

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1002

In the Matter of)	
)	
WAH CHANG)	
)	
)	Petitioner,
)	
v.)	
)	
PACIFICORP)	
)	
)	Respondent.

RULING

**DISPOSITION: REQUEST FOR ORAL ARGUMENT DENIED;
MOTION TO EXCLUDE DENIED; MOTION TO
STRIKE DENIED**

Introduction and Background

On June 18, 2002, Circuit Court Judge Don Dickey issued a letter ruling allowing Wah Chang (Petitioner) to present additional evidence to the Commission consisting of evidence within two categories, as follows:

- (i) evidence of manipulation of the Western wholesale electricity markets in the years 2000 and 2001; and
- (ii) complaints filed by PacifiCorp with the Federal Energy Regulatory Commission (FERC).

In accordance with this ruling, this record was reopened and Wah Chang submitted direct testimony, and accompanying exhibits, by a consultant, Robert McCullough, on December 15, 2005 (as corrected and supplemented on December 30, 2005 and January 4, 2006). On January 26, 2001, Wah Chang and PacifiCorp (Respondent) filed a Stipulated Motion for Protective Order. The parties' motion was granted and Protective Order No. 01-149 (Protective Order) was issued on February 2, 2001.

On February 23, 2006, Wah Chang filed a Motion to Exclude Information from the Protective Order (Motion to Exclude), with supporting documentation. On March 16, 2006, PacifiCorp filed a Response to Wah Chang's

Motion to Exclude Information from the Protective Order (PacifiCorp's Opp. to Motion to Exclude). On April 7, 2006, Wah Chang filed a Reply in Support of its Motion to Exclude Information from the Protective Order (Wah Chang's Reply Supporting Motion to Exclude).

On March 16, 2006, PacifiCorp also filed a Motion to Strike Petitioner's Direct Testimony and Exhibits (Motion to Strike), along with supporting documentation. On April 7, 2006, Wah Chang filed a Response to PacifiCorp's Motion to Strike Petitioner's Direct Testimony and Exhibits (Wah Chang's Response to Motion to Strike). On April 21, 2006, PacifiCorp filed a Reply in Support of its Motion to Strike Petitioner's Direct Testimony and Exhibits (PacifiCorp's Reply Supporting Motion to Strike).

Requests for Oral Argument

PacifiCorp requested the opportunity to present oral argument on both Wah Chang's Motion to Exclude, and its own Motion to Strike. I do not find oral argument to be necessary to rule on either motion.¹

If PacifiCorp still desires to present oral argument, PacifiCorp may file a motion, pursuant to OAR 860-014-0091, to certify one or more legal questions to the Commission.² Should such questions be certified, the Commission may decide to hear oral argument.

Motion to Exclude

Wah Chang's Motion

Wah Chang seeks to exclude whole exhibits, or significant portions of exhibits, that PacifiCorp provided under the Protective Order. Appendix A provides a full list of the information that Wah Chang seeks to exclude from the Protective Order. Wah Chang generally contends that the identified information, although designated by PacifiCorp as confidential, is not "a trade secret or other confidential research, development, or commercial information," as required by ORCP (36)(C)(7).³

¹ Pursuant to OAR 860-012-0035, I have the authority, as an Administrative Law Judge, to make evidentiary rulings.

² OAR 860-014-0091 provides:

- (1) A ruling of the Administrative Law Judge (ALJ) may not be appealed during the proceeding except where the ALJ certifies the question to the Commission pursuant to OAR 860-012-0035(1)(i), upon a finding that the ruling: (a) May result in substantial detriment to the public interest or undue prejudice to any party; or (b) Denies or terminates any person's participation.
- (2) A request for certification of a ruling of the ALJ must be filed within ten days of the date of service of the ruling, or the date of the oral ruling.

³ ORCP 36(C)(7) provides in pertinent part:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (7) that a trade secret or other

Wah Chang further contends that PacifiCorp has the burden, under the Protective Order, to show that the challenged material is, in fact, entitled to protection.⁴ To make this showing, Wah Chang asserts that PacifiCorp must prove the information “is a trade secret or other confidential commercial information,” and that disclosure of the information “will work clearly defined and serious injury.”⁵

Wah Chang argues that PacifiCorp cannot meet this burden for the following reasons: 1) the information is stale, involving PacifiCorp’s day-ahead, same-day and real-time trading activities five or more years ago; 2) the information is publicly available on a FERC-sponsored website⁶, or was otherwise made public by FERC in conjunction with FERC Docket No. PA02-2-000; and 3) some of the information, such as the identities of PacifiCorp’s traders, was never confidential.

Wah Chang also argues that the Commission should weigh the harm to PacifiCorp of disclosing the information at issue, against the public interest in gaining access to the information.⁷ Petitioner submits that the general public’s interest in open Commission proceedings,⁸ as well as significant public concern regarding the impact of the 2000-2001 energy crisis on retail customers⁹ weigh in favor of disclosure.

PacifiCorp’s Opposition

As a primary purpose of the Protective Order is to avoid the cost and delay inherent to the review of a significant volume of documents, and because Wah Chang and PacifiCorp agreed upfront to keep certain information confidential, PacifiCorp contends that a wholesale declassification, of the type that Wah Chang seeks, undermines the justified expectations of the parties.¹⁰ PacifiCorp observes that it produced an extraordinary volume of commercial information without first requesting that the Commission preclude, or limit the production on grounds of relevance, burden or privilege.¹¹ PacifiCorp suggests that granting Wah Chang’s Motion will have a

confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

⁴ The Protective Order provides, at page 7, that “the party resisting disclosure has the burden of showing that the challenged information falls within ORCP 36(C)(7).”

⁵ Motion to Exclude at 5, citing *Citizen’s Utility Bd. v. PUC*, 128 Or App 650, 658 (1994); *In the Matter of Oregon Electric Utility Co., LLC, et. al.*, OPUC Docket UM 1121, Order No. 05-114 (2005) at 7-9.

⁶ See http://ferc.aspensys.com/FercData/EnronDataExtracts/DO4_25_WSCC_Sellers_Data_Monthly/

⁷ *Id.* at 8 citing ORS 192.501(2) stating “[trade secrets] are exempt from disclosure under ORS 192.410 to 192.505 unless the public interest requires disclosure in the particular instance” and *CUB v. PUC*, 128 Or App at 660; *In the Matter of the Request by US West*, OPUC Docket UM 960, Order No. 00-002 at 14 (2000).

⁸ *Id.*, citing *Re Pacific Northwest Bell Telephone Company*, OPUC Docket UF 3107, Order No. 75-275 at 4 (1975).

⁹ *Id.*, citing *Industrial Customers of Northwest Utilities v. PUC*, 196 Or App 46 (2004).

¹⁰ Opp. to Motion to Exclude at 2 citing *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 529 F Supp 866, 894 (E.D. Pa. 1981)

¹¹ *Id.* at 2. In footnote number 2 of PacifiCorp’s Response to Motion to Exclude, PacifiCorp states that Wah Chang issued 15 sets of data requests that stated a total of 156 separate requests, plus sub-requests, to which PacifiCorp produced over 75,000 pages of materials, plus electronic disks containing data that would be the equivalent of over 106,000 pages, as well as data that cannot be converted to pages.

future chilling effect on the ability of parties to be forthcoming during discovery in reliance on protective orders.¹²

PacifiCorp also argues that Wah Chang must demonstrate a desire to use the information that it seeks to exclude from the Protective Order, and has failed to do so.¹³ As Wah Chang does not seek to use much of the information that it seeks to have disclosed,¹⁴ PacifiCorp posits that the true purpose of Wah Chang's Motion to Exclude is to try the case in the media, or to facilitate use of the information in other cases.

PacifiCorp disagrees with Wah Chang's contention that PacifiCorp carries the burden to show that the information at issue qualifies for protection. PacifiCorp argues that a party seeking to declassify a large number of documents must justify the significant judicial and private resources required to assess the confidentiality of such documents.¹⁵ PacifiCorp asserts that Wah Chang does not meet this burden, having not even relied on the information at issue to support its direct case.

PacifiCorp responds to Wah Chang's argument that disclosure is in the public interest by arguing that this argument is not appropriately made with regard to information exchanged during discovery.¹⁶ PacifiCorp asserts that the Commission should apply such a test only to evidence that is accepted into the record.¹⁷

In any case, PacifiCorp contends that the material at issue is properly considered confidential, as contemplated by the Protective Order and ORCP 36(C)(7). PacifiCorp points out that the information at issue is commercially sensitive and valuable to PacifiCorp's competitors as it involves: information regarding PacifiCorp's real-time balancing strategy; names of PacifiCorp's counterparties, volume and pricing information about PacifiCorp's market transactions; and information about the extent to which PacifiCorp relies upon buying and selling electric power in real time. PacifiCorp argues that such information is valuable even if it is arguably outdated, as a shrewd competitor could extrapolate PacifiCorp's current market strategy based on allegedly "stale" procurement patterns.¹⁸ PacifiCorp also contends that Wah Chang overstates the extent to which the information has been made public in connection with FERC proceedings. With one exception,¹⁹ PacifiCorp asserts that the information at issue has not been submitted to FERC in the same form as PacifiCorp provided it to Wah

PacifiCorp estimates that it produced in excess of 181,000 pages of material, as well as additional electronic files.

¹² *Id.* at 6, citing Order No. 06-033 at 5.

¹³ The Protective Order states that "the party desiring to use the information may move for exclusion of the information from the protection conferred by this order." At ¶ 15.

¹⁴ Opp. to Motion to Exclude at 2, citing Protective Order at ¶ 10.

¹⁵ *Id.* at 9, citing *Zenith*, 529 F Supp at 893-894.

¹⁶ *Id.* at 16, citing *CUB v. PUC*, 128 Or App at 660.

¹⁷ *Id.*, citing *Herald Ass'n. Inc., v. Judicial Conduct Bd.*, 544 A 2d 596, 598 (Vt. 1988); OAR 860-014-065(6) provides that "[u]nless evidence received in evidence by the Commission or ALJ, no portion of a deposition may constitute a part of the record in a proceeding."

¹⁸ *Id.* at 13, citing *Zenith*, at 891.

¹⁹ *Id.*, stating that WC/849 was submitted to FERC in the same form.

Chang.²⁰ In addition, PacifiCorp states that the exhibits contain highly sensitive information including corporate organization, employee information, and confidential information regarding PPM Energy, a PacifiCorp affiliate not a party to this proceeding.

Wah Chang's Reply to PacifiCorp's Opposition

Wah Chang clarifies that it does not seek wholesale declassification of the documents submitted by PacifiCorp. Rather, Wah Chang explains that it seeks to exclude only a limited amount of confidential information that will be entered into the record. Wah Chang also asserts that it is attempting to resolve this discovery dispute exactly as contemplated by the Protective Order.²¹ Wah Chang also takes issue with PacifiCorp's implication that discovery materials have, or will be given to, anyone for use in any case but this one, in violation of the Protective Order. Wah Chang denies that the Protective Order has been violated in this manner.

Wah Chang further denies that it has violated the Protective Order by contesting PacifiCorp's designations of confidentiality. Wah Chang contends that a general Protective Order that does not require a particularized showing of good cause cannot be reasonably relied upon to hold records under seal.²²

Wah Chang also disputes PacifiCorp's contentions that Wah Chang must demonstrate a desire to use every challenged document in its direct case. Wah Chang argues that this requirement is not contained in the Protective Order, and that such a requirement would contradict the openness of Commission proceedings. Wah Chang rebuts PacifiCorp's claim that the public interest test applies only to documents admitted into the record, claiming that all materials produced in a proceeding, regardless of admissibility, are part of the record for the purpose of the public's right to inspect and copy.²³

Wah Chang contends that PacifiCorp distorts the volume of documents at issue, and exaggerates the burden of reviewing the disputed material.²⁴ Wah Chang asserts that decisions regarding the confidentiality of documents at issue will not require significant resources, as Wah Chang does not seek the wholesale declassification of documents submitted by PacifiCorp. For this reason, Wah Chang refutes PacifiCorp's assertion that it carries a burden to justify why documents should be deemed not to be confidential.²⁵

²⁰ *Id.*, citing Memo in Support at 6, FERC requires sales data only; not purchase data.

²¹ Motion to Exclude Reply at 3, citing Protective Order at ¶ 15; see footnote 11.

²² *Id.* at 10 citing *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 112, 1138 (9th Cir. 2003).

²³ *Id.*, citing *Zenith*, 529 F. Supp. at 899.

²⁴ *Id.* at 4; for instance, according to PacifiCorp, one exhibit contains 98,828 pages of Excel spreadsheets when, in fact, WC/1112 is a disk with 350 Excel files of ISO settlement data, which Wah Chang claims do not have to be printed or reviewed page by page.

²⁵ *Id.* at 11, citing *Zenith*, 529 F. Supp. at 893.

Wah Chang criticizes PacifiCorp's effort to demonstrate that the information at issue is confidential. Wah Chang calls PacifiCorp's hypothesis, that someone might extrapolate current trade secrets and business strategy from past practices, pure speculation. In any case, Wah Chang observes that current purchase and sale information for PacifiCorp is available on FERC's website.²⁶

Discussion and Ruling

The scope of Wah Chang's motion is not contemplated by the language of the Protective Order. The Protective Order requires that the party that contests a confidentiality designation "shall *specifically identify* the contested information."²⁷ Wah Chang asks for the exclusion of 28 exhibits, or significant portions thereof, constituting a significant portion of all of the materials that were produced by PacifiCorp, and almost the entirety of the documents that Wah Chang intends to enter into the record to present its direct claims.²⁸ Based on generalizations regarding the subject matter, and the nature of the information at issue, Wah Chang claims that these 28 exhibits, in full or part, are not confidential, and should not be protected from public disclosure by the Protective Order. After consideration of the identified exhibits, in context of the parties' arguments, the conduct of discovery in this proceeding and the nature of this proceeding as a docket reopened pursuant to court order to take new evidence, I conclude that Wah Chang's Motion is simply too general to grant.

Wah Chang is correct that, under the Protective Order, PacifiCorp has the burden of showing that the challenged information falls within ORCP 36(C)(7). The Protective Order requires a challenge to a confidentiality designation to be specific, however, to enable the party that made the designation to support it, and to avoid blanket challenges that are hard to defend. As a primary purpose of protective orders is to facilitate discovery, the specificity requirement is intended to avoid situations where a party seeking exclusion is allowed to demand, with little or no justification, that the opposing party prove the confidentiality of every document submitted under a protective order. I remind parties that there is an expectation that parties make confidentiality designations under a protective order in good faith, and note that Wah Chang does not appear to contend that PacifiCorp acted in bad faith.

When Wah Chang and PacifiCorp entered into the Protective Order, PacifiCorp had a reasonable expectation that Wah Chang would not seek to make public over half of the material that PacifiCorp submitted as confidential.²⁹ Moreover, given the nature of this proceeding, Wah Chang likely had knowledge of the type of information that PacifiCorp would produce, and should have raised concerns about the confidentiality of evidence that was likely to be introduced in this case at an earlier

²⁶ *Id.* at 1, stating that because all wholesalers are required to file on a quarterly basis with FERC, PacifiCorp's purchases, as well as its sales, are available.

²⁷ Protective Order at ¶ 15 (emphasis added).

²⁸ Motion to Exclude at 3.

²⁹ PacifiCorp submitted a total of 47 exhibits marked as confidential. *See* Wah Chang's Direct Testimony and Exhibits (Dec. 15, 2005).

date, either before entering into the Protective Order, or before resuming discovery activity under the Protective Order. Had Wah Chang done so, its arguments, and the cases it cites in support of its arguments, would have been more compelling.

Motion to Strike Testimony and Exhibits

PacifiCorp's Motion to Strike

PacifiCorp's Motion to Strike significant portions of Wah Chang's testimony and exhibits asserts that: 1) the testimony of expert witness, Robert McCullough, presents alleged facts, of which he has no personal knowledge, that are precluded by the applicable rules of evidence; 2) many exhibits introduced by Wah Chang are not relevant to Petitioner's case, not being cited or referenced in testimony; and 3) many exhibits introduced by Wah Chang constitute hearsay or should otherwise be deemed unreliable, and not subject to any exception that would allow their use.

PacifiCorp protests that the written testimony of Wah Chang's witness, Mr. McCullough, presents "alleged facts" that Mr. McCullough has no personal knowledge of, and offers opinions about inappropriate subjects such as the alleged state of mind and credibility of PacifiCorp's employees or witnesses. Although PacifiCorp acknowledges that an expert witness may base an opinion on facts that he does not have personal knowledge of, pursuant to ORE 703³⁰, PacifiCorp asserts that the witness may not introduce such facts into the record.³¹ PacifiCorp also asserts that it is improper for Mr. McCullough to opine on the state of mind of third parties, or to state what conclusions the Commission should make.³²

PacifiCorp further complains that Wah Chang submitted thousands of pages of irrelevant material that encumber the record. PacifiCorp contends that Wah Chang has the burden to establish the relevance of the material offered, and that it has not carried this burden.³³ In support of this contention, PacifiCorp points out that of the

³⁰ ORE 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

³¹ Motion to Strike at 5, citing *McCathern v. Toyota Motor Corp.*, 332 Or 59, 70 (2001).

³² Motion to Strike at 5-8, citing *U.S. v. Whitted*, 11 F 3d 782, 785 (8th Circ. 1993) (expert opinion that merely tells the fact-finder what conclusion to reach is not "helpful"); *See Weinstein's Federal Evidence* § 702.03[3] and 702.06[1]; *See e.g. Salas v. Carpenter*, 980 F 2d 299, 305 (5th Circ. 1992) (expert opinion regarding state of mind is not admissible, as it is not helpful to the fact-finder).

³³ OAR 860-014-0060(2) provides:

When relevant evidence offered by a party is included in a book, paper, or document containing irrelevant material, the party offering the exhibit must plainly designate the matter offered: (a) If irrelevant material is included in the exhibit that would encumber the record, the exhibit may not be received in evidence. The exhibit may be marked for identification, and, if properly authenticated, the relevant matter may be read into the record; (b) If the Commission or ALJ directs, a copy of the relevant portions of the exhibit may be received as evidence. The offering party must offer copies of the document to all other parties appearing at the hearing. The parties must be afforded an

110 exhibits filed by Wah Chang, 31 exhibits are not cited in Wah Chang's testimony, while another 31 exhibits are cited, but only a small portion of the cited documents, which are voluminous, are actually referenced or discussed in testimony.³⁴ PacifiCorp asserts that Wah Chang actually relies on less than one percent of the material submitted by Wah Chang, and fails to show how the additional material "tends to make the existence of any fact at issue in the proceedings more or less probable."³⁵ Therefore, PacifiCorp urges that all irrelevant material be struck.

If the irrelevant material is not struck, PacifiCorp argues that it will be unfairly prejudiced. PacifiCorp worries that with extraneous information in the record, PacifiCorp will be unable to effectively respond to Wah Chang's arguments, not knowing what specific evidence Wah Chang will rely on. PacifiCorp asserts, therefore, that the irrelevant evidence should be excluded because its probative value is outweighed by its prejudicial effect.³⁶ In addition, PacifiCorp submits that the irrelevant material will confuse the issues, and cause undue delay because the Commission will have to cull through massive exhibits, many of them not cited, to determine what material is relevant.³⁷

Finally, PacifiCorp contends that much of the offered evidence is hearsay, lacks foundation, or is otherwise unreliable and is inadmissible pursuant to OAR 860-014-0045(1)(b), which requires that relevant evidence be "of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." For example, PacifiCorp observes that many of the exhibits are Enron emails, presentations, notes and records, constituting pure hearsay. Furthermore, PacifiCorp asserts that at least eleven of the exhibits have not been properly authenticated. PacifiCorp argues that its inability to examine the persons responsible for creating certain documents, or to otherwise establish the circumstances surrounding the creation of the documents, results in unfair prejudice to PacifiCorp that outweighs any probative value of the evidence.

Wah Chang's Opposition to Motion to Exclude

Wah Chang contests PacifiCorp's assertion that the Commission routinely applies the ORE in its administrative proceedings, arguing that the Commission actually relies on the ORE only on rare occasions.³⁸ Wah Chang asserts that the appropriate standard under OAR 860-014-0045(1) is that evidence is admissible if it is commonly relied upon by reasonably prudent persons in the conduct

opportunity to examine the exhibit and to offer in evidence other portions of the exhibit found to be relevant.

³⁴ Motion to Strike at 9-10, citing Declaration of Susan K. Roberts, ¶ 5.

³⁵ *Id.*, citing OAR 860-014-0045(1)(a).

³⁶ Motion to Strike at 12, citing OAR 860-014-0045(1)(c) allowing the Commission to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.

³⁷ *Id.*

³⁸ Opp. to Motion to Strike at 2 citing Order No. 04-378 applying Rule 503 (attorney-client privilege) and Rule 511 (waiver of privilege).

of their serious affairs. Wah Chang further points out that under the Oregon Administrative Procedures Act (APA), which follows the same standard,³⁹ hearsay is admissible as long as it meets the statutory test of reliability⁴⁰.

Wah Chang argues that even if the ORE was applied, Mr. McCullough's testimony is appropriate expert witness testimony. Wah Chang states that ORE 702 allows experts to testify to the credibility of witnesses, as well as to the states of mind of third parties in certain circumstances.⁴¹ The true test, Wah Chang asserts, is whether or not the testimony is helpful to the trier of fact.⁴² Wah Chang contends that Mr. McCullough's statements are helpful and reliable, and being based on the details of PacifiCorp's own transactions, are not improper. Furthermore, Wah Chang argues that even if the four examples given by PacifiCorp are conclusory statements, only those statements should be excluded, not the entire affidavit⁴³.

Wah Chang also contests PacifiCorp's claim that the exhibits at issue are irrelevant. Observing that this docket was reopened to allow the Commission to consider evidence within broad parameters defined by the Circuit Court, Wah Chang explains that all of the exhibits submitted with its direct testimony are relevant, as they pertain to the manipulation of the western electricity markets in 2000-2001, or to certain complaints filed by PacifiCorp at FERC. Furthermore, Wah Chang challenges PacifiCorp's assertion that it will suffer unfair prejudice without an explanation of the relevance of the exhibits at issue. Wah Chang observes a surprise argument is unlikely, as PacifiCorp is very familiar with the issues and the subject matter. Nevertheless, Wah Chang explains the relevance of each challenged exhibit in Appendices 1 and 2 to its Opposition to Motion to Exclude.

Finally, Wah Chang asserts that its exhibits are admissible because they are reliable and authenticated.⁴⁴ In support of this assertion, Wah Chang points out many of these documents have been used in proceedings at FERC or other settings⁴⁵, and that FERC stated, when it released the documents, that it expected other jurisdictions to use the documents.⁴⁶ Furthermore, Wah Chang points out that the Commission specifically contemplated that the type of materials offered by Wah Chang

³⁹ *Id.* at 3, citing ORS 183.450; *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295 (1990) (“[u]nder the APA, only evidence that is irrelevant, immaterial, or unduly repetitious is excluded; all other evidence that a reasonable person would rely on is admissible”)

⁴⁰ *Id.* at 3, citing *Reguero v. Teach Standards and Practices Comm'n.*, 312 Or 402, 417 (1991).

⁴¹ *Id.* at 4-5, citing *U.S. v. Hiss*, 88 F Supp 559 (S.D.N.Y. 1950) (interpreting Federal Rule 702, identical to ORE 702); *Haley v. Pan Am World Airlines*, 746 F 2d 311 (5th Circ. 1984) (same).

⁴² Opp. to Motion to Strike at 4.

⁴³ *Id.* at 9, citing *Salas*, 980 F 2d at 305.

⁴⁴ *Id.* at 12, stating that in response to PacifiCorp's assertion that 11 of the exhibits are not properly authenticated, Wah Chang offers the Affidavit of Robert McCullough in Support of Wah Chang's Response to PacifiCorp's Motion to Strike Direct Testimony and Exhibits attesting to the source and reliability of the exhibits.

⁴⁵ *Id.*, citing *American Electric Power Service Corporation, et. al.*, 103 FERC P61, 345 (June 25, 2003); *Enron Power Marketing, Inc.*, 103 FERC P61, 346 (June 25, 2003).

⁴⁶ *Id.*, citing *Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 102 FERC ¶ 61,311 at 62,044 (March 21, 2003).

might become available as a result of FERC and other investigations, and that they would be received into these proceedings.⁴⁷

PacifiCorp's Reply to Wah Chang's Opposition

Responding to Wah Chang's criticisms, PacifiCorp observes that Wah Chang fails to address a number of key arguments made by PacifiCorp in its opening brief. For example, PacifiCorp points out that Wah Chang did not respond to the assertion that Mr. McCullough does not have personal knowledge of certain facts that he testifies to, and opines about. PacifiCorp also argues that Wah Chang provides no support for the assertion that the testimony is of the kind that a reasonably prudent person would reasonably rely upon, given that Mr. McCullough has no personal knowledge of it. Furthermore, PacifiCorp argues that Wah Chang failed to establish that Mr. McCullough's speculations as to the state of mind of certain PacifiCorp employees and his conclusory statements are helpful to the trier of fact. PacifiCorp finds that the proper "helpfulness" test is whether or not the expert brings more to the jury than the lawyers can offer in argument.⁴⁸ PacifiCorp argues that Mr. McCullough's testimony does not meet this standard. Regardless, PacifiCorp clarifies that it objects to Mr. McCullough's testimony because it is entirely based on purported facts of which Mr. McCullough has no knowledge.

Second, PacifiCorp finds that the relevance explanations provided by Wah Chang are merely cursory and do not provide the necessary explanations of why this material is necessary even though it is not used in the direct testimony. PacifiCorp asserts that the additional material will unnecessarily burden the record and allow Wah Chang additional ammunition for future attack, if there is a result adverse to it in this proceeding.

Third, PacifiCorp argues that the fact that some of the exhibits were used in other regulatory proceedings says nothing about how they were used, and whether or not they were reliable, and does not excuse Wah Chang's reliance on hearsay.

Discussion and Analysis

Administrative agencies are not subject to the same evidentiary standards as courts of law. Although the Commission may apply the ORE, Wah Chang is correct that it does not routinely do so. OAR 860-014-0045(1) provides the primary legal standard for the admission of evidence in proceedings before the Commission. Under this standard, hearsay may be admitted, and evidence is not necessarily excluded because its reliability depends on the credibility of the person making the statement.⁴⁹

⁴⁷ *Id.* at 13, citing Order No. 03-153 at 3, providing that when the appropriate officials complete their investigations, Wah Chang may file a motion to reopen the record and present additional evidence.

⁴⁸ Motion to Strike Reply at 5, citing *Salas*, 980 F 2d at 305.

⁴⁹ ORS 183.450(1); *See also Reguero v. Teacher Standards and Practices Commn*, 101 Or App 27 (1990).

The Commission has the responsibility, and is able, to weigh evidentiary integrity when rendering a decision.

In Order No. 04-305, entered on May 27, 2004, the Commission reopened this docket, and allowed Wah Chang to resume discovery. In that order, the Commission once again reiterated the intent, previously stated in Order Nos. 03-153, to make a decision whether to revise Order No. 01-873 “based on all the relevant information that can be produced.” The Commission anticipated taking any evidence within the parameters of the Circuit Court’s order, which it considered to be very broad.⁵⁰ Given this procedural background, I am inclined to apply OAR 860-014-0045(1) broadly in this proceeding.

Relevant evidence is evidence that tends to establish the point for which it is offered, and is commonly relied upon by reasonably prudent persons in conduct of their serious affairs. I agree with Wah Chang that the materials submitted by PacifiCorp, in context of the procedural history of this docket, pass this test. Again, the Circuit Court direction to the Commission to consider evidence of market manipulation was “wide ranging and limited only by a general subject matter and a time frame.”⁵¹ While Wah Chang’s failure to refer to a number of exhibits in its testimony, or to explain to the relevance of such exhibits on the record, may make such evidence less persuasive, it does not render the material irrelevant.

In addition, I find that it is unlikely that “surprise” arguments will arise from Wah Chang or that PacifiCorp will not be able to adequately respond due to the volume of the material. Therefore, I find it unlikely that PacifiCorp will suffer unfair prejudice enough to outweigh the probative value of the evidence.

Due to the foregoing, PacifiCorp’s motion to strike is denied.

Dated at Salem, Oregon, this 25th day of July 2006.

Traci A. G. Kirkpatrick
Administrative Law Judge

⁵⁰ In Order No. 04-305, the Commission stated, “[r]ather than identifying specific pieces of evidence, the Circuit Court deemed evidence falling into two categories as material and previously unavailable. Although the latter category is confined to particular proceedings at the FERC, the former category is wide ranging and limited only by a general subject matter and time frame.”

⁵¹ Order No. 04-305 at 7.

**APPENDIX A:
EXHIBITS WAH CHANG MOVES TO EXCLUDE**

WC/800	Direct Testimony of Robert McCullough (corrected January 3, 2006) except page 14, ll. 21-22.
WC/842	2005 Discovery Buy/Resell by Counterparty
WC/849	Exhibit 8A, 8B and 8C to Affidavit of Stanley K. Watters May 22, 2000.
WC/856	Audio File Names for Some Buy/Resell Conversations
WC/902	Excel Spreadsheet Containing Hyperlinks to Audio Files of Trader Conversations Submitted to FERC and Cross-References to Transcript of FERC Submitted Conversations (WC/901) – (on CD).
WC/903	Transcripts of PacifiCorp Trader Conversations Selected through Wah Chang Listening Project.
WC/904	Excel Spreadsheet Prepared by McCullough, Research of Selected Audio Files from Wah Chang’s Listening Project and Corresponding [Audio Files] (on CD).
WC/905	PC 075269 – Produced by PacifiCorp as Attachment 155 in Response to Wah Chang Data Requests – (on CD).
WC/906	PC 018963 – Produced by PacifiCorp as Attachment 99 in Response to Wah Chang Data Requests – (on CD).
WC/907	Real-Time Blotters (PC 019435 through PC 027756) Produced by PacifiCorp as Attachment 92 in Response to Wah Chang Data Requests (on DVD).
WC/1000	Deposition Testimony of Greg Maxfield, taken October 17, 2005.
WC/1001	Deposition Testimony of Valarie Sabo, taken October 24, 2005.
WC/1002	Deposition Testimony of David Kvamme, taken October 24, 2005.
WC/1003	Deposition Testimony of Jim Portouw, taken November 15, 2005.
WC/1004	Deposition Testimony of John Apperson, taken November 15, 2005.
WC/1005	Deposition Testimony of Paul Kroger, taken November 16, 2005.
WC/1006	Deposition Testimony of Marlin Green, taken November 16, 2005.
WC/1007	Deposition Testimony of Todd Carpenter, taken November 21, 2005, except deposition pages 105-107.
WC/1008	Deposition Testimony of John Rogers, taken November 21, 2005.
WC/1009	Deposition Testimony of Stanley Watters, taken November 29, 2005.
WC/1010	Deposition Testimony of Gary Eldridge, taken November 30, 2005.
WC/1108	Letter from Edward Silliere of Dow Jones to “Gentlemen” RE: Guidelines for Participants, California-Oregon Border (COB) Electricity Price Index, dated February 1, 1995.
WC/1118	Supplemental Response of PacifiCorp to FERC’s Data Request, dated May 21, 2002; Supplemental Affidavit of Stanley K. Watters on Behalf of PacifiCorp.
WC/1119	Exhibit 2 to PacifiCorp’s Response to FERC’s Data Request, dated May 21, 2002.
WC/1121	E-mail: <ul style="list-style-type: none"> • July 6, 2000, from Terry Hudgens to Stan Watters, et al. re Cal ISO; • September 8, 2000, from Keith Johnson to Alan Richardson, et al. re Energy

	<p>Market Report—09/07/00;</p> <ul style="list-style-type: none"> • March 20, 2001, from Keith Johnson to Alan Richardson, et al. re Energy Market Report—03/19/01; • May 25, 2001, from Steven Wallace to Cory Anderson, et al. re Downward Price Pressure; • June 25, 2001, from John Apperson to Jim Portouw, et al. re Effect of FERC Price Cap Order on Fundamentals; • July 9, 2001, from Nathalie Wessling to Cory Anderson, et al. re July 9 Bloomberg Power Lines Report; • August 10, 2001, from Rob Goodman to Jean Wilson, et al. re Scheduling Stateline.
WC/1122	Attachment 126(b) to PacifiCorp Data Response.
WC/1123	List of PacifiCorp Traders and Organizational Chart.
WC/1127	PacifiCorp Response to Oregon Department of Justice Civil Investigative Demand, February 19, 2003.