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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1002

WAH CHANG,)	
)	
)	Petitioner,
)	
vs.)	ORDER
)	
PACIFICORP,)	
)	
)	Respondent.

DISPOSITION: MOTION FOR INTERIM RELIEF DENIED

On December 1, 2000, Wah Chang filed a Petition for relief from a special contract for electric service, a Motion for Interim Relief, a Memorandum of Law in Support of its Motion, an Affidavit, and a Data Request. The documents are directed against PacifiCorp. On December 14, 2000, PacifiCorp filed a Motion for Extension of Time to respond to Wah Chang's documents. On that same date Wah Chang filed a Reply in Opposition to PacifiCorp's motion. On December 18, 2000, Administrative Law Judge Lowell Bergen issued a Ruling granting PacifiCorp's motion and establishing a due date of December 29, 2000, for PacifiCorp to file responses to Wah Chang's documents. On December 29, 2000, PacifiCorp filed a Reply to Wah Chang's motion for interim relief, Affidavits in Support of PacifiCorp's Reply, and an Answer to Wah Chang's petition. On January 10, 2001, Wah Chang filed a Supplemental Memorandum in support of its motion for interim relief and Affidavits of four individuals. On January 23, 2001, PacifiCorp filed a Reply and an Affidavit. On January 26, 2001, Wah Chang filed additional documents, including its Closing Memorandum in support of its motion for interim relief. Another round of memoranda on Wah Chang's request for interim relief concluded on February 5, 2001.¹

¹ The parties filed lengthy memorandums and affidavits in support of their arguments. Those arguments have been carefully considered. This order does not discuss all the arguments raised in those documents, but does discuss the issues appropriate and necessary to decide whether to grant Wah Chang's request for interim relief.

Prior to 1997 PacifiCorp provided electricity to Wah Chang under PacifiCorp Schedule 48T. In 1997 Wah Chang requested PacifiCorp to supply electricity to Wah Chang under lower, non-tariffed rates. Wah Chang was investigating whether it could obtain electric service from a source other than PacifiCorp. Negotiations ensued, and on September 1, 1997, Wah Chang and PacifiCorp entered into a Master Electric Service Agreement (MESA) establishing prices for the next five-year period. At the Commission's Public Meeting on September 9, 1997, we approved the MESA to be effective for the five-year period starting on September 12, 1997. The MESA provides that rates during the first three years of the contract are fixed. During the final two years of the contract, the rates are based on market factors, including the daily average California-Oregon border prices as published in *The Wall Street Journal* (referred to as the Dow COB index). The market-based rates became effective on September 12, 2000.

The market-based rates that include the Dow COB index have increased dramatically in recent months. Wah Chang now asks us to determine that the Dow COB index pricing under the MESA results in unjust and unreasonable rates and to order PacifiCorp to serve Wah Chang at PacifiCorp's Schedule 48T rates. Wah Chang requests that we order PacifiCorp to serve Wah Chang under Schedule 48T on an interim basis while we process its underlying petition for relief.

According to the affidavits filed in this phase of the proceeding, Wah Chang paid \$5,285,232 less to PacifiCorp during the first three years of MESA than it would have paid under Schedule 48T. It appears that the current rates Wah Chang is paying have offset its gains made during the first three years of the MESA. Wah Chang is very concerned about the rates it will be paying under the MESA during the remaining life of the special contract. The MESA is effective until September of next year.

In its request for interim relief, Wah Chang cites ORS 756.040, which authorizes the Commission to use its powers to protect customers from unjust and unreasonable exactions and practices. Wah Chang says that California wholesale bulk power market activities are unjust and adversely affect Wah Chang's contract with PacifiCorp. Wah Chang asks the Commission to use ORS 756.040 to allow Wah Chang relief from the rates specified in the MESA for the remainder of the contract term.

PacifiCorp states that the dramatic increases in the California market have also had a devastating effect on PacifiCorp. It says it has had to purchase on the short-term spot market far more electricity than it sells to Wah Chang at prices at or above the prices Wah Chang pays PacifiCorp pursuant to the MESA. Wah Chang responds that even if that is the case, the Commission should "spread PacifiCorp's net energy costs to all customers." PacifiCorp contends that if Wah Chang is allowed to terminate its obligations under the MESA, PacifiCorp will lose money selling electricity to Wah Chang, and the losses could be passed on to PacifiCorp's other ratepayers.

PacifiCorp cites the history of how the MESA came into existence, and points out that the contract specifically puts on Wah Chang the risk of changes in the market rates that dictate the rates Wah Chang pays PacifiCorp. PacifiCorp states that it has tried to work with Wah Chang to deal with the price increases, but the efforts have not been successful.

Resolution

Wah Chang's petition for interim relief poses issues about how we should respond to an emergency request for interim relief. PacifiCorp points out that Wah Chang's request for interim relief is similar to a petition for a preliminary injunction in a judicial court. PacifiCorp states that the general law in Oregon and elsewhere is that a preliminary injunction is appropriate only when a petitioner shows that it will suffer irreparable harm if immediate relief is not granted and that it is likely to prevail on its underlying claim. PacifiCorp cites Oregon Rules of Civil Procedure Rule 79 as well as *Gildow v. Smith*, 153 Or. App. 648 and other cases in support of its proposed standard. Wah Chang also addresses those factors in its documents, and contends that the Commission is free to choose its own standards for granting or denying a request for interim relief.

Using preliminary injunction standards here to determine whether to grant interim relief to Wah Chang is reasonable, and we adopt them for use in this proceeding. The standards are logical, well established, and require the moving party to make a substantial but not overly burdensome showing before emergency relief is granted. We are not adopting these standards for use in all requests for interim relief that may come before us, but we find these standards to be appropriate for use in this proceeding.

We addressed the MESA at our Public Meeting on September 9, 1997. The original version of the contract between Wah Chang and PacifiCorp allowed Wah Chang to terminate the contract if certain costs increased. Our Staff recommended that the proposed contract be approved only if that provision was deleted. We agreed with that recommendation and approved the amended MESA, which does not contain a provision allowing termination of the contract for changes in costs or prices.

Wah Chang benefited from the MESA for the first three years of its existence. Now the market-based rates it requested have increased substantially and its rates are higher than they would be under Schedule 48T. Unfortunately for Wah Chang, the risk of market fluctuations rests with it. Wah Chang asked for and received the revised rates embodied in MESA.

Wah Chang has not offered to return the money it saved under the MESA during the first three years of the contract. It simply wants relief from current rates because of high prices on the wholesale electricity market.

The first part of the injunctive relief standard asks whether the moving party will be irreparably harmed if injunctive relief is not granted. Economic damages do not generally qualify as irreparable injury. Economic damages can normally be awarded if a party prevails on its claim for relief, making a preliminary emergency decision unnecessary. However, there could be other circumstances that would justify a finding of irreparable injury. Wah Chang states that it may be irreparably damaged if its request for interim relief is denied. It points out that it is not clear that the Commission has authority to grant it reparations from PacifiCorp if the Commission decides ultimately that the MESA rates are unreasonable. Therefore, Wah Chang argues it may not be made whole if it ultimately prevails. Wah Chang has filed a judicial action against PacifiCorp seeking relief from amounts paid under the MESA, but notes that it is not certain it will be made whole even if it ultimately prevails.

Wah Chang has not persuaded us that it will suffer irreparable harm if its request for interim relief is not granted. If it ultimately prevails on its underlying claims, either the Commission or the Circuit Court in which Wah Chang has sued PacifiCorp should be able to fashion appropriate remedies to adequately compensate Wah Chang.

The second part of the injunctive relief standard asks whether the moving party is likely to prevail in its underlying complaint. One very important factor we consider when a special contract comes before us for review is the impact of the proposed contract on the utility's other customers. Our obligations encompass all customers of the utility companies we regulate. We do not approve proposed special contracts unless it appears that a utility's other customers will benefit. Wah Chang argues that, if necessary, PacifiCorp's net system costs should be spread to all PacifiCorp's customers. The obvious implication is that revenues that Wah Chang would save by being released from the MESA may need to be recovered from other PacifiCorp customers. We are not now making a decision on the merits of Wah Chang's underlying petition, but we would want to seriously consider the impacts on PacifiCorp's other customers before voiding the MESA, even on an interim basis. Wah Chang has not persuaded us that it is likely to prevail on its underlying claim for relief.

Wah Chang paid PacifiCorp more than \$5,000,000 less during the first three years of MESA's five-year term than it would have paid under Schedule 48T. That money could help it deal with current rates. We are concerned about the impact on Wah Chang of the substantial increases in the wholesale price of electricity in the marketplace. Unfortunately, PacifiCorp and other consumers also are suffering from those increases. We are doing what we can to find solutions to the changed energy situation. We are not persuaded to grant emergency, interim relief to Wah Chang by suspending the rates established in the MESA.

ORDER

IT IS ORDERED that the Motion for Interim Relief filed by Wah Chang against PacifiCorp is denied.

Made, entered, and effective _____.

Ron Eachus
Chairman

Roger Hamilton
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.