BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1002

WAH CHANG, Petitioner, v. PACIFICORP, Respondent.	**POST-HEARING OPENING BRIEF OF PACIFICORP** **REDACTED VERSION- CONFIDENTIAL INFORMATION REDACTED**

I. INTRODUCTION

This is the second phase of a case first commenced in December 2000, nearly 7 years ago. The Commission issued an order in October 2001 which thoroughly addressed all the circumstances surrounding the five-year Master Electric Service Agreement ("MESA") between Wah Chang and PacifiCorp. That order, issued shortly after the end of the Western energy crisis, affirmed the validity of the MESA and denied relief to Wah Chang. The parties continued to operate under the MESA for the remainder of its term (through September 2002), prices under the MESA reverted to below-tariff levels for most of the final year, Wah Chang paid the rates owed under the MESA, and its facility in Millersburg, Oregon remained in operation throughout.

Following Wah Chang's appeal of the Commission's decision to Marion County Circuit Court, this proceeding was re-opened to permit Wah Chang to present new evidence on two issues: (1) the outcome of complaints filed by PacifiCorp with FERC, in which PacifiCorp was seeking relief from certain short-term contracts on the same grounds as asserted by Wah Chang in this proceeding, and (2) evidence of manipulation of the Western wholesale electricity markets in the years 2000-2001. The evidence under the limited scope of this re-opened proceeding has

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

offered provides any basis for the Commission to revisit its Order which affirmed the terms of the MESA and denied Wah Chang any relief. The "new" evidence shows:

(1) With respect to one of the two matters on which Wah Chang was authorized to submit evidence, PacifiCorp was ***denied*** relief at FERC in its complaint under Section 206 of the Federal Power Act to have the rates it was paying under certain short-term contracts declared to be unjust and unreasonable, based on theories similar to those advanced by Wah Chang here.[1] In denying relief, FERC determined that PacifiCorp "[s]imply found itself with contracts that had become uneconomic with the passage of time."[2]

(2) With respect to the other matter, the additional evidence – and the focus of Wah Chang's efforts in this re-opened proceeding – consists of what is now known to be the widespread malfeasance by a nonparty, Enron. Based on the fact that PacifiCorp was one of the many counterparties to certain Enron "gaming" transactions, Wah Chang accuses PacifiCorp of having contributed to market manipulation. Wah Chang produces no evidence, however, that PacifiCorp intended to manipulate the market, that PacifiCorp derived any material benefit from gaming, or that PacifiCorp even had *any reason knowingly* to participate in it. Wah Chang's own expert witness acknowledges that PacifiCorp's role in these transactions was so limited that it could be attributed to "computer error," and FERC's identification of significant Enron counterparties did *not* include PacifiCorp. FERC also found that PacifiCorp was a "net buyer" of electricity during the relevant time period, meaning that PacifiCorp would have had no economic incentive to do anything that would have raised electricity prices.

---

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

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

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

(3) To the extent Wah Chang has identified a small number of suspect transactions in which PacifiCorp played some (however passive or minor) role, Wah Chang has failed to demonstrate that these transactions had any effect on the prices that Wah Chang paid under the MESA. In fact, as demonstrated by PacifiCorp's expert witness and as discussed herein, none of the "gaming" activities of which Wah Chang complains would logically have had any effect on the Dow Jones COB Index price that determined Wah Chang's rate. Because there is no causal link between the alleged wrongdoing and the alleged harm, Wah Chang's requested relief is arbitrary and indefensible.

In other "new" developments since the Commission's October 2001 order, the Ninth Circuit Court of Appeals and FERC have issued decisions that have been interpreted as granting some relief to "victims" of the Western energy crisis. In December 2006, the Ninth Circuit issued a decision – which the U.S. Supreme Court will review in its next term – in which the court granted relief to various buyers under wholesale contracts in the face of evidence of widespread market manipulation.[3] In June 2007, FERC issued its decision in Enron Power Marketing,[4] which contains a thorough discussion of all the schemes in which Enron was engaged, and concludes that Enron's behavior "constitutes market manipulation and results in unjust and unreasonable rates." The decision also identifies many of the counter-parties to Enron's schemes and, as noted above, does ***not*** mention PacifiCorp as a "player" in these

---

[3] *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). Unlike the MESA, however, the contracts at issue in *Snohomish PUD* were ***wholesale*** agreements negotiated and signed during the Western energy crisis, and were executed under the market-based rate authority granted by FERC. In contrast, the MESA was signed three years before the start of the Western 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, 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.

[4] 119 FERC ¶ 63,013, Docket EL03-180, Initial Decision, June 21, 2007.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

activities.[5] More recently, the Ninth Circuit issued its decision in *Port of Seattle v. FERC*, and directed FERC to consider market manipulation evidence in deciding whether to grant refunds for sales in the Northwest bi-lateral spot market that were made during the Western energy crisis.[6] None of these developments provides any basis for granting Wah Chang relief in this case.

Not only are these decisions legally distinguishable, they are factually distinguishable, for the simple reason that Wah Chang was not a "victim" of the Western energy crisis. Rather, it knowingly accepted the risks of price fluctuations for the final two years of the MESA. Rather than being a "victim," Wah Chang was arguably a "winner" during the Western energy crisis, and wants to add to its winnings by forcing PacifiCorp – and its other Oregon customers – to compound the losses they have already incurred by putting Wah Chang in a ***better*** position than if it had never entered into the MESA. The Commission has already reached findings on the manner in which Wah Chang was a "winner":

- Wah Chang saved several million dollars during the first three years of the MESA;
- At the time of the Commission's decision, prices under the MESA had reverted to below-tariff levels; and
- During the period when Wah Chang was paying higher market prices under the MESA, its affiliate (Oremet) was recognizing "substantial net revenue gains" by selling power into the same markets that Wah Chang now claims were dysfunctional.

In sharp contrast, PacifiCorp and its Oregon customers were "losers" during the Western energy crisis. PacifiCorp incurred about $1 billion in excess net power costs over its six-state service

---

[5] As in *Snohomish PUD*, the basis for the relief granted in the case was Enron's violation of its market-based rate authority. The MESA between Wah Chang and PacifiCorp, however, is a retail contract, not a wholesale contract, and does not rely on market-based rate authority for its validity. Rather, the MESA was expressly approved by the Commission as a special contract, based on Wah Chang's specific circumstances.

[6] *Port of Seattle v FERC*, ___F3d___, 2007 WL 2406900 (9th Cir). The "Northwest refund proceeding" involves bi-lateral spot market purchases that were made ***after*** the start of the Western energy crisis, based on market-based rate authority granted by FERC.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

PAGE 5

CONFIDENTIAL INFORMATION READCTED PURSUANT TO OPUC PROTECTIVE ORDER 01-149 IN DOCKET NUMBER UM1002.

THE INFORMATION CONTAINED HEREIN MAY BE SHOWN ONLY TO QUALIFIED PERSON AS DEFINED IN THE PROTECTIVE ORDER.

PAGE 6

CONFIDENTIAL INFORMATION READCTED PURSUANT TO OPUC PROTECTIVE ORDER 01-149 IN DOCKET NUMBER UM1002.

THE INFORMATION CONTAINED HEREIN MAY BE SHOWN ONLY TO QUALIFIED PERSON AS DEFINED IN THE PROTECTIVE ORDER.

to become dysfunctional.[10] Wah Chang asked the Commission to reset its rates for the last two years of the MESA to a fixed rate of $49.55 per megawatt hour (initially, Wah Chang requested to pay the regular tariff rate, but it changed its request at the 2001 hearings).

According to its testimony in this phase of the case, however, Wah Chang is reverting to its position that it should be "charged standard industrial tariff rates during the period of manipulation."[11] Notably, Wah Chang does not propose that the ***below-tariff rates*** it paid for the first three years of the MESA should be adjusted in any way.[12] And, since rates declined to below-tariff levels for the final year of the MESA, Wah Chang is seeking to keep those benefits under the MESA as well. It is only for the few months between September 2000 and July 2001 – when prices under the MESA exceeded the "standard industrial tariff rates" – that Wah Chang seeks the extraordinary relief of having the Commission "reform" the contract.

In other words, the deal Wah Chang wants in this proceeding is "lower of cost or market": If prices under the MESA (which are market-based) are lower than cost (PacifiCorp's tariff rate), Wah Chang keeps the benefit of the lower price; if prices under the MESA are higher than tariff, it is allegedly due to market manipulation, and Wah Chang gets the lower tariff price, with the revenue deficiency borne by PacifiCorp's other Oregon customers.

B. The Commission's October 2001 Order

The Commission held a hearing on Wah Chang's Petition on June 22, 2001 and issued the Order in October 2001. The Commission denied Wah Chang's Petition, concluding, after considering all the evidence, that the rates Wah Chang was required to pay under the MESA 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;

---

[10] Order at 4.
[11] WC/800, McCullough/5.
[12] *Id.* at 3.
[13] *See* Order at 3-8.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

- Wah Chang saved several million dollars million during the first three years of the MESA;
- Wah Chang knowingly assumed the risk of price fluctuations during the last two years of the MESA;
- Wah Chang could have agreed to include a price cap or collar in the MESA, but chose not to do so because that would limit its gain if prices declined in the future;
- Wah Chang explored financial hedges when prices were rising in the fall of 2000, but chose not to obtain one at that time because it thought that Dow COB Index prices would decrease;
- Wah Chang was able, by the time of the hearing, to fix its energy costs at prices lower than the rate it was asking the Commission to set by obtaining a financial hedge for the summer of 2001;
- Electricity prices had stabilized and returned to their historic levels due, in part, to actions of the FERC;
- Wah Chang's "sister corporation," Oremet, 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;
- Releasing Wah Chang from its obligations under the MESA created a "potential for harm to other customers."

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

In sum, the Commission found that Wah Chang had knowingly assumed the risk of increases in the prices it paid under the MESA and concluded, after considering all of these facts, that the rates in the MESA were not unjust or unreasonable.[14]

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

> It is our general policy that ***only the most compelling circumstances*** justify retroactive modification of a Commission order adopting a fully negotiated settlement agreement. Such circumstances might include facts constituting mistake, fraud, impossibility, or some other ***extraordinary*** basis for modifying an executed agreement.[15]

In reaching its decision, the Commission thus decided that Wah Chang had not presented sufficient evidence of "compelling circumstances" or an "extraordinary" basis that would justify modifying the negotiated and Commission-approved MESA.[16]

The Commission specifically considered and rejected Wah Chang's argument that a dysfunctional market affected by collusion, profiteering, and other misconduct entitled Wah Chang to relief from the terms of the MESA. The Commission concluded that potential collusion, illegal trading practices, and market manipulation are irrelevant to whether the MESA rates are just and reasonable:

> Wah Chang has theories about the California electricity market and prices. FERC and others also have theories. We will not try in this proceeding to determine the causes for the price increases in the California wholesale market.[17]

Instead, the Commission based its decision that the rates in the MESA were not unjust or unreasonable upon its consideration of numerous facts, including principally the overall structure

---

[14] Order at 6.
[15] Order at 6, *quoting* Commission Order No. 95-857 (emphasis added).
[16] *Id.*
[17] Order at 7.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

of the MESA (which substantially benefited Wah Chang in the first three years and for most of the final two years), and Wah Chang's clear assumption of market risk, as outlined above.

C. Wah Chang's Motion To Present Additional Evidence

Wah Chang sought judicial review of the Order before the Circuit Court for Marion County pursuant to *former* ORS 756.580. While that case was pending, in May 2002, Wah Chang moved the court for leave to present additional evidence to the Commission pursuant to *former* ORS 756.600. The two types of evidence Wah Chang sought leave to present were (1) evidence of manipulation of the Western wholesale electricity markets in the years 2000-2001, and (2) complaints filed by PacifiCorp with the FERC, in which PacifiCorp was seeking relief from certain short-term contracts.[18]

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

> [Wah Chang] continues to argue that the Commission acted unlawfully because it did not make a factual determination on whether the California wholesale market was dysfunctional. The Commission's order is not based on a factual finding that the California wholesale market is, or is 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.*** [19]

The Circuit Court granted Wah Chang's motion, but not because it disagreed with the Commission's view that evidence of manipulation of the California wholesale market was irrelevant to its decision. Rather, the Circuit Court granted Wah Chang's motion because the

---

[18] *Former* ORS 756.600 permitted a party seeking judicial review of a Commission order pursuant to *former* ORS 756.580 to move the Circuit Court for leave to present additional evidence to the Commission while the appeal was pending if the additional evidence is material and there were good and substantial reasons for not presenting the evidence in the proceeding before the Commission.

[19] *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 at 4 (emphasis added).

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

court perceived that the Order was unclear about exactly *why* the Commission declined to determine what caused energy prices in the western power markets to fluctuate in 2000 and 2001:

> Although the commission stated that it declined to determine the theories or causes of the price fluctuations[, it] is not clear whether they did so because of the insufficiency of the evidence.[20]

Based on this perceived lack of clarity, the court reasoned that if the Commission's Order was based on a lack of evidence, it should reopen its record to accept such evidence. If, however, the Commission's Order was based on a conclusion that "evidence of third party wrongdoing" would not alter the Commission's decision, then the Commission could reject Wah Chang's proffered evidence altogether:

> ***Unless the Commission should rule that under no foreseeable circumstances could such evidence obtain a different result here***, the Commission should reopen its record to include such evidence and then apply its rules and law in arriving at the correct application, here.[21]

The Circuit Court's ruling, therefore, was not in any respect a reversal or remand of the Order. Rather, it was simply a direction to the Commission to consider whether there was any possibility that additional evidence could alter its decision. In addition, the court did not decide that evidence of third party wrongdoing would be sufficient to grant Wah Chang relief from the MESA: "Whether evidence of third party wrongdoing would be sufficient in ***any*** case before the Commission to justify acceptance of facts in support of a potential change in the terms or application of an executed and approved contract is uncertain."[22]

D. Scope Of The Re-Opened Proceedings Before The Commission

The Order denying Wah Chang's petition in 2001 did not specify precisely what the Commission would consider to be "the most compelling circumstances" or an "extraordinary"

---

[20] Letter Ruling dated June 18, 2002, at 2-3.
[21] *Id.* at 3 (emphasis added).
[22] *Id.* (emphasis in original).

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

basis that would justify granting Wah Chang relief from the MESA. Nevertheless, some guideposts are clear.

- First, it is beyond dispute that general evidence of manipulation of the California wholesale energy market is insufficient to grant Wah Chang relief. Wah Chang presented such evidence through its expert witness in the original hearing. The Commission decided, however, that regardless of the existence or cause of high prices in the California wholesale market, the rates in the MESA were just and reasonable. The Commission rejected Wah Chang's argument that the Commission should narrowly focus on the events in California in 2000 and 2001. Instead, the Commission based its decision on a review of *all* of the circumstances surrounding the parties' MESA. For example, the Commission's decision was based, in part, on the facts that Wah Chang saved several million dollars during the first three years of the MESA and offset most of the higher prices that it paid pursuant to the MESA with sales of electricity at the same high market rates that it now challenges.

- Second, the only evidence that could possibly justify granting the extraordinary remedy of modifying an executed agreement is evidence proving that ***PacifiCorp*** engaged in fraud or some other wrongful conduct, and that such conduct had a material effect upon the prices that Wah Chang paid under the MESA.[23] Wah Chang conceded this point when it argued to the Commission that "under the erroneously narrow standard applied by the Commission, Wah Chang is entitled to relief if PacifiCorp engaged in fraud."[24]

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

> We are not willing to say that under no circumstances could evidence about the manipulation of the wholesale electricity market on which the

---

[23] Order at 6.

[24] Wah Chang's Brief Regarding Hearing Scope, Schedule and Discovery, filed November 22, 2002, at 7.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

PAGE 13

CONFIDENTIAL INFORMATION READCTED PURSUANT TO OPUC PROTECTIVE ORDER 01-149 IN DOCKET NUMBER UM1002.

THE INFORMATION CONTAINED HEREIN MAY BE SHOWN ONLY TO QUALIFIED PERSON AS DEFINED IN THE PROTECTIVE ORDER.

PAGE 14

CONFIDENTIAL INFORMATION READCTED PURSUANT TO OPUC PROTECTIVE ORDER 01-149 IN DOCKET NUMBER UM1002.

THE INFORMATION CONTAINED HEREIN MAY BE SHOWN ONLY TO QUALIFIED PERSON AS DEFINED IN THE PROTECTIVE ORDER.

PAGE 15

CONFIDENTIAL INFORMATION READCTED PURSUANT TO OPUC PROTECTIVE ORDER 01-149 IN DOCKET NUMBER UM1002.

THE INFORMATION CONTAINED HEREIN MAY BE SHOWN ONLY TO QUALIFIED PERSON AS DEFINED IN THE PROTECTIVE ORDER.

PAGE 16

CONFIDENTIAL INFORMATION READCTED PURSUANT TO OPUC PROTECTIVE ORDER 01-149 IN DOCKET NUMBER UM1002.

THE INFORMATION CONTAINED HEREIN MAY BE SHOWN ONLY TO QUALIFIED PERSON AS DEFINED IN THE PROTECTIVE ORDER.

conduct, the effect of which was to *materially affect the prices paid by Wah Chang under the MESA*. Wah Chang has completely failed to make any such showing.

IV. LEGAL STANDARD

A. Because Wah Chang Contracted For The MESA Rates, Wah Chang Cannot Avoid Those Rates Unless It Shows That They Are Contrary To The *Public* Interest.

The only legal basis that Wah Chang asserts for avoiding the rates set by the MESA is that those rates are "unjust and unreasonable." As a matter of law, however, a party to a Commission-approved special contract *cannot* challenge the rates under that contract on the grounds that they are unjust or unreasonable.[41] As the Oregon Court of Appeals has described the *Mobile-Sierra* doctrine, "the fact that the parties had contracted for firm prices in each case meant that they had bargained away their right to apply for modification of prices on the ground that they were unjust and unreasonable."[42]

The *Mobile-Sierra* doctrine thus provides that by agreeing to pay particular rates pursuant to a special contract, the parties to that contract have agreed that the contract rates are just and reasonable. Of particular importance here, *Mobile-Sierra* applies not only to a contract that fixes a price, but also to a contract that fixes a *methodology* for setting prices in the future, as the MESA does.[43]

Moreover, by approving such a contract, the regulatory agency charged with overseeing the special contract has *already determined* that the rates set by the contract are just and reasonable:

> The [*Mobile-Sierra* doctrine] is refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings

---

[41] *United Gas Pipe Line Co v Mobile Gas Service Corp*, 350 US 332 (1956); *Federal Power Comm'n v Sierra Pacific Power Co*, 350 US 348 (1956) (rejecting challenges to rates set by special contracts on the grounds that the regulatory agencies hearing those challenges had no authority to modify rates set by approved special contracts).

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

[43] *See, eg, Union Elec Co v FERC*, 890 F2d 1193, 1194 (DC Cir 1989).

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid.[44]

The *Mobile-Sierra* doctrine creates a "practically insurmountable" barrier to reformation of a special contract.[45] The doctrine creates a presumption that private contract rates are "just and reasonable." The only way to overcome this presumption is for the complainant to demonstrate that the contract rates are "contrary to the public interest."[46]

B. Oregon Applies An "Analog" Of The *Mobile-Sierra* Doctrine.

Although *Mobile-Sierra* is a federal doctrine that is not directly controlling here, the principle of respecting and enforcing private contract rates unless they thwart the *public* interest has general applicability.[47] In *American Can Co v Davis*, 28 Or App 207, 223, 559 P2d 898 (1976), the Oregon Court of Appeals took note of the doctrine but held that it was inapplicable to the particular facts before it.[48] In a more recent case, however, the Court of Appeals discussed

---

[44] *Richmond Power & Light v FPC*, 481 F2d 490, 493 (DC Cir 1973).

[45] *Papago Tribal Utility Authority v FERC*, 723 F2d 950, 954 (DC Cir 1983).

[46] *Oregon Trail*, 168 Or App at 478-79.

[47] *See, eg, Re Rate Design for Unbundled Gas Utility Services*, 22 CPUC 2d 444, 79 PUR 4th 93, 1986 WL 215057 (Cal PUC 1986) (noting that like the FERC, the Commission will modify contractual provisions that "unequivocally thwart the public interest"); *Re Southwest Arkansas Electric Cooperative Corp*, 2001 WL 951323, *4-6 (Ark PSC 2001) (applying the *Mobile-Sierra* doctrine to a private contract between a utility and a large industrial customer); *In re Freedom Ring, LLC*, 1997 WL 911768 (NH PUC) (analyzing *Mobile-Sierra* and applying a public interest test to a private contract); *MCImetro Access Transmission Services, Inc v Illinois Bell Telephone Co*, 1999 WL 33914914 (Ill CC 1999) (applying the *Mobile-Sierra* doctrine to a contract enacted under the Illinois Public Utilities Act); *City of Albuquerque v New Mexico Public Service Comm'n*, 854 P2d 348 (N Mex 1993) (citing *Mobile* and *Sierra* as examples of how New Mexico reviews private energy contracts); *Re Columbia Gas of Ohio, Inc*, 113 PUR4th 1, 49 (Ohio PUC 1990); *Town of Bramwell v. Appalachian Power Co*, 91 PUR4th 555, 1988 WL 391468 (W Va PSC 1988) (holding that a contract between a utility and a municipality was a "*Sierra-Mobile* contract" that prevented one party from unilaterally changing rates). *See also* Leonard Saul Goodman, 2 The Process of Ratemaking, 1202 (1998) (noting regulators' "reluctance to revisit maximum reasonableness of negotiated rates").

[48] The discussion in *American Can* assumed, in part, that *Mobile-Sierra* applied strictly to wholesale contracts and did not apply to a retail contract between a utility and an end customer. The doctrine has since been expanded to encompass contracts between "utilities and their *customers*." *Union Elec Co,* 890 F2d at 1194; *see also, Commonwealth Aluminum Corp v United States*, 19 Cl Ct 300, 303 (US Cl Ct 1990) (accepting, without discussion, that *Mobile-Sierra* applies to contracts between the BPA and various aluminum manufacturers); *KN Energy, Inc v Great Western Sugar Co*, 698 P2d 769, 782-83 (Colo 1985) (applying doctrine to contract between public utility and sugar manufacturer); *Re Big Rivers Electric Corp*, Case No 9885, 89 PUR 4th 499 (Ky PSC 1987) (contract between energy co-op and aluminum company); *Re Iowa Pub Service Co*, Docket No. U-521, 10 PUR 4th 360 (Iowa St Commerce Com 1975) (contract between public service company and chemical company).

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Mobile-Sierra at length and referred to the "*American Can* doctrine" as the Oregon "analog" of *Mobile-Sierra*.[49]

Moreover, this Commission's prior Order in this very proceeding, without referring to *Mobile-Sierra* by name, makes clear that *Mobile-Sierra*-type principles are to be applied when the Commission is asked to disturb privately negotiated, and Commission-approved, contract rates for electricity between sophisticated parties. In its Order, the Commission ruled that Wah Chang had assumed the risk of high market rates, had gotten what it bargained for, and should be held to the terms of the MESA in the absence of "the most compelling circumstances."[50]

Although this proceeding was reopened for the purpose of allowing Wah Chang to present additional evidence, the legal standard to be applied to that evidence is the same as it was in 2001, when the Commission denied Wah Chang's petition. Under that standard, the market rates that Wah Chang paid under the MESA are presumptively "just and reasonable" because Wah Chang *agreed* to them in a contract that was (1) freely negotiated by the parties and (2) carefully reviewed and approved by the Commission. Under *Mobile-Sierra*, the presumption that the MESA rates are just and reasonable can be overcome only by showing that enforcing the contract would be contrary to the public interest.[51] As demonstrated below, Wah Chang cannot make this showing because the ratepaying public *benefited* from the MESA. If Wah Chang had been on the standard tariff rather than the MESA, PacifiCorp would have received less revenue from Wah Chang to offset its own higher costs during the energy crisis and would have had to seek recovery of those costs from its other customers.

---

[49] *Oregon Trail*, 168 Or App 466, 478 n9, 7 P3d 594.

[50] *See* Order at 6.

[51] In its order reopening this proceeding, the Commission noted that "it is theoretically possible that the California wholesale electricity market became dysfunctional because of PacifiCorp's manipulation, deceit, illegal conduct, and fraud in that market. The record does not show that to be the case, but the example demonstrates that future evidence could reveal circumstances and conduct we would not want to ignore." Order No. 03-153 at 2-3. Thus, while the Commission did not expressly reference the *Mobile-Sierra* "public interest" rationale, the language that the Commission did use is consistent with the "public interest" exception to the enforcement of contract rates.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

In fact, it is the very relief requested by Wah Chang – being retroactively relieved from the rates it agreed to pay – that would harm the public by forcing PacifiCorp to recoup those costs from the rest of its customer base.[52] As described above, granting the relief requested by Wah Chang would require an additional $25.5 million to be recovered from PacifiCorp's Oregon customers through the UM 995 deferral mechanism.

C. The Ninth Circuit's 2006 *Snohomish PUD* Decision Has No Bearing On The Legal Standard To Be Applied In This Proceeding.

Faced with the extremely high burden under *Mobile-Sierra* of showing that the MESA rates are contrary to the public interest, Wah Chang has indicated that it may rely on the recent Ninth Circuit decision in *Snohomish PUD* to argue that *Mobile-Sierra* does not apply here, or that even if it does apply, enforcing the MESA rates would be contrary to the public interest. In anticipation of such arguments, PacifiCorp discusses *Snohomish PUD* below.

1. *Snohomish PUD*'s Limitation On *Mobile-Sierra* Has No Applicability Here.

In *Snohomish PUD*, the Ninth Circuit ruled that the *Mobile-Sierra* doctrine did not apply to certain wholesale electricity contracts formed during the Western energy crisis. In a desperate bid to remain solvent in the face of extraordinary prices on the spot market, certain local utilities and state agencies entered into long-term contracts to purchase wholesale energy at fixed rates. Those long-term contracts became unprofitable after market rates declined. The local utilities and state agencies then petitioned the FERC to modify their contracts, contending that the contract rates were not just and reasonable. FERC applied the *Mobile-Sierra* doctrine to the challenged contracts and denied their petitions.

The Ninth Circuit reversed, holding that *Mobile-Sierra* analysis did not apply to the challenged contracts because they had not been subject to meaningful advance regulatory review

---

[52] *See* Order at 7 ("The potential for harm to other customers, while not dispositive, suggests that we should be cautious in considering a request to revise an executed contract we previously found to be fair and reasonable.").

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

that ensured that the rates were just and reasonable. The court inferred from prior case law that three preconditions must exist before *Mobile-Sierra* applies:

> (1) the contract by its own terms must not preclude the limited *Mobile-Sierra* review; (2) the regulatory scheme in which the contracts are formed must provide FERC with an opportunity for effective, timely review of the contracted rates; and (3) where, as here, FERC is relying on a market-based rate-setting system to produce just and reasonable rates, this review must permit consideration of all factors relevant to the propriety of the contract's formation.[53]

Because FERC had automatically applied *Mobile-Sierra* without considering whether these preconditions existed, the court remanded for further analysis.[54]

Snohomish PUD's limitation on *Mobile-Sierra* is irrelevant to the proceeding before the Commission, because all three of the preconditions that the Ninth Circuit identified for *Mobile-Sierra* review are present here: (1) the MESA does not "by its terms" preclude limited *Mobile-Sierra* review; (2) the MESA, including its rate-setting mechanism, was reviewed, initially rejected, and later approved by the Commission, with input from Commission staff, before it went into effect[55]; and (3) there has been no suggestion – ever – that the MESA was improperly formed. Thus, even under the Ninth Circuit's analysis in *Snohomish PUD*, the preconditions for *Mobile-Sierra* review exist. Accordingly, the MESA rates are presumptively just and reasonable and should remain in force unless the Commission finds them "contrary to the public interest."

2. *Snohomish PUD*'s Discussion Of The "Public Interest" Does Not Favor Wah Chang.

In addition to identifying "preconditions" for *Mobile-Sierra* review, the Ninth Circuit in *Snohomish PUD* held that FERC had applied an incorrect formulation of the "public interest" in

---

[53] 471 F3d at 1061.

[54] *Id.* at 1090.

[55] Although the final two years of the MESA relied on a market rate rather than a fixed rate, courts have held that *Mobile-Sierra* applies equally to private contracts providing a *methodology* for establishing a price, not merely those fixing a price in advance. *See, e.g., Union Elec Co v FERC*, 890 F2d 1193, 1194 (DC Cir 1989).

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

considering whether the "just and reasonable" presumption was overcome.[56] The court distinguished "low-rate" challenges (typically where a utility argues that a contract rate is too low) from "high-rate" challenges (typically where a customer argues that a contract rate is too high).[57] The court in *Snohomish*, which involved "high-rate" challenges to contracts, held that FERC had improperly applied the factors relevant to a "low-rate" challenge (such as whether the utility was prevented from adequately recovering its costs). The court held that in a high-rate challenge, the "public interest" at issue is "assuring that the consuming public pays fair rates for the very energy covered by the challenged contracts."[58]

The Ninth Circuit's discussion of the "consuming public" occurred in the context of *wholesale* contracts among utilities and electricity providers, which differs critically from this proceeding. The court in *Snohomish PUD* was concerned about the effect that high wholesale rates could have on the retail prices ultimately paid by the end customers of the companies paying those wholesale rates. In other words, *Snohomish PUD* stands for the proposition that the key public interest in a high-rate case is whether the passive "consuming public" would be victimized at the retail level because wholesale contract rates are too high. This inquiry has no logical or policy-based application in a challenge to a *retail* contract brought by a ratepaying customer that voluntarily assumed the risk of the high rates that it ended up paying. Wah Chang, as the signatory to the contract under review, is not the "consuming public" in any meaningful sense.

Thus, even assuming that this Commission were to follow the reasoning of *Snohomish PUD* in circumscribing the applicability of *Mobile-Sierra* principles, that would have no effect on Wah Chang's petition here. Even within the Ninth Circuit's *Snohomish PUD* framework, ordinary *Mobile-Sierra* analysis applies to Wah Chang's argument that the MESA rates are not

---

[56] 471 F3d at 1087.
[57] *Id.* at 1088-89.
[58] *Id.* at 1089.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

just or reasonable. Accordingly, Wah Chang is entitled to relief only if it can show that the MESA rates are contrary to the public interest. It cannot do so, for the simple reason that the MESA rates had no detrimental effect on any consumers except for the single consumer – Wah Chang – that freely entered into the contract.[59] Indeed, it is the very relief requested by Wah Chang – retroactive modification of the MESA rates – that would harm the public interest, because that relief would lead to higher rates being imposed on the rest of PacifiCorp's customer base, *i.e.*, it would harm the consuming public.[60]

V. DISCUSSION

A. Wah Chang's "New Evidence" Fails To Demonstrate Wrongdoing By PacifiCorp That Affected The Prices Wah Chang Paid Under The MESA.

Wah Chang's direct case in this phase of the proceeding, submitted in December 2005, consists primarily of the testimony and exhibits of Mr. Robert McCullough. Mr. McCullough's testimony is essentially a catalogue of misdeeds by an unrelated party, Enron, that "gamed" the western energy markets. Among the flaws in Mr. McCullough's testimony are that he fails to show the effect of any of these actions on the Dow COB Index – the only price that is relevant to the MESA and, therefore, this proceeding. Furthermore, while Mr. McCullough attempts to tar PacifiCorp with the Enron brush by identifying "suspect" transactions to which PacifiCorp was a

---

[59] Notably, throughout the seven years of this proceeding, Wah Chang has never cited any legal authority – because it cannot – stating that a single customer may invoke the "just and reasonable" standard to lower its own rates at the expense of the rest of the ratepaying public.

[60] Another legal authority on which Wah Chang placed heavy reliance in the initial arguments to the Commission was the 2001 decision of the Washington Utilities and Transportation Commission ("WUTC") in *Air Liquide America Corp, et al, v Puget Sound Energy, Inc*, WUTC Docket No. UE-001952. Wah Chang argued erroneously that the WUTC in *Air Liquide* had rejected the *Mobile-Sierra* doctrine; that *Air Liquide* was persuasive precedent for the proposition that electricity prices during the Western energy crisis were unjust and unreasonable; and that the decision supported Wah Chang's request to pay a fixed rate rather than the market rates it had bargained for. For numerous reasons that were discussed in PacifiCorp's 2001 briefing, Wah Chang misinterpreted *Air Liquide*, which arose in a fundamentally different context, affecting far more customers, than Wah Chang's situation. This Commission correctly declined to give *Air Liquide* any weight in its October 2001 Order denying Wah Chang's petition. Nothing has changed since then that would make *Air Liquide* relevant to this proceeding, and because that case was discussed at length in earlier briefing, PacifiCorp will not repeat that discussion here.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

party (typically, buy-resell transactions in which 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. Each of these issues is addressed below.

1. The "Gaming" Addressed in Wah Chang's Testimony Was Directed at a Market that Is Not Relevant to the Dow COB Index Price Paid by Wah Chang Under the MESA.

The majority of gaming behavior that Mr. McCullough discusses is not likely to have had any effect on the Dow COB Index. The market operated by the California Independent System Operator ("CAISO") was the primary market in which products related to transmission and reliability were targeted for the types of gaming discussed by Mr. McCullough. Thus, any alleged manipulation of the CAISO market is not relevant to the Dow COB Index price paid by Wah Chang under the MESA. It is highly unlikely that the prices Wah Chang paid at COB were influenced or affected by any of these alleged trading games that mostly attempted to make money through deceptions based on being paid for false services in the highly traded organized energy markets in California. As Dr. Cicchetti testified during the hearings:

> The pricing that we're talking about when we think about . . . buying from the PX, bouncing it off COB in a ricochet or buy/resell relationship, or whatever it may happen to be, with respect to it coming back either to the real-time market of the CAISO or to the out-of-market purchase of the CAISO, those kinds of trades wouldn't have been – were not part of what was reported to the COB firm price index, so that any manipulation, if one wants to think of that that way, or any attempt to avoid a price cap or to take advantage of arbitrage pricing differences between the power exchange at a low price and what one thought would be a higher price in one of the CAISO markets, any of that action that was going on was not moving the prices at COB because those transactions wouldn't have qualified as firm, day-ahead transactions reported to COB.[61]

Table 4 below, from Dr. Cicchetti's Reply Testimony, shows each alleged scheme with a brief description and Dr. Cicchetti's conclusion as to whether that scheme could have had any

---

[61] Tr. 113:5-22.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

influence on the market clearing prices in the California Power Exchange ("CPX") auction markets or for the COB index price. Dr. Cicchetti's unrebutted testimony is that while some of these schemes may have had some effect on the CPX price, most did not because they were schemes designed to collect congestion relief payments, not to move the CPX market clearing price. More importantly, Dr, Cicchetti concluded that none of the schemes is likely to have affected the COB indexed spot price that Wah Chang paid. Those particular schemes that Dr. Cicchetti identified as having the potential to affect the Dow COB Index – "Fat Boy," "Ricochet" and Non-Transmission Buy/Resells – are discussed in the sections that follow. The evidence on the record in this proceeding shows that these schemes did not have any effect on the Dow COB Index.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

TABLE 4

GAME	BRIEF DESCRIPTION	AFFECT ON PX PRICE	AFFECT ON COB INDEX PRICES
	Transmission Congestion Games		
LOAD SHIFT	Deliberately creates congestion on a transmission line by deliberately over-scheduling in one zone and under-scheduling by a corresponding amount in another zone	NO	NO
WHEEL OUT	Strategy designed to capture congestion payments for relieving congestion by fooling the CAISO's computerized congestion management program. Here, a company would schedule transmission over a line that it knew was out-of-service to get paid for scheduling a counter-flow schedule.	NO	NO
NON-FIRM EXPORT	Strategy designed to capture congestion payments for relieving congestion by fooling the CAISO's computerized congestion management program. Here, a company recieves a counter-flow congestion payment by scheduling non-firm energy from a point in California to a control area outside of California. The company then cuts the non-firm energy after it recieves the counter-flow payment.	NO	NO
DEATH STAR (aka Forney's Perpetual Loop, Red Congo, Black Widow, Big Foot, and Cong Catcher)	Strategy that involved submitting circular schedules, defined as a series of two of more export and import schedules that begin and end in the same control area. The strategy was designed to "fool" the CAISO's computerized congestion management system and purpose was to receive congestion payments.	NO	NO
	Games Where CAISO MCP is Accepted as a Price Taker		
FAT BOY (Inc'ing Load)	Strategy designed by the IOUs' to underschedule load in the CPX market. Sellers responded and shifted sales from the CPX to the CAISO Real-Time market	MAYBE	NOT LIKELY
	Games Involving Price Differences Between Markets		
GET SHORTY	This strategy is known as paper trading of ancillary services. In effect, a company agrees to provide ancillary services in the CPX market, and if called upon to provide the services, buys them in the CAISO market if the prices are lower.	NO	NO
SELLING NON-FIRM AS FIRM	Under this strategy, a company sells non-firm energy to the CPX claiming it is firm energy. A company using this strategy is at financial risk if its non-firm supplies were cut and it had to purchase in the CAISO's real-time market to cover the energy. This tends to lower CPX prices as supply increases.	NO	NO
EXPORT OF CALIFORNIA POWER	Energy was purchased in the CPX and sold in the uncapped markets outside of California. Takes advantage of the price spread between capped and uncapped markets. If more demand was placed in the CPX markets, prices would tend to increase, other things equal. However, to the extent this increase replace IOU demand . CPX prices might not have differed from what they would or should have been.	YES/MAYBE	NO/MAYBE
	Other Games That Did Not Set the MCP		
RICOCHET (Megawatt Laundering)	Designed to avoid the CAISO price cap by buying energy from the CPX in the day-ahead market, exporting it to a second entity and then reselling the energy in the CAISO real-time market as an OOM transaction. Did not set the MCP. If more demand was placed in the CPX markets, prices would tend to increase, other things equal. However, to the extent this increase replace IOU demand strategically shifted, CPX prices might not have differed from what they would or should have been.	YES/MAYBE	NO/MAYBE

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

2. As to the Games that Might Have Relevance, the Evidence Fails to Demonstrate that They Had Any Impact on the COB Index Price Paid by Wah Chang under the MESA.

a. "Fat Boy"

While Mr. McCullough claims that PacifiCorp "facilitated" Enron's "Fat Boy," "Ricochet" and "Death Star" schemes, he admits that the "40 to 50" instances in which PacifiCorp participated in "Fat Boy" are so limited that they could be attributable to a "computer error."[62] Mr. McCullough's prefiled testimony acknowledges that "PacifiCorp schedules were *small* compared to major perpetrators of Fat Boys, such as Powerex."[63] According to Mr. McCullough's deposition testimony:

> There is some evidence of Fat Boy, but as I said, the scale is not significant enough to believe that it was an ongoing process. Could be as easily a computer error as an attempt to profit.[64]

There is thus no evidence in the record to support any finding that PacifiCorp knowingly engaged in such transactions, or any evidence that quantifies any impact of these "40 to 50" instances of Fat Boy on the Dow COB Index.

b. Ricochet

Mr. McCullough purports to show the impact on calendar year 2000 monthly prices attributable to Fat Boy and Ricochet schemes.[65] But this "analysis" shows the alleged impact of these schemes by ***all*** market participants, not just PacifiCorp. That PacifiCorp's role in these schemes was immaterial is confirmed by the FERC decision cited in Mr. McCullough's rebuttal testimony, which lists several counter-parties to Enron's Death Star and Ricochet transactions, and ***does not identify PacifiCorp as one such counter-party***.[66]

---

[62] McCullough Deposition at 64:11-12, 102:17-21, cited at PacifiCorp/23, Cicchetti/74.
[63] Exhibit WC/800, McCullough/42.
[64] McCullough Deposition at 102:17-21.
[65] Exhibit WC/800, McCullough/39.
[66] 119 FERC ¶ 63,013, Docket EL03-180, Initial Decision, June 21, 2007. Paragraph 78 of the Initial Decision discusses Death Star transactions, and concludes that Enron engaged in 585 Death Star 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.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Mr. McCullough also fails to address the result of FERC's investigation of PacifiCorp's involvement in Ricochet, where PacifiCorp was assessed a nominal penalty ($67,745) as full settlement for all revenues for ***all*** of the "Wheel Out" activities.[67] Notably, these were found to be the "congestion" earnings from this practice, *i.e.*, they were unrelated to wholesale ***prices***.[68] With respect to Ricochet in particular, FERC Staff found no such transactions by PacifiCorp during the relevant period.[69]

c. Non-Transmission Buy/Resells

Mr. McCullough's direct testimony states that he identified 637 transactions between PacifiCorp and Enron as "Non-Transmission Buy/Resells." Mr. McCullough uses the term to refer to a "simultaneous 'purchase' and 'sale' of the same quantity of power at the same location with the same counterparty for a fee equal to the difference between the nominal purchase and sale price."[70] Mr. McCullough focused considerable attention on these particular transactions, given his view that these transactions were "components of Ricochets and Death Stars."[71] The record is clear, however, that these transactions had no impact whatsoever on the prices paid by Wah Chang under the MESA, because they were not transactions reported to Dow Jones. Moreover, although Mr. McCullough claims that such transactions are "sham" transactions, his own testimony acknowledges that there can be a legitimate business purpose for these

---

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.

[67] 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).

[68] 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 PacifiCorp's potential liability in the refund case resulting from the FERC orders related to the California Spot Market 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).

[69] PacifiCorp/23, Cicchetti/67.

[70] Exhibit WC/800, McCullough/65.

[71] *Id.* at 66.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

transactions. Wah Chang also attaches great significance to what it believes are actions by PacifiCorp's traders that contradict the instructions of their supervising officer, Mr. Watters. In fact, however, the evidence shows that the traders complied with Mr. Watters' instructions. Finally, Wah Chang introduced a study which purports to show that on the days PacifiCorp allegedly engaged in non-transmission buy/resells at COB, its reports to Dow Jones of sales transactions caused the Dow COB firm on-peak and firm off-peak indexes to be higher than they would have been absent PacifiCorp's reports. This study is fundamentally flawed, however, and is of no value.

These issues are discussed in turn below.

(i) Non-Transmission Buy/Resells Can Have a Legitimate Business Purpose.

Mr. McCullough admits in his direct testimony that non-transmission buy/resells can have legitimate business purposes. Mr. McCullough accurately cites financial sleeves, where a seller insists on a credit-worthy middleman as an example of a legitimate business purpose.[72] In such an instance, power would be transferred to one entity and then immediately transferred to a different entity, with the middleman receiving a fee for acting as the go-between. He also describes the situation where traders exchange energy at different locations as being a legitimate purpose for a buy/resell transaction as he defines it. As described in Dr. Cicchetti's Reply Testimony, there are other examples of legitimate business purposes for buy/resell agreements. Among these are the possibility of testing the interest of other participants in the market and creating an audit trail to support an end-of-day market-to-market valuation.[73]

---

[72] *Id.* at 65.

[73] Exhibit/PacifiCorp/23, Cicchetti/59. Most trading companies have risk limitations that restrict traders. The units measured are revenue (price times quantity) and the portfolio is valued using a net present value 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.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Although Mr. McCullough has no way of actually knowing why PacifiCorp entered into any transaction, he asserts that these transactions were "components of Ricochets and Death Stars."[74] However, FERC fully investigated PacifiCorp's trading activities and found no evidence that PacifiCorp had engaged in the trading practices known as Ricochet or Death Star.[75]

(ii) The Non-Transmission Buy/Resell Transactions Cited by Wah Chang Did Not Affect the Dow COB Index Prices, as They Were Not the Type of Transactions Reported to Dow Jones.

Non-transmission buy/resell transactions by their very nature would not be included in the transactions that PacifiCorp or any other participant reported to Dow Jones and used to develop the Firm Dow COB Index. In Dr. Cicchetti's Reply Testimony, he discussed the Dow Jones requirements for transactions to be included in calculating the Firm COB Price Index.[76] As Dow Jones describes the process:

> The firm indexes average together blocks of power sold on a one-day forward pre scheduled basis. No real-time power is included in these indexes. Transactions are limited to power traded in 16-hour blocks during on-peak hours and 8-hour blocks for off-peak. Transactions which call for delivery for more than one day are not included in calculations for these indexes except for the standard multi-day trading that occurs as a result of schedulers' conferences of month end trading is also included. Trading must follow the standard WSPP schedule. Volume is reported as total megawatts (MW) transacted per hour.

Dow Jones defines Firm as financially firm backed with liquidated damages or physically firm. Buy/resell transactions typically do not fit the various specific parameters of the requirements for a Firm Dow Jones COB transaction. Buy/resells tend not to be for standard 16-

---

[74] Exhibit WC/800, McCullough/66.

[75] Given that the results of the investigation revealed effects that were *de minimis,* FERC Trial Staff and PacifiCorp reached a settlement for $67,745 (which was the total revenue PacifiCorp made in its Wheel Outs). FERC Trial Staff found that ***none*** of the alleged Ricochet transactions occurred during the relevant period and the prices did ***not*** exceed the applicable price cap. Thus, the transactions did not meet FERC Staff's definition of a Ricochet. Under the Agreement and Stipulation approved by FERC, $67,745 was accepted as full settlement for all revenues for the Wheel Out activity, False Import (Ricochet), Cutting Non-Firm, Circular Scheduling (Death Star), and Wheel Out. Thus, all "gaming" allegations were resolved by this settlement approved by FERC. *PacifiCorp*, 106 FERC ¶ 61,235 (*Order Approving Contested Settlement Agreement)* (Mar. 8, 2004).

[76] Exhibit PacifiCorp/23, Cicchetti/10-11.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

hour blocks of Peak power or 8-hour blocks of Off-Peak power and the MWs traded are often "odd" sized amounts and likely are real time, not day ahead.[77]

As Dr. Cicchetti testified during the hearing:

> None of these [non-transmission buy/resells] should have been – and I have actually looked to see. None of them were reported by PacifiCorp to COB. And they shouldn't have been, and they weren't.
> . . .
> COB required physical trades of well-defined products. Buy/resells didn't qualify and shouldn't have been reported, and they were not.
> . . .
> I looked to see if those – any of those were, in fact, reported to Dow Jones as part of their firm sales for either peak or off-peak, the two prices that are part of the index that goes into determining the prior month's price that's used to establish the price under the MESA, and none of those transactions showed up in any of PacifiCorp's reports to Dow Jones.[78]

The 637 non-transmission buy/resells identified by Mr. McCullough – and similar such transactions that he may continue to identify in his endless mining of the power transaction data bases – are simply irrelevant to the matter at issue in this proceeding: whether or not PacifiCorp's actions had any effect on the prices paid by Wah Chang under the MESA. The evidence establishes that these transactions did not fall within the scope of transactions properly reportable to Dow Jones, and properly were not reported to Dow Jones. Thus they could not have had any impact on the Dow COB Index under which electricity sales to Wah Chang were priced under the terms of the MESA.

(iii) The Evidence Shows that PacifiCorp's Traders Followed the Instruction to Cease Buy/Resells at Non-Market Prices.

Wah Chang attaches great significance to the instructions given by PacifiCorp's Senior Vice President of Commercial & Trading, Mr. Watters, with respect to the issue of non-

---

[77] Exhibit PacifiCorp/33, Cicchetti-Dubin/8.
[78] Tr. 115:3-7, 115:14-17, 117:2-9.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

transmission buy/resells, and whether those instructions were followed by PacifiCorp's traders. In light of the above analysis regarding the irrelevance of non-transmission buy/resells in the determination of the Dow COB Index, this issue is largely moot. Even if it were relevant to the analysis, however, Wah Chang has mischaracterized the facts and created a false impression of noncompliance by PacifiCorp's traders. In fact, the evidence shows that Mr. Watters' instructions with respect to buy/resell transactions were largely followed by PacifiCorp's traders.

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

> [W]e would no longer do bundled transactions but that we would separate out the legs of these buys and the sells, and that we would only buy power at what we were willing to 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.[79]

Dr. Cicchetti testified during the hearing that he analyzed the buy/resell transactions completed after these instructions were given, and concluded that the instructions were largely carried out by PacifiCorp's traders. As Dr. Cicchetti stated:

> The second thing I have done is to look at PacifiCorp's buy/resell prices, the ones that are not reported to COB, but I have looked at those and compared them to COB. And what I found is that before December of 2000, the buy/resell prices were below COB pretty significantly, and they were mostly about $100 a megawatthour, and then the $10 difference or $20 difference might be added to it.
>
> After January, when PacifiCorp – you heard it this morning. According to Mr. Watters, he said they wanted to break it apart, any buy/resell activity, and pay the market price when they buy a piece and charge a market price when they sell a piece. After January, you find those same trades that are reported in Mr. McCullough's buy/resells are all in the 300 – not all, but primarily

[79] Tr. 56:16-22.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

> in the 300 to $400 range. In other words, they're reflecting COB prices.
>
> So I think the only time that PacifiCorp did not have prices at COB that were like the COB index or market price was before December when they did some buy/resells at below market prices. And – but after the directive went out, the only low price I find during the entire period from December to June is in the month of June. There's one trade where they bought at 50 and sold at 60 just a matter of days before the energy crisis came to an end. Every other trade was at market prices.
>
> And I have compared those trades, those buy/resell prices with the actual COB prices as well, and again, they're fractions of a cent difference. Sometimes they're a little bit above, sometimes a little bit below, but there are very, very inconsequential differences between COB's buying and reselling and the COB market prices on those same days, in those same periods, peak or off-peak.[80]

The comparison to which Dr. Cicchetti refers is set forth in Exhibit PacifiCorp/75.

Thus, if Wah Chang attempts to characterize Mr. Watters' instructions as requiring a cessation of all buy/resell activity, that depiction is not borne out by the language of Mr. Watters' instructions. Rather than showing traders continuing to engage in a forbidden activity – which seems to be the purpose of Wah Chang featuring the videotaped deposition of Mr. Watters during the hearing – the record in fact establishes that Mr. Watters' instructions were followed by the PacifiCorp traders. In any event, for the reasons stated in the preceding section, Wah Chang's focus on non-transmission buy/resells is largely irrelevant, given their irrelevance in determining the Dow COB Index upon which the MESA pricing terms are based.

(iv) The Howard Study Is of No Value, Given that the Transactions It Purports to Analyze Were Not Reported to Dow Jones.

In its rebuttal testimony in this proceeding, Wah Chang introduced for the first time evidence which purported to show the impact of PacifiCorp trading activities at COB on the Dow COB Index. This evidence, in the form of a study prepared by Mr. Howard, purports to

---

[80] Tr. 119:24 – 121:9.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

PAGE 34

CONFIDENTIAL INFORMATION READCTED PURSUANT TO OPUC PROTECTIVE ORDER 01-149 IN DOCKET NUMBER UM1002.

THE INFORMATION CONTAINED HEREIN MAY BE SHOWN ONLY TO QUALIFIED PERSON AS DEFINED IN THE PROTECTIVE ORDER.

PAGE 35

CONFIDENTIAL INFORMATION READCTED PURSUANT TO OPUC PROTECTIVE ORDER 01-149 IN DOCKET NUMBER UM1002.

THE INFORMATION CONTAINED HEREIN MAY BE SHOWN ONLY TO QUALIFIED PERSON AS DEFINED IN THE PROTECTIVE ORDER.

evidence of price manipulation by PacifiCorp is nothing more than a misleading statistical sideshow.

3. PacifiCorp Was Found by FERC to be a Net Buyer During the Western Energy Crisis, and Thus Would Not Have Benefited from Manipulating Prices Upward.

Under Wah Chang's myopic view of the issues in this case, PacifiCorp allegedly engaged in market manipulation for the purpose of raising prices at COB – and thus the Dow COB Index prices which Wah Chang paid under the MESA – in order to maximize its revenues under the MESA. Increasing prices at COB was contrary to PacifiCorp's economic interests, however. As Dr. Cicchetti testified during the hearing:

> In the case of PacifiCorp, looking at its regulated utility side, it was a major buyer of electricity. In fact, it bought, at a normal basis, 30 percent for the electricity it would normally need to satisfy its native load. That entity, if it had any interest in trying to manipulate prices or even had the ability to manipulate, I believe would try to get a lower price, not a higher price.[89]

PacifiCorp was found by FERC[90] to be a ***net buyer*** during the Western energy crisis. As a net buyer "that frequently relied on the real-time market for power to serve this [native] load,"[91] PacifiCorp was a ***net loser*** during the Western energy crisis, and 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, 2001.[92] As noted above, under the deferral mechanism

---

[89] Tr. 118:21 – 119:4.

[90] Following its *Final Report on Price Manipulation in Western Markets*, issued in March 2003 in Docket No. PA02-2-000, FERC Staff conducted an investigation into the possibility of physical withholding of electric generation from the California market during the period May 1, 2000 through 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.*

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

[92] Docket UM 995, Order No. 02-469 at 3.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

adopted by the Commission in Order No. 01-420, PacifiCorp was authorized to recover approximately $160 million of these excess power costs from Oregon customers.[93]

4. Wah Chang Grossly Exaggerates PacifiCorp's Role with Respect to Enron's Schemes.

Mr. McCullough's testimony consistently and disingenuously exaggerates PacifiCorp's role with respect to Enron's schemes. For example, Mr. McCullough's direct testimony claims that PacifiCorp's role was "significant" with respect to Enron's short-term trading.[94] In support of this conclusion, he cites to a November 5, 2001 email from Enron's Tim Belden referring to PacifiCorp as "the most important counterparty for both our short term northwest an[d] short term southwest desks." This email is irrelevant because, as Mr. McCullough knows, this email has no bearing whatsoever on whether PacifiCorp participated in the Enron schemes he cites in his testimony. At the time this email was written – in November 2001 – the western energy crisis was over; it had ended nearly six months earlier when FERC imposed west-wide price caps on June 19, 2001. The issue at the time Mr. Belden wrote his email in November 2001 was Enron's imminent bankruptcy – which occurred one month later – and the "scarce margin" available to Enron in terms of which counterparties would even do business with Enron. Mr. McCullough admitted in his deposition that this was the context in which PacifiCorp was identified as a "significant" counter-party:

> [W]e have a finite amount of credit support available to Enron at the period that was just before the bankruptcy. In fact, less than a month before the bankruptcy announcement.[95]

This period is completely irrelevant to the issue of whether PacifiCorp participated in Enron's schemes during the western energy crisis. Mr. McCullough disingenuously takes an email written after the fact and attempts to create the impression that throughout the western energy crisis, PacifiCorp was (a) a "significant" participant in Enron's schemes, and (b) even

---

[93] *Id.*
[94] Exhibit WC/800, McCullough/43:7-13.
[95] *Id.* at 65:15-19.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

aware of the content of the email, months after the crisis ended. The evidence clearly shows otherwise.

Mr. McCullough also attempts to create the impression in his direct testimony that PacifiCorp was a knowing and material participant in Enron's schemes. Yet when pressed during his deposition, he declined to accuse PacifiCorp of ***knowingly engaging*** in any of Enron's schemes:

> Q. Are there any other Enron-type gaming activities that you believe PacifiCorp ***engaged in*** during the energy crisis?
>
> A. I would disagree with the characterization embedded in that question. What I've said in this testimony is that there is clear evidence that PacifiCorp ***facilitated*** Ricochet and Death Star. There is some evidence of Fat Boy, but as I said, the scale is not significant enough to believe that it was an ongoing process. Could be as easily a computer error as an attempt to profit.[96]

In other words, Mr. McCullough draws a clear distinction between whether PacifiCorp knowingly ***engaged in*** "gaming" during the western energy crisis, or simply unknowingly facilitated "gaming" by others. Mr. McCullough sums up PacifiCorp's role in the following excerpt from his deposition:

> [O]ur review of the data indicates that PacifiCorp, ***either through design or mischance***, found itself on the wrong side of these transactions. The most kindly way to put it is PacifiCorp chose its friends poorly at this point.[97]

There is thus a complete disconnect between the relief requested by Wah Chang in this proceeding – abrogating the MESA and instead charging Wah Chang according to PacifiCorp's tariff – and the evidence presented by Wah Chang. There is no evidence to support penalizing PacifiCorp in the manner proposed by Wah Chang for actions consisting merely of "mischance," choosing friends "poorly," or "a computer error." Moreover, as discussed above, whether or not

---

[96] *Id.* at 102:10-21 (emphasis added).
[97] *Id.* at 46:5-10.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

PAGE 39

CONFIDENTIAL INFORMATION READCTED PURSUANT TO OPUC PROTECTIVE ORDER 01-149 IN DOCKET NUMBER UM1002.

THE INFORMATION CONTAINED HEREIN MAY BE SHOWN ONLY TO QUALIFIED PERSON. . AS DEFINED IN THE PROTECTIVE ORDER.

PAGE 40

CONFIDENTIAL INFORMATION READCTED PURSUANT TO OPUC PROTECTIVE ORDER 01-149 IN DOCKET NUMBER UM1002.

THE INFORMATION CONTAINED HEREIN MAY BE SHOWN ONLY TO QUALIFIED PERSON AS DEFINED IN THE PROTECTIVE ORDER.

its Motion for Finding, however, Judge Power specifically invited the parties to discuss two Oregon rules of evidence, ORS 40.135(m) and ORS 40.135(w). These are discussed below.

ORS 40.135(m) establishes an evidentiary presumption that "[t]he ordinary course of business has been followed." PacifiCorp does not believe this presumption is applicable to Wah Chang's Motion for Finding, because (1) PacifiCorp does not dispute that the ordinary course of business has been followed, and (2) the statute does not call for any inferences to be drawn from the fact that the usual course of business was, or was not, followed. PacifiCorp believes it has acted in the ordinary course of business. Like any organization that stores vast quantities of information, PacifiCorp inevitably loses information from time to time, in the regular course of business. PacifiCorp is especially vigilant when storing information that it has a legal duty to preserve or that is commercially significant, but the recordings at issue were neither. Furthermore, the possibility that some recordings may have been inadvertently destroyed or misplaced is heightened in light of PacifiCorp's office relocation in March 2001. *See* accompanying Declaration of Aivars Saukants, attached to this brief as Exhibit 2.

ORS 40.135(w) establishes a presumption that "[a] thing once proved to exist continues as long as is usual with things of that nature." This presumption has no bearing on this case, because the parties *agree* that the recordings at issue do not exist. The question raised by Wah Chang's Motion for Finding is not whether the tapes exist, but whether the Commission should infer any facts from the fact that they do not exist. ORS 40.135(w) does not inform this analysis, and it would lead to the nonsensical situation in which the Commission presumed the existence of recordings that the parties agree do not exist.

VI. CONCLUSION

PacifiCorp respectfully urges the Commission to confirm its October 2001 order, and to deny Wah Chang's requested relief to one-sidedly reform the terms of the MESA. Wah Chang has exercised its court-ordered opportunity to provide additional evidence, and it has failed to

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

offer any evidence of "***the most compelling circumstances***" or an "***extraordinary basis***" that would justify modifying an executed agreement, the MESA.[105] The evidence that Wah Chang offered fails to demonstrate that it is entitled to the extraordinary relief – *i.e.*, a one-sided reformation of a special contract to enable it to retain the "upside" of the contract and shed itself of the "downside" – that it has requested. Wah Chang has filed hundreds of pages of testimony and exhibits largely documenting and analyzing the machinations of irrelevant power transactions. The transactions are largely irrelevant because:

(1) they involved irrelevant parties, focusing primarily on Enron's well-documented market manipulation activities, rather than focusing on the particular activities of PacifiCorp,

(2) they involved manipulation of irrelevant markets, such as the CAISO markets, rather than examining the impact on the Dow COB Index on which the MESA pricing was based, or

(3) they involved both irrelevant parties and irrelevant markets.

To the extent Wah Chang offered evidence focusing in particular on PacifiCorp's conduct and whether it had any impact on the Dow COB Index, the evidence failed to demonstrate any nexus between the relatively small number of allegedly "suspect" PacifiCorp transactions and the Dow COB Index. PacifiCorp was plainly not a "player" in the market manipulation games, and FERC's findings following extensive investigations confirm this conclusion. With respect to the focus in particular on non-transmission buy/resells, the evidence establishes that those transactions by their very nature have no impact on the Dow COB Index, given the reporting requirements specified by Dow Jones and PacifiCorp's apparent compliance with that reporting regime, as confirmed by Dr. Cicchetti.

---

[105] Order No. 01-873 at 6.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

After all the evidence is considered, Wah Chang has failed to sustain its considerable burden to demonstrate circumstances that would warrant the opportunistic reformation of the MESA that it seeks. This proceeding should be terminated.

DATED: October 15, 2007

PERKINS COIE LLP

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

Attorneys for PacifiCorp

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Exhibit 1

CONFIDENTIAL INFORMATION READCTED PURSUANT TO OPUC PROTECTIVE ORDER 01-149 IN DOCKET NUMBER UM1002.

THE INFORMATION CONTAINED HEREIN MAY BE SHOWN ONLY TO QUALIFIED PERSON . AS DEFINED IN THE PROTECTIVE ORDER.

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1002

WAH CHANG, Petitioner, v. PACIFICORP, Respondent.	**DECLARATION OF AIVARS SAUKANTS**

STATE OF OREGON)
) ss.
County of Multnomah)

I, Aivars Saukants, testify under penalty of perjury as follows:

1. I am the Manager of Transaction Processing, Commercial & Trading of PacifiCorp. I make this declaration based on personal knowledge and am competent to testify as to the matters set forth herein.

2. During 2000 and 2001, PacifiCorp used a recording system called WordNet to record its traders' telephone conversations. PacifiCorp used WordNet until December 2006, when it was replaced with NICE Systems recording devices.

3. The purpose of recording trader conversations is to have a contemporaneous record of a transaction in case the terms of the transaction are later disputed. Thus, a recording has short-term value to PacifiCorp, and serves no business purpose after the end of the time period in which a transaction might be disputed.

4. It was only as a result of FERC investigations in the western energy crisis that trader conversation recordings came to be seen as having possibly greater evidentiary

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 50
Fax: 503

significance. In April 2007, PacifiCorp adopted a policy of retaining all recorded telephone calls for five (5) years absent a legal requirement to retain them for a different period.

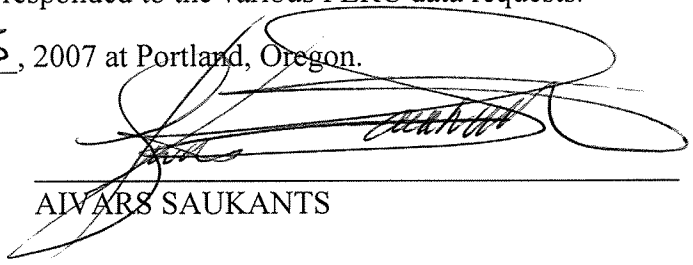
5. In March 2001, PacifiCorp's Commercial & Trading group physically moved offices, relocating to its current location at 825 NE Multnomah, Suite 600, Portland, Oregon. At that time, the trader conversation recordings were transferred to a locked storage cabinet with controlled access. They have remained subject to controlled access since March 2001. It is possible, however, that in connection with the office move, certain tapes were misplaced or destroyed.

6. When FERC issued its data request on May 8, 2002 in Docket No. PA02-2-000, PacifiCorp's legal department immediately requested that all relevant documents, including trader conversation recordings, be retained until further notice. As part of responding to the data requests in FERC Docket No. PA02-2-000, PacifiCorp's legal counsel and Commercial & Trading personnel discovered that trader conversation recordings for the time period May 2, 2000 through June 28, 2000 and July 11, 2000 through July 24, 2000 were missing. PacifiCorp's legal department inquired of personnel who were likely to be knowledgeable to try to determine what happened to these trader conversation recordings. The person at PacifiCorp who was primarily responsible for and knowledgeable regarding the preservation of trader conversation recordings during the period from March 2001 through August 2004 was Lori Wisbeck. As the primary custodian, she was consulted about what could have happened to these tapes, and Ms. Wisbeck, as well as the other employees who were asked, said that their best guess was that the WordNet device had malfunctioned or had not been turned on during those time periods. Based on this information, this is the explanation that PacifiCorp provided in January 2003 to data requests in FERC Docket Nos. EL00-95-069 and EL00-98-058 and in the subsequent affidavit submitted on June 20, 2003 to the Office of Market Oversight and Investigations. Ms. Wisbeck died in August 2004.

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 5
Fax: 5(

7. Documents produced in this proceeding indicate that WordNet recordings did exist for the referenced time periods, at least for some period of time. PacifiCorp was unaware of this information at the time that it responded to the various FERC data requests.

EXECUTED on October 15, 2007 at Portland, Oregon.



AIVARS SAUKANTS

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.
Fax: 503.

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing document, encaptioned PACIFICORP'S POST-HEARING OPENING BRIEF, by causing a copy to be hand delivered (except as otherwise noted) to:

Richard H. Williams
Milo Petranovich
Lane Powell PC
Suite 2100
601 SW Second Avenue
Portland, OR 97204

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

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

DATED: October 15, 2007.

PERKINS COIE LLP

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

Attorneys for PacifiCorp

Perkins Coie LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222