

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1002

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

DISPOSITION: MOTION FOR LEAVE TO FILE REPLY DENIED

**BACKGROUND**

On August 7, 2007, Wah Chang filed a motion requesting that the Commission find that “PacifiCorp participated in electricity market manipulation schemes during 2000-2001, and that its participation was direct, active and knowing, and contributed to the inflated prices that Wah Chang was forced to pay pursuant to the Master Electric Services Agreement.” Wah Chang’s motion is based on its claim that PacifiCorp destroyed evidence “relevant to and supportive of Wah Chang’s case and adverse to PacifiCorp’s.” The “missing evidence” consists of audio tape recordings of PacifiCorp trader conversations during critical periods of the western energy market crisis. Citing ORS 40.135, Wah Chang asks this Commission to presume that the “missing evidence” would be adverse to PacifiCorp and to infer PacifiCorp’s participation in market manipulation from its suppression of evidence.<sup>1</sup>

On August 22, 2007, PacifiCorp served its response to Wah Chang’s motion. PacifiCorp states that “Wah Chang has known for years that PacifiCorp has been unable to locate (certain) tapes of trader conversations.” PacifiCorp documents its earlier reports in FERC proceedings that certain documents were “missing.”

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<sup>1</sup> 1) The following are presumptions: (c) Evidence willfully suppressed would be adverse to the party suppressing it.

PacifiCorp argues that an adverse inference is not warranted merely because evidence is missing, where there is no indication that a party acted willfully or violated a legal duty to preserve the evidence. It is not enough to show the tapes are missing. It is not enough that their absence is surprising or inexplicable. The circumstances must show that PacifiCorp willfully destroyed the tapes in bad faith because of its “consciousness of a weak case.”

According to PacifiCorp, Wah Chang has not demonstrated that PacifiCorp had a duty to preserve the missing recordings, much less presented evidence of “blameworthiness.” Wah Chang has not demonstrated that PacifiCorp knew the evidence was relevant to some issue at trial, where there is no evidence that the tapes (if they existed) were destroyed or lost at a time when PacifiCorp had any reason to believe it would become involved in legal proceedings in which the tapes might be relevant.

On August 28, 2007, Wah Chang filed a motion for leave to file a reply memorandum in support of its motion. According to Wah Chang, a reply is necessary to correct factual mistakes contained in PacifiCorp’s response, and to clarify the standard of decision. Wah Chang states that its reply will assist the Commission in resolving the underlying motion. Wah Chang’s proffered reply is attached to its motion.

On August 31, 2007, PacifiCorp filed its response to Wah Chang’s motion for leave to file its reply. PacifiCorp argues that Wah Chang already had the opportunity to present its full argument. The rules provide for only the one round of pleadings, and Wah Chang has cited no reason for an exception in this case.

## **DISCUSSION**

Wah Chang’s motion for leave to file its reply is denied. The Commission’s Rules allow for the filing of the motion and a response. Wah Chang has not stated sufficient grounds to allow an exception in this case.

A general statement to the effect that a reply is necessary to correct factual mistakes is not compelling. To be more informed, the Commission would have to read the reply, which would obviate the need for a ruling on this motion. Wah Chang’s offer “to clarify the standard of decision” is unnecessary. The Commission will decide what standard it will apply.

This ruling does not address the merits of the underlying motion for a finding that PacifiCorp participated in market manipulation. That motion will be addressed in the final decision, if the Commission finds that a ruling will be material to its disposition of this matter.

As I stated at the hearing, allegations that evidence has been destroyed are to be taken very seriously. In their briefs, I invite the parties to address this issue further. In particular, in light of two other presumptions in the Oregon rules of evidence: ORS 40.135(m) states, “The ordinary course of business has been followed;” and ORS 40.135(w) states, “A thing once proved to exist continues as long as is usual with things of that nature.”

Dated at Salem, Oregon, this 10th day of September, 2007.

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Patrick Power  
Administrative Law Judge