekly MWhs traded were about 374.01 MWhs

1 between PacifiCorp and Enron at COB. In contrast, during the other weeks
2 shown in Table 1, PacifiCorp and Enron averaged about 3.0 times more
3 Buy/Resells (17.96) and more than about 3.5 times more Buy/Resell MWhs
4 (1,317.15) at COB.

5 6. I restrict the analyses in Table 1 to COB and Enron and the pre-Watters directed
6 change of policy, to keep this discussion relatively simple. However, I find that I
7 reach the same conclusions when I relax these restrictions in the analysis.
8 Accordingly, the ten weeks with missing transcripts were *not* a period of
9 heightened allegedly "questionable" Buy/Resell trading activity between
10 PacifiCorp and Enron, or anyone else.

11 7. I prepared work papers (Attachment A) that relied upon the methods Mr. Howard
12 used in this proceeding and those that Dr. Dubin and I used to test the statistical
13 reliability of these conclusions that the relevant days in these ten weeks had fewer
14 Buy/Resell trades and a lower MWh volume than other periods. I find that,
15 typically with greater than 99 percent confidence during the pre-November 2000
16 time period, PacifiCorp had fewer Buy/Resell trades and volumes during the days
17 in these ten weeks than at other times with Enron and "others" at COB and
18 elsewhere.

19 8. I do *not* know what was said during any conversation for which no recording or
20 transcript is available. I *do* know that the ten-week period of missing
21 tapes/transcripts was not a particularly heightened period for Buy/Resells. In fact,
22 there were significantly fewer such trades during these ten weeks between
23 PacifiCorp and Enron at COB, as well as with Enron at other locations, or with

1 other counter-parties at COB and elsewhere for the period before November 2000,
2 when PacifiCorp changed its Buy/Resell trading policies.

3

4 I declare under penalty of perjury that the foregoing Declaration is true and
5 correct.

6 Dated: November 9, 2007

A handwritten signature in cursive script, appearing to read "C. Cicchetti", written over a horizontal line.

7

Charles J. Cicchetti, Ph.D.

ATTACHMENT A

```
1
2
3 SST Spool File: bs_mean3.log
4 Thu Nov 08 20:06:54 2007
5
6
7 load file[bsmwhs2]
8
9 # T-TESTS COMPARING NO TRANSCRIPT DAYS TO ALL OTHER DAYS
10 # 12 CASES
11 # April 2000 - October 2000 only
12
13 set one = 1
14 set aproct00 = ((year==2000)*((month>=4)*(month<=10)))
15
16 macro test(a,b,c, evar) { # Student's t-test for equality of means in
17 two independent groups with unequal variance (Welch)
18
19 calc m1 = mean(a,b)
20 calc m2 = mean(a,c)
21 calc s1 = stddev(a,b)
22 calc s2 = stddev(a,c)
23 calc n1 = sum(!miss(a)&b)
24 calc n2 = sum(!miss(a)&c)
25 if ( evar) {
26 calc v = ((n1-1)*s1^2 + (n2-1)*s2^2) * (1/n1 + 1/n2) / (n1+n2-2) #
27 equal variance case
28 calc df = n1+n2-2 # equal variance case
29 } else {
30 calc v = (s1^2)/n1 + (s2^2)/n2
31 calc df = ( (s1^2)/n1 + (s2^2)/n2 )^2 / ((s1^4)/((n1-1) * (n1^2) ) +
32 (s2^4)/((n2-1) * (n2^2) ))
33 }
34
35 calc t = (m1-m2) / sqrt(v)
36 }
37
```

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1
2 # _____
3
4
5 # COMPARE DAILY MEAN OF BUYSSELL COUNTS (PREVALENCE) ON NO TRANSCRIPT
6 DATES TO OTHER DATES
7
8 # 1
9 # ENRON AT COB: EQUAL VARIANCE, APR-OCT 2000
10 @test(bscec,notransc==1,notransc==0 & aproct00==1,1)
11 Compare bscec for group notransc==1 and group notransc==0 & aproct00==1
12
13 Mean group notransc==1 = 0.861111 using 72 obs of 72 cases
14 Mean group notransc==0 & aproct00==1 = 2.6831 using 142 obs of 142
15 cases
16 df = 212 t-value = -4.39162 cumt = 8.87949e-006 invt(.975) = 1.97115
17 invt(.950) = 1.65232
18
19
20 # ENRON AT COB: UNEQUAL VARIANCE, APR-OCT 2000
21 @test(bscec,notransc==1,notransc==0 & aproct00==1,0)
22 Compare bscec for group notransc==1 and group notransc==0 & aproct00==1
23
24 Mean group notransc==1 = 0.861111 using 72 obs of 72 cases
25 Mean group notransc==0 & aproct00==1 = 2.6831 using 142 obs of 142
26 cases
27 df = 211.787 t-value = -5.30959 cumt = 1.38403e-007 invt(.975) =
28 1.97101 invt(.950) = 1.65174
29
30
31
32
33 # 2
34 # ALL COUNTERPARTIES NOT ENRON AT COB: EQUAL VARIANCE, APR-OCT 2000
35 @test(bscoc,notransc==1,notransc==0 & aproct00==1,1)
36 Compare bscoc for group notransc==1 and group notransc==0 & aproct00==1
37
38 Mean group notransc==1 = 0.236111 using 72 obs of 72 cases
39 Mean group notransc==0 & aproct00==1 = 0.78169 using 142 obs of 142
40 cases
41 df = 212 t-value = -2.64412 cumt = 0.00440146 invt(.975) = 1.97115
42 invt(.950) = 1.65232
43
44
45 # ALL COUNTERPARTIES NOT ENRON AT COB: UNEQUAL VARIANCE, APR-OCT 2000
46 @test(bscoc,notransc==1,notransc==0 & aproct00==1,0)
47 Compare bscoc for group notransc==1 and group notransc==0 & aproct00==1
48
49 Mean group notransc==1 = 0.236111 using 72 obs of 72 cases
50 Mean group notransc==0 & aproct00==1 = 0.78169 using 142 obs of 142
51 cases
52 df = 200.16 t-value = -3.39928 cumt = 0.00040767 invt(.975) = 1.9716
53 invt(.950) = 1.65291
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# 3
# ALL COUNTERPARTIES AT COB: EQUAL VARIANCE, APR-OCT 2000
@test(bscac,notransc==1,notransc==0 & aproct00==1,1)
Compare bscac for group notransc==1 and group notransc==0 & aproct00==1

Mean group notransc==1 = 1.09722 using 72 obs of 72 cases
Mean group notransc==0 & aproct00==1 = 3.46479 using 142 obs of 142
cases
df = 212 t-value = -4.58586 cumt = 3.86328e-006 invt(.975) = 1.97115
invt(.950) = 1.65232

# ALL COUNTERPARTIES AT COB: UNEQUAL VARIANCE, APR-OCT 2000
@test(bscac,notransc==1,notransc==0 & aproct00==1,0)
Compare bscac for group notransc==1 and group notransc==0 & aproct00==1

Mean group notransc==1 = 1.09722 using 72 obs of 72 cases
Mean group notransc==0 & aproct00==1 = 3.46479 using 142 obs of 142
cases
df = 209.735 t-value = -5.72038 cumt = 1.81618e-008 invt(.975) =
1.97157 invt(.950) = 1.65169

# 4
# ALL COUNTERPARTIES AT ALL LOCATIONS: EQUAL VARIANCE, APR-OCT 2000
@test(bscaa,notransc==1,notransc==0 & aproct00==1,1)
Compare bscaa for group notransc==1 and group notransc==0 & aproct00==1

Mean group notransc==1 = 1.20833 using 72 obs of 72 cases
Mean group notransc==0 & aproct00==1 = 3.57042 using 142 obs of 142
cases
df = 212 t-value = -4.4776 cumt = 6.16353e-006 invt(.975) = 1.97115
invt(.950) = 1.65232

# ALL COUNTERPARTIES AT ALL LOCATIONS: UNEQUAL VARIANCE, APR-OCT 2000
@test(bscaa,notransc==1,notransc==0 & aproct00==1,0)
Compare bscaa for group notransc==1 and group notransc==0 & aproct00==1

Mean group notransc==1 = 1.20833 using 72 obs of 72 cases
Mean group notransc==0 & aproct00==1 = 3.57042 using 142 obs of 142
cases
df = 209.775 t-value = -5.58417 cumt = 3.61209e-008 invt(.975) =
1.97092 invt(.950) = 1.65185
```



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2 # _____
3
4
5 # COMPARE DAILY AVG MWHS OF BUYSELL TRANSACTIONS ON NO TRANSCRIPT DATES
6 TO OTHER DATES
7
8 # 5
9 # ENRON AT COB: EQUAL VARIANCE, APR-OCT 2000
10 @test(bsqec,notransc==1,notransc==0 & aproct00==1,1)
11 Compare bsqec for group notransc==1 and group notransc==0 & aproct00==1
12
13 Mean group notransc==1 = 53.4306 using 72 obs of 72 cases
14 Mean group notransc==0 & aproct00==1 = 199.317 using 142 obs of 142
15 cases
16 df = 212 t-value = -4.28468 cumt = 1.38791e-005 invt(.975) = 1.97115
17 invt(.950) = 1.65232
18
19
20 # ENRON AT COB: UNEQUAL VARIANCE, APR-OCT 2000
21 @test(bsqec,notransc==1,notransc==0 & aproct00==1,0)
22 Compare bsqec for group notransc==1 and group notransc==0 & aproct00==1
23
24 Mean group notransc==1 = 53.4306 using 72 obs of 72 cases
25 Mean group notransc==0 & aproct00==1 = 199.317 using 142 obs of 142
26 cases
27 df = 207.168 t-value = -5.40261 cumt = 8.97731e-008 invt(.975) =
28 1.97115 invt(.950) = 1.65239
29
30
31
32
33 # 6
34 # ALL COUNTERPARTIES NOT ENRON AT COB: EQUAL VARIANCE, APR-OCT 2000
35 @test(bsqoc,notransc==1,notransc==0 & aproct00==1,1)
36 Compare bsqoc for group notransc==1 and group notransc==0 & aproct00==1
37
38 Mean group notransc==1 = 31.2361 using 72 obs of 72 cases
39 Mean group notransc==0 & aproct00==1 = 140.951 using 142 obs of 142
40 cases
41 df = 212 t-value = -1.47222 cumt = 0.0712216 invt(.975) = 1.97115
42 invt(.950) = 1.65232
43
44
45 # ALL COUNTERPARTIES NOT ENRON AT COB: UNEQUAL VARIANCE, APR-OCT 2000
46 @test(bsqoc,notransc==1,notransc==0 & aproct00==1,0)
47 Compare bsqoc for group notransc==1 and group notransc==0 & aproct00==1
48
49 Mean group notransc==1 = 31.2361 using 72 obs of 72 cases
50 Mean group notransc==0 & aproct00==1 = 140.951 using 142 obs of 142
51 cases
52 df = 151.074 t-value = -2.04263 cumt = 0.0214138 invt(.975) = 1.97561
53 invt(.950) = 1.65534
54
55
56

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2 # 7
3 # ALL COUNTERPARTIES AT COB: EQUAL VARIANCE, APR-OCT 2000
4 @test(bsqac,notransc==1,notransc==0 & aproct00==1,1)
5 Compare bsqac for group notransc==1 and group notransc==0 & aproct00==1
6
7 Mean group notransc==1 = 84.6667 using 72 obs of 72 cases
8 Mean group notransc==0 & aproct00==1 = 340.268 using 142 obs of 142
9 cases
10 df = 212 t-value = -3.00864 cumt = 0.00147091 invt(.975) = 1.97115
11 invt(.950) = 1.65232
12
13
14 # ALL COUNTERPARTIES AT COB: UNEQUAL VARIANCE, APR-OCT 2000
15 @test(bsqac,notransc==1,notransc==0 & aproct00==1,0)
16 Compare bsqac for group notransc==1 and group notransc==0 & aproct00==1
17
18 Mean group notransc==1 = 84.6667 using 72 obs of 72 cases
19 Mean group notransc==0 & aproct00==1 = 340.268 using 142 obs of 142
20 cases
21 df = 167.53 t-value = -4.08306 cumt = 3.43537e-005 invt(.975) = 1.97455
22 invt(.950) = 1.65361
23
24
25
26
27 # 8
28 # ALL COUNTERPARTIES AT ALL LOCATIONS: EQUAL VARIANCE, APR-OCT 2000
29 @test(bsqaa,notransc==1,notransc==0 & aproct00==1,1)
30 Compare bsqaa for group notransc==1 and group notransc==0 & aproct00==1
31
32 Mean group notransc==1 = 88.9167 using 72 obs of 72 cases
33 Mean group notransc==0 & aproct00==1 = 353.514 using 142 obs of 142
34 cases
35 df = 212 t-value = -3.09226 cumt = 0.00112672 invt(.975) = 1.97115
36 invt(.950) = 1.65232
37
38
39 # ALL COUNTERPARTIES AT ALL LOCATIONS: UNEQUAL VARIANCE, APR-OCT 2000
40 @test(bsqaa,notransc==1,notransc==0 & aproct00==1,0)
41 Compare bsqaa for group notransc==1 and group notransc==0 & aproct00==1
42
43 Mean group notransc==1 = 88.9167 using 72 obs of 72 cases
44 Mean group notransc==0 & aproct00==1 = 353.514 using 142 obs of 142
45 cases
46 df = 168.472 t-value = -4.19105 cumt = 2.23661e-005 invt(.975) =
47 1.97397 invt(.950) = 1.65425
48
49
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51 quit mem time
52 Memory release complete
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54 Time = 1.562 seconds
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1 **CERTIFICATE OF SERVICE**

2 I certify that I have this day served the foregoing document, encaptioned
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13 DATED: November 12, 2007.

14 **PERKINS COIE LLP**

15
16 By 

James M. Van Nostrand, OSB No. 794289
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17 Attorneys for PacifiCorp
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