ENTERED 09/02/09

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1002

WAH CHANG, Petitioner, v. PACIFICORP, dba PACIFIC POWER, Respondent.	ORDER

DISPOSITION: RELIEF DENIED; COMPLAINT DISMISSED

I. INTRODUCTION

In this order we dismiss a complaint brought by Wah Chang, in which it seeks relief from a five year special tariff that it asked this Commission to approve in September 1997. Under the special tariff, that this Commission approved in 1997, Wah Chang purchased electricity from PacifiCorp, dba Pacific Power (PacifiCorp or the Company), for three years at a discount and for two additional years at a wholesale rate. Wah Chang complains only about the final two years of the special tariff.

In our order, we analyze this case under ORS 756.040 and ORS 757.230 and determine that:

(1) Under the special tariff, Wah Chang assumed the risk of the wholesale market for the final two years of the tariff;

(2) The only basis for relieving Wah Chang from the wholesale market risk it took would be for it to show that PacifiCorp acted in bad faith and that PacifiCorp's actions increased the wholesale market price over the last two years of the special tariff; and

(3) Wah Chang failed to prove bad faith by PacifiCorp.

As an alternative ground, we again rely on ORS 756.040 and ORS 757.230 and present our economic analysis to show that Wah Chang's special tariff remains fair and reasonable.

II. BACKGROUND

Wah Chang is a large industrial customer of PacifiCorp and manufactures specialty metals at a plant in Millersburg, Oregon. On August 11, 2007, PacifiCorp and Wah Chang requested that the Public Utility Commission of Oregon (Commission or PUC) establish a special tariff for electricity sold by PacifiCorp to Wah Chang. The request was based on a Master Service Electric Agreement (MESA) between the two parties. The purpose of the MESA was to provide Wah Chang an opportunity for a discount from the otherwise applicable industrial tariff rates. Wah Chang was offered the discount as an incentive to induce it not to proceed with the formation of a municipal utility in Millersburg, Oregon.

At its Public Meeting on September 9, 1997, the Commission reviewed and accepted the provisions of the MESA and approved a special tariff incorporating the terms of the MESA under ORS 757.230(1), which prescribes specified factors to be considered where "a tariff filing * * * results in a rate classification primarily related to price competition or a service alternative."

In approving the special tariff, the Commission considered, among other things, whether the discount was necessary and whether PacifiCorp and other ratepayers would benefit from retaining Wah Chang as a customer of the utility. Regarding whether the discount was necessary, the Commission reviewed a consultant's study of the economic viability of municipalization by the City of Millersburg and the study's assumption that Wah Chang could contract for its power supply on the open market. Regarding whether the rate would protect PacifiCorp and its ratepayers, the Commission calculated the difference in contribution to PacifiCorp's fixed costs between service to Wah Chang under the MESA and Wah Chang leaving the system. The estimated benefit to PacifiCorp and its ratepayers of retaining Wah Chang on PacifiCorp's system ranged from $5 to $6 million.

The term of the special tariff was for five years, beginning September 12, 1997. PacifiCorp, not willing to predict its own operating costs that far into the future, would not agree to a fixed price for the full five-year period. Consequently, the parties agreed to a three-year fixed rate, followed by a two-year variable rate.

The two-year variable rate was based on a published index of market prices. The variable rate was made up of a commodity and delivery component. The commodity component was tied to an index of the daily average California-Oregon border prices as published in *The Wall Street Journal* (Dow COB Index). The delivery component was comprised of an adder of $11 per megawatt hour (MWh) for costs of transmission, distribution, ancillary services, and other system support charges, as well as a charge to reflect line losses. The variable rates became effective on September 12, 2000.

During the three-year fixed rate, Wah Chang received a discount of more than $5 million from what it would have paid under the standard industrial tariff rates in effect at the time. During the change to market prices in September 2000, however, Wah Chang's rates increased significantly due to what became known as the Western Energy Crisis of

2000-2001. On December 1, 2000, Wah Chang filed a petition with the Commission asking for immediate and permanent relief from the rates specified in the special tariff.

The Commission denied interim relief in Order No. 01-185 and permanent relief in Order No. 01-873. In those orders, the Commission stated its policy to uphold contracts negotiated at arm's length and found that Wah Chang had assumed the risk of price increases under the special tariff.

Wah Chang petitioned the Marion County Circuit Court for review of the Commission's order. While its petition was pending, Wah Chang filed a motion with the circuit court requesting permission to present new evidence to the Commission. The new evidence related to manipulation of the western wholesale electricity markets in the years 2000 and 2001 by Enron Corporation (Enron) and others, and complaints filed by Pacific Power at the Federal Energy Regulatory Commission (FERC) seeking relief from power purchase contracts. In the FERC proceedings, Pacific Power alleged that the market dysfunction caused the rates in its power purchase contracts to be unjust and unreasonable.

On June 18, 2002, the Marion County Circuit Court granted Wah Chang's motion, finding that the new evidence was material and not available at the time of the Commission's decision. The court stated that the Commission should reopen its record to allow Wah Chang the opportunity to present the evidence unless the Commission decided that under no foreseeable circumstances could the additional evidence change the result of the Commission's determination.

In Order No. 03-153, this Commission stated that it was not willing to say that "under no circumstance could evidence about the manipulation of the wholesale electricity market on which the subject MESA rates were based change the Commission's determination of this dispute."[1] As an example of the sort of evidence that might cause the Commission to reverse itself, the Commission stated "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."[2] The Commission indicated that it wanted to make its decision based on all the relevant information. Acknowledging that such evidence would not be available until the FERC completed its investigation, the Commission invited Wah Chang to file a motion to reopen the record to receive such evidence at the appropriate time.

On March 26, 2003, the FERC investigative staff issued its *Final Report on Price Manipulation in Western Markets - Fact Finding Investigation of Potential Manipulation of Electric & Natural Gas Prices under PA02-2*, in which it recommended that 38 utilities and marketers, including PacifiCorp, suspected of trading activities be directed to show cause why they should not be found in violation of their tariffs and required to return all related profits.[3] In PUC Commission Staff's report dated June 12, 2003, Staff recommended that the Commission delay any decision on opening a formal proceeding on

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[1] Order No. 03-153 at 2 (Mar 13, 2003).
[2] *Id*.
[3] FERC Docket PA02-2-000 (Mar 26, 2003).

possible misconduct or mismanagement by PacifiCorp until the FERC investigative staff completed its fact-finding investigations.[4]

In PUC Commission Staff's follow-up report dated September 15, 2004, our Staff recommended that this Commission not pursue misconduct or mismanagement cases against PacifiCorp based upon the small number of bundled buy/sell transactions, PacifiCorp's intermediate position in the transactions, PacifiCorp's voluntary termination of bundled buy/sells at the COB, the lack of any affiliate transactions, and the FERC-approved settlement of PacifiCorp's gaming practices docket.[5]

The PUC Staff recommended that the Commission not pursue further action related to PacifiCorp's trading activity because PacifiCorp had only limited involvement in intermediary buy/sell transactions over a five-month period starting in July 2000, during which PacifiCorp entered into 767 buy/sell transactions with four power marketers.[6] All together, these deals involved only 40,376 MWh, which was less than 1 percent of PacifiCorp's wholesale purchases or sales for 2000. While these trades looked similar to other buy/sell transactions, PacifiCorp voluntarily terminated them in mid-November 2000 when PacifiCorp become increasingly aware that the deals were limited to a single point of delivery.[7]

On January 15, 2004, Wah Chang filed a motion asking the Commission to reopen this proceeding. In opposing Wah Chang's motion, PacifiCorp argued that the FERC had reviewed PacifiCorp's conduct and had concluded that PacifiCorp did not engage in market manipulation. If the matter were reopened, PacifiCorp argued that its scope should be limited, both in terms of the evidence to be admitted and to the extent of the Commission's deliberations. In Order No. 04-305, we granted Wah Chang's motion to reopen this proceeding and allow additional discovery.

Meanwhile, Wah Chang pursued alternate remedies. In December 2001, Wah Chang filed a complaint in Linn County Circuit Court seeking a declaration excusing it from further performance under the MESA. Citing market dysfunction and extremely high market prices, Wah Chang alleged it no longer had any duty to perform under the contract due to mutual mistake, frustration of purpose, and commercial impracticability.

Early in the Linn County case, the court found that it had concurrent jurisdiction over this dispute. While acknowledging the Commission's authority to set rates,

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[4] *Trading Activities by Portland General Electric, PacifiCorp, and Idaho Power Company During the Western Electricity Crisis of 2001-2001: Did They Violate any Oregon Statutes, Rules, or Orders?* (Jun 12, 2003) (Staff Trading Activities Report). We take official notice of this report under OAR 860-014-0050. Any party may object to the fact noticed within 15 days of the date of this order.
[5] *Report on the Federal Energy Regulatory Commission Resolution of Show Cause Proceedings Against Portland General Electric Company, PacifiCorp, and Idaho Power Company and Recommendations on Opening Formal Investigations of Possible Mismanagement and/or Misconduct During the Western Electricity Crisis of 2000-2001* (Sept. 15, 2004). We take official notice of this report under OAR 860-014-0050. Any party may object to the fact noticed within 15 days of the date of this order.
[6] Enron Power Marketing, Inc., Aquila, Sempra, and Williams.
[7] *See* Staff Trading Activities Report at 26-27.

the court stated that the Commission does not "have exclusive jurisdiction, or even any jurisdiction, over the contract entered into between the parties *qua* a contract."[8]

The Linn County Circuit Court initially granted PacifiCorp's motion for summary judgment, finding that Wah Chang had assumed the risk of higher prices when it signed the contract. The circuit court subsequently reversed itself, based on Wah Chang's showing that a reasonable person could not have reasonably foreseen the nature and extent of the market manipulation. The Oregon Court of Appeals affirmed the circuit court's order reversing its earlier order granting PacifiCorp summary judgment.[9]

In response to the Linn County Circuit Court's decision to proceed, PacifiCorp filed a petition for writ of mandamus asking the Oregon Supreme Court to stay or abate the civil complaint pending resolution of Wah Chang's claims by the Commission. In its petition, PacifiCorp had argued that this Commission has primary jurisdiction over this case. The Oregon Supreme Court denied PacifiCorp's petition without addressing the merits.[10] Wah Chang's complaint is still pending in Linn County Circuit Court.

III. PROCEDURAL HISTORY OF THE REOPENED PROCEEDINGS

In Order No. 04-305, we reopened proceedings in this case. On December 15, 2005, Wah Chang submitted its direct testimony of witnesses McCullough and Stare. On March 16, 2006, PacifiCorp filed a motion to strike Wah Chang's testimony, asserting that McCullough's testimony was deficient on several grounds and claiming that much of the evidence offered by Wah Chang was not relevant. PacifiCorp's motion was denied on July 25, 2006.

On May 18, 2007, Wah Chang filed a motion to exclude "assumption of risk" as an issue in this proceeding, citing the Oregon Court of Appeals decision upholding the Linn County Circuit Court order reinstating Wah Chang's lawsuit against PacifiCorp. Wah Chang's motion was denied on June 7, 2007.

On May 24, 2007, PacifiCorp filed its reply testimony of witness Cicchetti. On July 6, 2007, Wah Chang filed its rebuttal testimony of witnesses McCullough and Martin. On July 18, 2007, PacifiCorp filed a motion to strike portions of Wah Chang's reply testimony, or, in the alternative, for leave to offer surrebuttal testimony. On July 27, 2007, the motion to strike was denied, and PacifiCorp was granted leave to file surrebuttal testimony.

On July 30, 2007, PacifiCorp filed surrebuttal testimony of witnesses Cicchetti and Dubin. Following Wah Chang's motion to strike portions of PacifiCorp's testimony, PacifiCorp filed revised versions of its testimony on August 7, 2007. On

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[8] Letter opinion of Judge Daniel R. Murphy, Linn County Case No. 00-2578 at 2 (May 2, 2007).

[9] *Wah Chang v. PacifiCorp*, 212 Or App 14, 28, 157 P3d 243 (2007).

[10] Wah Chang's request for official notice of the Oregon Supreme Court's decision is granted under OAR 860-014-0050. Any party may object to the fact noticed within 15 days of the date of this order.

August 8, 2007, Wah Chang filed sursurrebuttal testimony of witnesses McCullough and Howard.

Two days of hearings were held beginning August 7, 2007. The evidentiary record was closed after the hearing. The parties filed concurrent opening briefs on October 15, 2007, followed by PacifiCorp's and Wah Chang's reply briefs on November 12 and 13, 2007, respectively.

By Administrative Law Judge (ALJ) ruling, dated February 7, 2008, the evidentiary record was reopened to receive additional information from PacifiCorp. Wah Chang was invited to respond to PacifiCorp's filing. On March 31, 2008, PacifiCorp submitted an exhibit in response to the ALJ's ruling. Wah Chang did not submit a response.

On June 26, 2008, the ALJ directed PacifiCorp to supplement its earlier filing and to have both parties address the application of ORS 757.230 to this matter. On July 30, 2008, PacifiCorp filed its response. Wah Chang filed its response on July 31, 2008. Also on July 30, 2008, PacifiCorp also submitted a letter to the Commission regarding the possible implications of the United States Supreme Court's decision in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, et al*. (*Snohomish PUD*).[11] PacifiCorp claims the opinion is relevant to the Commission's decision in this matter. On August 8, 2008, Wah Chang submitted a reply to PacifiCorp's letter, arguing that the decision does not support PacifiCorp's argument.

The record in this docket was closed following oral argument before the Commission on November 12, 2008.

IV. PARTIES' POSITIONS

A. Wah Chang

Wah Chang's arguments focus on the Western Energy Crisis of 2000-2001. Wah Chang cites PacifiCorp's own filings at the FERC, where PacifiCorp asked the FERC to reform contracts based on PacifiCorp's claim that the dysfunctional markets rendered the contracts unjust and unreasonable. Wah Chang notes that the PUC Commissioners signed a letter urging the FERC to order refunds to PacifiCorp because "the exorbitant prices that [PacifiCorp] paid were the direct result of the manipulated and dysfunctional California spot market."[12]

Wah Chang cites the Commission's duty under ORS 756.040 to protect utility customers against "unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates." It also cites ORS 757.020, which mandates that every charge made by any public utility "be reasonable and just, and every unjust or unreasonable charge for such service is prohibited." Regardless of the misconduct that led to

[11] 554 US ___, 128 S Ct 2733, 171 L Ed 2d 607 (2008).
[12] PUC Letter to the Honorable Pat Wood III, FERC Chairman (Apr 17, 2003).

the market dysfunction, Wah Chang argues that the resulting rates cannot be considered just and reasonable.

Wah Chang responds to our decision in Order No. 01-873 that Wah Chang had assumed the risk of future price increases. There, we stated our policy "to uphold agreements negotiated by parties at arm's length" and cited an earlier order in which we had declined to modify a memorandum of understanding in the absence of "compelling circumstances."[13] Wah Chang first argues that the Commission cannot elevate assumption of risk or other contract law principles above its statutory charge to set just and reasonable rates. Wah Chang observes that this Commission modified contract rates in docket UE 171, where we examined rates to be paid by the Klamath Basin Irrigators. In that proceeding, we affirmed that our broad ratemaking power cannot be limited by private contracts.[14] Second, Wah Chang argues that the dysfunction of the western energy markets in 2000-2001 constitutes "compelling circumstances" that warrant modification of the special tariff rates.

Wah Chang describes some of the manipulation schemes that contributed to the dysfunctional California electric market, including "Ricochet," "Fat Boy," and false shortages.[15] Wah Chang states that it is beyond reasonable dispute that the manipulation and dysfunction of the California spot markets contributed to high and volatile prices throughout the western states. Wah Chang states that the Dow COB Index prices were highly correlated to the California Power Exchange (CalPX) day-ahead prices, as well as the California Independent Service Operator (Cal-ISO) prices. Wah Change explains their close correlation by stating that COB prices represent a COB seller's opportunity cost.

While Wah Chang believes that these facts are sufficient grounds to warrant relief, Wah Chang argues that PacifiCorp's own conduct also is a material factor to be taken into account. Wah Chang states that PacifiCorp aided the market manipulation by Enron and others by engaging in sham transactions. Wah Chang further alleges that PacifiCorp may have intentionally destroyed incriminating audio tapes containing conversations between PacifiCorp traders and counterparties.

Wah Chang attempts to link PacifiCorp directly to the market manipulation by showing that PacifiCorp engaged in hundreds of non-transmission buy/sell transactions. Wah Chang alleges such transactions are shams, where no energy actually is transmitted. According to Wah Chang, by engaging in these transactions, PacifiCorp's counterparties could create the appearance that the power they were selling in the Cal-ISO control area had been imported. Other possible illegitimate purposes include manipulating price indices and falsely increasing trading volume and sales revenue.

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[13] Order No. 01-873 at 6.
[14] Order No. 05-726 at 4.
[15] These names were given to identify various schemes used by Enron and others to manipulate the California electricity market. These schemes included transferring energy outside the state to evade price caps and creating phony congestion on power lines.

Wah Chang also alleges that PacifiCorp participated in "Red Congos," the name given to "Death Star"[16] transactions among PacifiCorp, Enron, and the City of Redding. Wah Chang asserts that PacifiCorp's knowing participation in "Red Congos" is shown in the Company's e-mails and transcripts of trader conversations. Wah Chang argues that PacifiCorp's traders were well aware that they were participating in manipulative transactions and that they knew that the non-transmission buy/sell transactions had no legitimate purpose. Wah Chang asserts that the trader tape transcripts show that the traders knew the transactions were phony.

Although Wah Chang argues that proof that PacifiCorp's management was involved in the market manipulation should not be necessary, Wah Chang states that there is substantial evidence that the conduct of PacifiCorp's traders engaging in the phony transactions was at least implicitly authorized by senior management. Wah Chang characterizes a directive from a PacifiCorp executive to the traders regarding simultaneous buy/sell transactions as not designed to stop PacifiCorp's involvement in the schemes, but rather to make sure that PacifiCorp got its full profit from its participation. According to Wah Chang, the PacifiCorp traders could not have done what they did without management's acquiescence or reckless disregard.

B. PacifiCorp

PacifiCorp construes the Marion County Circuit Court remand narrowly. PacifiCorp states that the proceeding was reopened to allow Wah Chang to present new evidence on two issues: (1) the outcome of complaints filed by PacifiCorp at the FERC, where 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 and 2001. PacifiCorp argues that Wah Chang has failed to prove that either factor warrants relief for Wah Chang.

Regarding the first consideration, PacifiCorp reports that it was denied relief at the FERC. Regarding the second consideration, PacifiCorp states that Wah Chang's additional evidence consists only of a catalogue of misdeeds by Enron and others. PacifiCorp claims that Wah Chang has failed to prove that PacifiCorp intended to manipulate the market, that PacifiCorp derived any material benefit from alleged illegal trading activities, or that PacifiCorp even had any reason to knowingly participate in market manipulation. PacifiCorp states it had no economic incentive to do anything that would have raised electricity prices because it was a net buyer during the Western Energy Crisis.

PacifiCorp contends that this Commission confirmed the narrow scope of this proceeding. Citing a Commission filing in Marion County Circuit Court opposing Wah Chang's motion for leave to present additional evidence, PacifiCorp notes that the Commission itself has previously expressed the view that "[a]dditional evidence that the

[16] The "Death Star" strategy permits an entity to be paid for moving energy to relieve congestion without actually moving any energy or relieving any congestion.

California market may be dysfunctional is immaterial to the Commission's determination that the MESA rates are just and reasonable."[17]

Under PacifiCorp's narrow view of the proceedings, the only question presented in this case is whether Wah Chang has demonstrated that PacifiCorp—not Enron—actively engaged in fraud or some other unlawful conduct that materially affected the prices paid by Wah Chang under the special tariff. PacifiCorp asserts that Wah Chang has completely failed to make any such showing. PacifiCorp argues that Wah Chang's new evidence fails to demonstrate any wrongdoing by PacifiCorp that affected the prices Wah Chang paid under the MESA.

According to PacifiCorp, the trading activities addressed by Wah Chang were largely directed at the Cal-ISO market. PacifiCorp states that it is highly unlikely that the prices Wah Chang paid based on the Dow COB Index were influenced by any of the alleged trading activities, because the Dow COB Index prices correlated more closely to the CalPX prices. PacifiCorp concludes that, because there is no causal link between the alleged wrongdoing and the alleged harm, Wah Chang's requested relief must be denied.

PacifiCorp discusses "Fat Boy," "Ricochet," and non-transmission buy/sell transactions in turn. PacifiCorp states that there is no evidence to support a finding that the Company engaged in "Fat Boy" transactions. The FERC found no misconduct by PacifiCorp in regard to "Ricochet" transactions. PacifiCorp further argues that non-transmission buy/sell transactions can have a legitimate business purpose and that these transactions did not affect the Dow COB Index. PacifiCorp also states that its traders followed management's directive to cease buy/sell transactions at non-market prices. PacifiCorp concludes that Wah Chang's evidence, which purports to show that PacifiCorp's trading activities had a material impact on the Dow COB Index price, is of no value. In addition, because it was a net buyer during the Western Energy Crisis, PacifiCorp claims that increasing Dow COB Index prices was contrary to its economic interests.

PacifiCorp cites the *Mobile-Sierra* doctrine in support of its arguments. The doctrine, named for two decisions issued in 1956 by the United States Supreme Court, governs the authority of FERC under the Federal Power Act (FPA) to modify wholesale power rates set bilaterally by contract rather than unilaterally by tariff.[18] According to PacifiCorp, the *Mobile-Sierra* doctrine creates a "practically insurmountable" barrier to reformation of a special contract. 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." PacifiCorp concedes that *Mobile-Sierra* is a federal doctrine, not directly controlling here, but argues that the principle of respecting and enforcing private contract rates, unless they thwart the public interest, has general applicability. PacifiCorp argues that Wah Chang failed to establish that the special tariff rates are contrary to the public interest.

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[17] PacifiCorp Post-Hearing Opening Brief at 10 (Oct 15, 2007).

[18] *See United Gas Pipe Line Co. v. Mobile Gas Service Corp*., 350 US 332, 76 S Ct 373, 100 L Ed 388 (1956); *FPC v. Sierra Pacific Power Co.*, 350 US 348, 76 S Ct 368, 100 L Ed 373 (1956).

According to PacifiCorp, Wah Chang is not a victim of the Western Energy Crisis; Wah Chang arguably was a winner. To that effect, PacifiCorp cites to the earlier period under the contract when Wah Chang saved several million dollars and to profits made by Oremet, a Wah Chang affiliate that sold power into the market.

Finally, PacifiCorp contends that any relief provided to Wah Chang would come at the expense of other ratepayers. PacifiCorp explains that, during the period from November 1, 2000, through September 9, 2001, the Company incurred about $260 million in excess power costs on an Oregon basis. PacifiCorp sought recovery of the additional costs through an application for deferred accounting. In its evaluation of the request, the Commission excluded revenues from Wah Chang because PacifiCorp was recovering those costs through the special tariff.[19] Ultimately, the Commission authorized PacifiCorp to recover about $130 million from Oregon customers.[20] If Wah Chang now receives relief, PacifiCorp contends that the Commission would be required to adjust the authorized recovery amount and impose additional costs on Oregon ratepayers.

V. DISCUSSION AND DECISION

Wah Chang filed its complaint on December 1, 2000, seeking relief from the special tariff rates it negotiated with PacifiCorp and approved by the Commission in September 1997. We must determine whether the rates charged Wah Chang under the special tariff should be modified for the last 21 months of the agreement (December 1, 2000, to September 11, 2002).

We divide our discussion into three parts. First, we clarify our exclusive jurisdiction to resolve this dispute over the rates charged by a regulated utility to a retail customer. Second, we give some background about the Western Energy Crisis of 2000-2001. Third, we conclude that our determination whether to grant Wah Chang's request to modify the special tariff rates requires an analysis under ORS 757.230(1). Under that analysis, we conclude that the special tariff rates, as originally negotiated by Wah Chang and PacifiCorp, remain just and reasonable.

[19] *See In the Matter of the Application of PacifiCorp for an Accounting Order Regarding Excess Net Power Costs*, Docket UM 995, Order No. 02-469.
[20] *Id*.

A. The Commission has Exclusive Jurisdiction over Utility Rates

The subject matter of this case is the retail rate charged under a special tariff approved by this Commission and incorporated into PacifiCorp's schedule of rates—a matter that falls under ORS 757.225, squarely within the exclusive jurisdiction of this agency. To date, however, Wah Chang has pursued a remedy both from this Commission and from the Linn County Circuit Court, where the court has asserted jurisdiction over the parties' agreement as set forth in the MESA that served as the basis of the special tariff.

In its letter opinion, the Linn County Circuit Court acknowledges that this Commission has exclusive jurisdiction over setting rates, but nonetheless finds that the court has jurisdiction over the MESA:

> That does not say that the PUC has exclusive jurisdiction, or even any jurisdiction, over the contract entered into between the parties *qua* a contract. As argued by the plaintiff, if the contract or agreement fails in some fashion under the common law of contracts, the agreement between the parties therefore ends and the PUC then has the jurisdiction to set a new rate, or to approve a new agreement.
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> * * * * *
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> Plaintiff raises conventional common law contract issues in its complaint over which the PUC has no special knowledge any more than in any other industrial application of a contract dispute. The issues of whether there was a mutual mistake, frustration of purpose, extreme hardship or unjust enrichment [are] not something the PUC has exclusive knowledge of, though they may have knowledge that bears on those issues.[21]

The circuit court concludes: "[T]he court has concurrent jurisdiction over this dispute and there is no basis at this time to defer to the PUC on contract issues."[22] Relying on the circuit court's assertion of jurisdiction, Wah Chang argues that the Commission should defer consideration of contract law issues pending their resolution by the court.

The circuit court attempts to draw a distinction between Wah Chang's obligations to pay PacifiCorp under the special tariff and Wah Chang's obligations to pay PacifiCorp under the MESA. But we believe that the circuit court should focus on the fact that the special tariff and the MESA do the same thing—set rates for electric service. It should also consider the effect of its ruling. What if the Commission decides that the special tariff rate is X, and the court determines that, under the MESA, the contract rate is Y?

[21] Letter opinion of Judge Daniel R. Murphy at 2.
[22] *Id.*

The court should also consider that having two contradictory rulings would turn the law on its head. ORS 757.225 requires PacifiCorp to charge the rates the Commission sets. The Company should not have to decide whether to follow ORS 757.225 or comply with the judgment of the circuit court.

In making our decision, we acknowledge that the determination of parties' rights under a contract is generally a common law issue that falls within a circuit court's general jurisdiction.[23] In seeking a declaration of its rights under the MESA, however, Wah Chang attempts to modify the rate it is required to pay as a retail customer of a regulated utility. Such matters are within the exclusive jurisdiction of this Commission.

The circuit court may be correct in saying that this Commission has no specialized knowledge of common law contract issues such as mutual mistake, frustration of purpose, extreme hardship, or unjust enrichment. But in so saying, the circuit court assumes that Wah Chang and PacifiCorp can, as a matter of law, set rates on their own in a contract. They cannot. Only this Commission can set rates.

Unlike most private enterprises, public utilities are subject to economic regulation. As monopoly providers of essential services, public utilities are subject to government control over entry, service, and rates. The Oregon Legislature has delegated its authority to regulate public utilities exclusively to the Commission. This delegation provides the Commission with "the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function."[24]

If PacifiCorp may charge only the rates set out in the special tariff, what then is the MESA? The MESA is merely a contract between Wah Chang and PacifiCorp to make a joint recommendation to the Commission to adopt, as a special tariff, the rates contained in the MESA. It is no different from stipulations that parties often submit to the Commission in rate cases. If, for example, Northwest Natural Gas Company or Portland General Electric Company has a rate revision proceeding before us, and if PUC Staff, the company, and customer groups that have intervened agree on what rates we should adopt, they will file a stipulation containing their joint recommendation, which the Commission may or may not adopt. The proposed rate in a stipulation is not a lawful rate until the Commission has made it one. And no one should contend that customer groups that have signed a stipulation can enforce it in a contract case brought in a circuit court. Similarly, the proposed rate in the MESA was not a lawful rate until the Commission made it one. Likewise, there cannot be a contract case in a circuit court to enforce the MESA. True, a stipulation comes from parties participating in a rate case, while Wah Chang and PacifiCorp negotiated the MESA outside of a rate case, and then PacifiCorp made a rate filing for approval of the MESA. But the origins of a stipulation on the one hand and the MESA on the other are distinctions without

[23] *See, e.g., Oregon Trail Electric Consumers Coop. Inc., v. CO-GEN Co.*, 168 Or App 466, 7 P3d 594 (2000) (declaration of the parties right under contract is an issue that a circuit court has jurisdiction to decide). We clarify that the contract at issue there, while also approved by the Commission, did not implicate rates charged by a regulated utility to a retail customer.

[24] *Pacific Northwest Bell Tel. Co. v. Sabin*, 21 Or App 200, 214, 534 P2d 984, *rev den* (1975).

any legal difference. The MESA is just a stipulation that means nothing until the Commission converts it into a special tariff.

Case law supports the conclusion that the MESA was merely a joint agreement requesting the Commission's approval of a special tariff that incorporated the rates Wah Chang and PacifiCorp negotiated.

In *American Can Co. v. Davis*,[25] Crown Zellerbach Corporation (Crown) challenged a Commission order that reset contract rates it had negotiated with Pacific Power & Light Company (Pacific). It argued that its contract with Pacific irrevocably fixed its rates and added that it had a constitutional right to continue to purchase power under it, even though the price was considerably below cost.

The Oregon Court of Appeals made quick work of Crown's arguments. It began by noting that the Public Utility Commissioner (predecessor to the Commission) "appears * * * to have been granted the broadest authority—commensurate with that of the legislature itself—for the exercise of his legislative function."[26] The court went on to say:

> Thus in 1965, when Crown's present contract first became effective, and in 1971, when the parties revised Crown's contract, *the rates and conditions of service established therein became Pacific's filed and published tariff schedules, fully subject to the Commissioner's regulatory authority.* Therefore, we conclude the Commissioner acted within his authority when he raised Crown's rates to a level he found reasonable.[27]

In dismissing Crown's constitutional claim about the impairment of a contract, the court explained why contracts between a utility and a customer mean *nothing* until the Commission has adopted them as tariffs:

> Furthermore, were such an argument upheld, then the whole public interest in utility regulation would become meaningless, since by making separate contracts with all or any of its individual customers, the utility and the customer could effectively bypass all or any relevant part of the public utility regulatory statutes and the regulations governing the public utility.[28]

As a regulated utility, PacifiCorp may charge its retail customers only those rates authorized by the Commission.[29] Public utilities and their customers cannot limit

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[25] 28 Or App 207, 559 P2d 898 (1976), *rev den* 278 Or 393 (1977).
[26] 28 Or App at 221, citing *Pacific N.W. Bell v. Sabin*, 21 Or App 200, 214, 534 P2d 984, *rev den* (1975).
[27] *Id.* at 222 (emphasis added). *See also Fields v. Davis*, 31 Or App 607, 614, 571 P2d 511 (1977) (special contracts must be treated as tariffs).
[28] *Id.* at 223.
[29] *See* ORS 757.205 *et seq*.

the Commission's power by private contract.[30] Thus, although the MESA purportedly established rates that PacifiCorp would charge Wah Chang for service, the contract was, as a matter of law, not a contract for rates, but merely a joint agreement requesting the Commission's approval of a special tariff that incorporated the negotiated rates.

The Commission has adopted rules that make clear how special tariffs fit within its regulatory scheme. The Commission approved the rates set forth in the MESA as a special tariff under ORS 757.230(1), which allows "schedules of rates applicable to individual customers or groups of customers." Thus, the MESA effectively became a tariff once approved.[31] Commission regulations specifically require that negotiated contracts be treated identically to other tariffs:

> (1) Energy and telecommunications utilities within Oregon entering into special contracts with certain customers prescribing and providing rates, services, and practices not covered by or permitted in the general tariffs, schedules, and rules filed by such utilities *are in legal effect tariffs and are subject to supervision, regulation, and control as such.*
>
> (2) All special agreements designating service to be furnished at rates other than those shown in tariffs now on file in the Commission's office shall be classified as rate schedules. True and certified copies shall be filed subject to review and approval pursuant to the requirements of OARs 860-022-0005 through 860-022-0030.[32]

In effect, PacifiCorp and Wah Chang agreed to ask that the Commission establish a special tariff governing service to Wah Chang, subject to the terms and conditions set out in the MESA. The Commission did so, authorizing PacifiCorp to include the rates set forth in the MESA as part of its Schedule 400. Although Wah Chang was the only customer served under the special tariff, other eligible customers could qualify for the same rate treatment. To have been eligible, a customer must have shown that it could: (1) qualify for service under industrial Schedule 48; (2) demonstrate the ability to proceed with municipal acquisition of PacifiCorp's existing electrical system; and (3) was willing to accept the risk of market-based pricing.[33]

The Commission's exclusive authority over utility tariffs is further confirmed by application of the filed rate doctrine. The filed rate doctrine was first applied in *Keogh v. Chicago & N. W. RY Co. et al.*[34] In considering a shipper's claim that it had been injured by anti-competitive actions of a carrier, the U.S. Supreme Court held that:

[30] *See American Can Co. v. Davis*, 28 Or App 207, 559 P2d 898 (1976) *rev den* 278 Or 393 (1977).
[31] *See Fields v. Davis*, 31 Or App 607, 614, 571 P2d 511 (1977) (special contracts must be treated as tariffs).
[32] OAR 860-022-0035 (emphasis added).
[33] *See* Pacific Power & Light, Oregon Schedule 400, at 3.
[34] 260 US 156, 43 S Ct 47 (1922).

> Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.[35]

As discussed below, only this Commission has the authority to suspend or set aside a rate "measured by the published tariff."

The application of the filed rate doctrine has been reaffirmed many times, including in a recent decision by the U.S. Court of Appeals in a case that involves the subject matter of this proceeding. In *Wah Chang v. Duke Energy Trading, et al.,*[36] the court dismissed Wah Chang's lawsuit against a number of sellers in the western energy market, holding that the filed rate doctrine "is a form of deference and preemption, which precludes interference with the rate setting authority of an administrative agency, like FERC. It is a far reaching doctrine."[37]

The court cited earlier decisions that further explain the filed rate doctrine:

> At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question. The doctrine applies to rates charged by railroads, natural gas companies, and other interstate operators over whom federal agencies have exclusive power to set rates. More relevant here, the Supreme Court has extended the doctrine to the Federal Power Act and to electricity rates.
>
> * * * * *
>
> As further developed, the filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC, but also from assuming a hypothetical rate different from that actually set by FERC.[38]

The court reaffirmed its earlier holdings that the doctrine applies to the market-based tariffs and rates in question, even if they were not set in the traditional manner. According to the court:

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[35] *Id.* at 163.
[36] 507 F3d 1222 (9th Cir 2007).
[37] *Id.* at 1225 (citation omitted).
[38] *Id.* (citations omitted.)

> The filed rate doctrine's fortification against direct attack is impenetrable. It turns away both federal and state antitrust actions; it turns away Racketeer Influenced and Corrupt Organization Act actions; it turns away state tort actions; and it even turns away state attempts to assert sovereign power to commandeer power contracts. In short, it turns away attempts like Wah Chang's, which necessarily hinge on a claim that the FERC approved rate was too high and would, therefore, undermine FERC's tariff authority through the medium of direct court actions against the Energy Companies.[39]

The court applied the filed rate doctrine, even though Wah Chang might not "have a separate right of action for damages if it does not have this one." We will not speculate about other possible remedies against (or involving) those from whom Wah Chang actually purchased electricity."[40]

Oregon courts have applied the filed rate doctrine to ensure that the regulator alone is empowered to judge the reasonableness of rates. In *Pacific Northwest Bell v. Eachus*, the Oregon Court of Appeals clarified the statutory framework governing utility rates and affirmed that "rates that have been approved and are in force may be adjusted only pursuant to the process described in the statutes."[41] Similarly, in *Simpson v. Phone Directories*, the Court of Appeals held that a plaintiff's breach of contract claim against a telephone directory publisher was limited by the Commission approved tariff governing the matter in dispute:

> ORS 756.565 states that all rates and service levels approved by the PUC are prima facie lawful and reasonable and that those rates and service levels are subject to attack only in actions prosecuted against the PUC for that purpose. *Those rates and service levels therefore cannot be collaterally attacked in proceedings such as this*.[42]

The filed rate doctrine is a policy of broad application. In procedural terms it may be characterized as promoting administrative efficiency—rate issues should be addressed in the forum where the rates are set or face collateral estoppel. In substantive terms it may be characterized as recognizing the fact that ratemaking is a legislative, not judicial, exercise requiring agency expertise. "The power to prescribe [rates] like the power to write laws, is legislative in character."[43]

Our setting of rates for electric, natural gas, water, and telecommunication services provided by public utilities is analogous to the setting of tax rates by our legislature.

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[39] *Id.* at 1225-1226.
[40] *Id.* at 1227-1228.
[41] 135 Or App 41, 49 898 P2d 774, *rev den*, 322 Or 193 (1995).
[42] 82 Or App 582, 586, 729 P2d 578 (1986), *rev den*, 303 Or 172 (1987) (emphasis added).
[43] *Valley & Siletz R.R. Co. v. Flagg*, 195 Or 683, 247 P2d 639 (1952).

Both are legislative functions. This Commission is, in effect, a mini-legislature to which the legislature has delegated the task of setting rates for investor-owned utility services.

In cases involving tax rates, courts may determine the meaning of tax statutes, but they may not set tax rates. That is a function reserved for the legislature. Similarly, in cases involving utility rates, courts may determine the meaning of statutes that give direction to the Commission, but they may not set rates. That is a function that the legislature reserved for this Commission.

The contract case in Linn County Circuit Court involves a request by Wah Chang that the judge lower the amount of money that Wah Chang owes PacifiCorp for electric service for the five-year period of the special tariff at issue before us. The court has no authority to lower what the special tariff requires Wah Chang to pay, for if it does so, it is, in effect, changing a utility rate.

We earlier mentioned ORS 757.225. It is the codification of the filed rate doctrine. It provides:

> No public utility shall charge, demand, collect or receive a greater or less compensation for any service performed by it within the state, or for any service in connection therewith, than is specified in printed rate schedules as may at the time be in force, or demand, collect or receive any rate not specified in such schedule. *The rates named therein are the lawful rates until they are changed as provided in ORS 757.210 to 757.220.* (Emphasis added.)

The "printed rate schedules" are the tariffs approved by the Commission, like the special tariff at issue in this case. The broad language of ORS 757.225 is clear: PacifiCorp must charge the rate set out in the special tariff.

The second sentence of ORS 757.225 dictates the legal implications of the filed rate doctrine: the filed rates are the only lawful rates "until they are changed" by the Commission. The circuit court has no jurisdiction to find the rates to be unlawful or to change the rates. That jurisdiction resides exclusively with the Commission. Reality necessitates that only one body governs utility rates. If a court were authorized to entertain rate complaints brought by customers, the utility would face conflicting legal directives from the court and this Commission as to what rate to lawfully charge under ORS 757.225.

The Commission's exclusive jurisdiction over rates is reinforced by ORS 756.565, which provides:

> All rates, tariffs, classifications, regulations, practices and service fixed, approved or prescribed by the Public Utility Commission and any order made or entered upon any matter within the jurisdiction of the commission shall be in force

> and shall be prima facie lawful and reasonable, until found otherwise in a proceeding brought for that purpose under ORS 756.610.

ORS 756.610 provides for judicial review of Commission decisions. Outside a proceeding before this agency, the only means to challenge the Commission's rate determination is through judicial review by the Oregon Court of Appeals and not through a collateral attack in the circuit court.

Not only was the special tariff governing PacifiCorp's provision of service to Wah Chang subject to the jurisdiction of the Commission at its formation, the Commission retained jurisdiction over the special tariff during the life of its term.

In summary, only this Commission is vested with the legislative authority to set rates charged by regulated utilities. Neither a court nor a utility and its customer may limit this authority and establish a different rate. Thus, although the rates at issue were first negotiated as part of an agreement between Wah Chang and PacifiCorp, they became legal rates only upon approval of the special tariff by this Commission, and they remain subject to the exclusive jurisdiction of this Commission.[44]

B. The Western Energy Crisis of 2000-2001

Before discussing the parties' positions on the merits, it is imperative to understand some background about the Western Energy Crisis of 2000-2001. The crisis was not confined to California. The crisis started in California and then spread to neighboring states like Oregon. There is a very good discussion of the seeds and effects of the crisis in *Snohomish PUD*.

In the mid-1990s, California, along with many other states, began looking at restructuring their electric energy markets so customers could buy electricity in a competitive market. California passed Assembly Bill 1890 (AB 1890) to achieve this goal. *Snohomish PUD* discusses what happened after AB 1890's passage:

> The bill transferred operational control of the transmission facilities of California's three largest investor-owned utilities to an Independent Service Operator (Cal-ISO). It also established the California Power Exchange (CalPX), a nonprofit entity that operated a short-term market – or "spot market" – for electricity. The bill required California's three largest investor-owned utilities to divest most of their electricity-generation

[44] We acknowledge that the Oregon Supreme Court denied PacifiCorp's writ of mandamus seeking abeyance of Wah Chang's civil lawsuit on the grounds that this Commission has primary jurisdiction to resolve the dispute. The supreme court, however, did not state why it denied Pacific Power's request, and for reasons explained above and amplified in Order No. 08-487, we are unwilling to cede jurisdiction over this rate matter to the Linn County Circuit Court. *See In re Portland General Electric Co*., Docket Nos. DR 10, UE 88, and UM 989, Order No. 08-487 at 43-50.

facilities. It then required those utilities to purchase and sell the bulk of their electricity from and to the CalPX's spot market, permitting only limited leeway for them to enter into long-term contracts.

In 1997, FERC approved the Cal-ISO as consistent with the requirements for an Independent Service Operator established in Order No. 888. FERC also approved the CalPX and the investor-owned utilities' authority to make sales at market-based rates in the CalPX, finding that, in light of the divestiture of their generation units and other conditions imposed under the restructuring plan, those utilities had adequately mitigated their market power.

The CalPX opened for business in March 1998. In the summer of 1999, it expanded to include an auction for sales of electricity under "forward contracts" – contracts in which sellers promise to deliver electricity more than one day in the future (sometimes many years). But the participation of California's large investor-owned utilities in that forward market was limited because, as we have said, AB 1890 strictly capped the amount of power that they could purchase outside of the spot market.

That diminishment of the role of long-term contracts in the California electricity market turned out to be one of the seeds of an energy crisis. In the summer of 2000, the price of electricity in the CalPX's spot market jumped dramatically – more than fifteen fold. *The increase was the result of a combination of natural, economic, and regulatory factors: "flawed market rules; inadequate addition of generating facilities in the preceding years; a drop in available hydropower due to drought conditions; a rupture of a major pipeline supplying natural gas into California; strong growth in the economy and in electricity demand; unusually high temperatures; an increase in unplanned outages of extremely old generating facilities; and market manipulation.* Because California's investor-owned utilities had for the most part been forbidden to obtain their power through long-term contracts, the turmoil in the spot market hit them hard. The high prices led to rolling blackouts and saddled utilities with mounting debt.

In late 2000, the Commission took action. A central plank of its emergency effort was to eliminate the utilities' reliance on the CalPX's spot market and to shift their purchases to the

> forward market. To that end, FERC abolished the requirement that investor-owned utilities purchase and sell all power through the CalPX and encouraged them to enter into long-term contracts. The Commission also put price caps on wholesale electricity. By June 2001, electricity prices began to decline to normal levels.[45]

The fact that the Western Energy Crisis was the result of many factors, and not just market manipulation, has been confirmed by commentators:

> So many events came together to bring the state [California] into crisis that commentators have referred to them as the "perfect storm," after the then-popular movie of the same name.[46]

C. Should the Commission Exercise its Ratemaking Authority to Revise Wah Chang's Rates Under the Special Tariff?

We now turn to the primary question presented by Wah Chang's complaint: Should the Commission exercise its ratemaking authority to revise Wah Chang's rates under the special tariff?

1. ORS 756.040 and ORS 757.230, read together, establish the standard of review to use in this case

We begin our analysis by highlighting the uniqueness of Wah Chang's rate challenge. The Commission generally sets rates on a prospective basis using estimates of the utility's prudently incurred costs to provide service. During extended rate proceedings, standard tariff rates are set for broad classes of customers, such as residential, commercial, and industrial classes.[47] Any customer may challenge the reasonableness of a general tariff rate by filing a complaint under ORS 757.500. In such a challenge, the Commission determines whether the rates are just and reasonable by examining the overall operating and capital costs of the utility, including a return to the equity holder.[48]

The rates at issue here, however, were established through a much different process. In reviewing a request to revise rates established under ORS 757.230, we conclude that we will hold Wah Chang to the special tariff rates set out in the MESA unless it can prove that PacifiCorp engaged in bad faith that materially affected the Dow COB Index price.

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[45] *Snohomish PUD*, 128 S Ct at 2742-43 (emphasis added).
[46] Energy, Economics and the Environment, Cases and Material, 2nd Ed., Bosselman, *et al*., at 969.
[47] *See In the Matter of Portland General Electric Company's Request for a General Rate Revision*, Docket UE 197, Order No. 09-020.
[48] *See* ORS 756.040.

In setting out this standard for review, we begin our discussion by providing background about how our statutes deal with setting rates for customers like Wah Chang, as opposed to remaining customers. We then establish our standard of review with reference to ORS 757.230 and ORS 756.040, the statutes that we determine apply in this case.

When the Commission established rates for Wah Chang in 1997, it did so under ORS 757.230, a statute specifically tailored for a customer like Wah Chang. That statute draws a distinction between customers like Wah Chang and "remaining customers."

Before we discuss the statute in detail, we note that Wah Chang differed from remaining customers in two ways. First, Wah Chang could choose whether to continue receiving service from PacifiCorp or to pursue the option of forming a municipal utility district in the City of Millersburg, where it is located. Thus, Wah Chang, unlike most customers, was not a captive customer of the utility that serves it. Rather than exercise that option, it chose to remain on the PacifiCorp system for five years. Under the special tariff it negotiated with PacifiCorp, Wah Chang was to receive a discount from the industrial rate that would otherwise apply for three years. It was then to pay a market rate over the final two years of the tariff.

Unlike Wah Chang, remaining customers must buy from the utility that serves them. The very reason the Commission exists is to protect them from monopoly pricing by the utility. The Commission does so when it reviews rates submitted by the utility under ORS 757.210, *et seq*., or when the Commission, on its own motion, determines that rates it previously set may no longer be just and reasonable and, under ORS 757.515, sets new ones.

Second, rates of remaining customers are cost-based, while those of customers like Wah Chang may not be. ORS 756.040 requires that the Commission set fair and reasonable rates. The statute deals with rates that are based on the cost utilities incur in providing service. ORS 756.040(1) provides in part:

> The commission shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates. Rates are fair and reasonable for the purposes of this subsection if the rates provide adequate revenue both for operating expenses of the public utility * * * and for capital costs of the utility, with a return to the equity holder that is:
>
> (a) Commensurate with the return on investments in other enterprises having corresponding risks; and
>
> (b) Sufficient to ensure confidence in the financial integrity of the utility, allowing the utility to maintain its credit and attract capital.

This language recognizes the tension between customers and shareholders by calling for a balance between their interests.

We now turn to ORS 757.230. It is legislative recognition that some customers, like Wah Chang, have options that others do not have, for it gives the Commission flexibility to create a customer class of one. The one has typically been a large, sophisticated industrial customer that does not want to pay the standard tariff rate because it believes it can do better elsewhere. In asking for a better rate, the customer must show that there is "price competition" or that it has a "service alternative."

ORS 757.230(1) provides in part:

> If the commission determines that a tariff filing under ORS 757.205 results in a rate classification primarily related to price competition or a service alternative, the commission, at a minimum, shall consider the following:
>
> (a) Whether the rate generates revenues *at least* sufficient to cover relevant short and long run costs of the utility during the term of the rates;
>
> *(b) Whether the rate generates revenues sufficient to insure that just and reasonable rates are established for remaining customers of the utility*[.] (Emphasis Added.)

The legislature added the above language in 1987. Bill Warren, an Assistant Commissioner, explained the need for allowing a utility and a customer to negotiate a rate and to bring it before the Commission to convert it into a special tariff:

> [A]n industrial customer may have the option of displacing electricity purchased from an electric utility. This may be through purchases of electricity from another supplier or through on-site generation. Low fuel prices generally have made these options less expensive than the rate charged by the utility. The challenge then facing the utility is to either lose the load entirely or price its service to keep the load at some profit. The profit is used by the Commissioner to keep rates lower than they would be if the load had been completely lost.[49]

ORS 757.230 allows the Commission to set special tariffs for customers with an option to leave the utility's system if the utility at least recovers its costs and if remaining customers benefit. The idea is that, in some circumstances, the customer will stay on if it receives a lower rate and, thereby continue to make some contribution to the fixed costs of the utility and thereby benefit remaining customers.

[49] Testimony, House Energy and Environment Committee, House Bill 2144, Ex I (Mar 30, 1987).

The language of ORS 757.230 requires the Commission to make certain that remaining customers are benefiting before it approves a special tariff. Under ORS 757.230(1)(a), the Commission must make sure that the utility is at least recovering its "short and long run costs," so the special tariff customer is not getting power at such a low rate that the utility is losing money. Under ORS 757.230(1)(b), the Commission is told to focus, not on the special tariff customers, but on generating "revenue sufficient to insure that just and reasonable rates are established for remaining customers," so it can decide whether "remaining customers" are better off keeping the special tariff customer or letting it go.

The fact that we find that ORS 757.230 controls our review of Wah Chang's request to revise the special tariff does not mean that we are ignoring ORS 756.040. Wah Chang is still entitled to rates that are fair and reasonable under that statute. But rates that are fair and reasonable for a unique customer like Wah Chang are not necessarily the same as rates that are fair and reasonable for other customers.[50]

We arrive at that conclusion by again noting that ORS 756.040 requires us to set rates that provide a utility adequate revenue to cover reasonable expenses and afford a reasonable return on investment. But when we read ORS 756.040 along with ORS 757.230, we recognize that the fair and reasonable standard for Wah Chang is different. The standard is different because for the first three years of the special tariff Wah Chang paid rates designed to give PacifiCorp a *lesser* return on investment than what ORS 756.040 requires of other customers. And for the final two years of the special tariff, the fair and reasonable standard is again different because Wah Chang, unlike other customers, paid rates that were connected to the Dow COB Index, rather than to the cost of service.

With respect to the final two years, we cannot conclude that ORS 756.040 requires us to determine whether, at some point, the market rate exceeded the standard rate by so much that the market rate became unjust and unreasonable. Were we to attempt to do so, we would have to decide whether the point was 1 percent, 10 percent, 100 percent, or some other number. And if we did so, we would be shifting those costs to "remaining customers." Finally, if we did so, we would be adding a term to the special tariff, for there is nothing in the language of the tariff that suggests such an approach.

Our duty to set fair and reasonable rates in all rate cases under ORS 756.040 must involve rate spread considerations under ORS 757.230, so if we adjust rates for one customer class, we do not cause rates for other customer classes to become unjust and unreasonable.[51] We therefore conclude that the fair and reasonable rate for Wah Chang under

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[50] Citing *American Can*, the dissent contends that all customers, including special tariff customers, are entitled to just and reasonable rates under ORS 756.040. The dissent fails to acknowledge that *American Can* was decided prior to the passage of ORS 757.230, which, by its own terms, creates an exception to the just and reasonable rate standard for special tariff customers.

[51] ORS 757.230 primarily provides the Commission with statutory standards for authorizing different customer rate classifications for utility service, and allows the Commission the ability to establish different rates for different customer classes. The statute provides as follows:

> The Public Utility Commission shall provide for a comprehensive classification of service for each public utility, and such classification may

ORS 756.040 requires the application of ORS 757.230, and the consideration of how any modification to the rates Wah Chang negotiated with PacifiCorp would impact remaining customers.[52]

2. There are two grounds under ORS 757.230 for our decision that Wah Chang's special tariff was fair and reasonable

Our primary ground is that Wah Chang supported our adoption of a special tariff that assigned to it the risk of a wholesale market and that the only basis under which Wah Chang can escape the risk it accepted under the special tariff is for it to show that PacifiCorp engaged in bad faith that materially affected the wholesale price.[53]

An alternative ground involves economic analysis. Under the special tariff, PacifiCorp was either serving Wah Chang with power it purchased at the Dow COB Index price, or it was using power from its own system. When PacifiCorp served Wah Chang with power it bought at COB prices, it was simply passing its costs along to Wah Chang. When PacifiCorp sold its own power to Wah Chang, it was foregoing the opportunity to sell it to someone in the wholesale market at the COB price. The revenue from sales at COB prices to someone else would have benefitted remaining customers by reducing the utility's power costs. The revenue from sales at COB prices to Wah Chang should provide the same reduction to PacifiCorp's power costs. Therefore, the COB price was the appropriate cost for serving Wah Chang whether PacifiCorp was purchasing at COB or selling from its own system.

a. Primary Ground

In determining the standard of review we will follow in deciding whether to grant Wah Chang relief, we first note that Wah Chang urged us to adopt a special tariff under which it assumed the risk of the wholesale market prices for the final two years of its special tariff. Second, we note that this case involves a zero sum game. If Wah Chang recovers anything, there are only two sources for that recovery: PacifiCorp shareholders or remaining customers.

> take into account the quantity used, the time when used, the purpose for which used, the existence of price competition or a service alternative, the service being provided, the conditions of service and any other reasonable consideration. Based on such considerations the commission may authorize classifications or schedules of rates applicable to individual customers or groups of customers.

[52] The dissent attempts to minimize the role of ORS 757.230, concluding that the required considerations set forth in sections (1)(a) and (b) merely inform the just and reasonable standard set forth in ORS 756.040. The dissent fails to recognize that the legislature's more specific intent expressed in ORS 757.230 with regard to special tariffs controls over the more general requirements expressed in ORS 756.040. ORS 174.020(2); *Bobo v. Kulongoski*, 338 Or 111, 119, 107 P3d 18 (2005).

[53] In making this statement we are not saying that we are bound in any way by the MESA that Wah Chang and PacifiCorp negotiated. As we made clear in our discussion of our exclusive jurisdiction, we read the MESA as nothing more than an agreement to make a joint recommendation to the Commission.

We begin by removing remaining customers from that calculus. Because under ORS 757.230 the Commission does not approve a special tariff *except when it finds that it protects remaining customers*, the Commission will adopt a standard for recovery that ensures those customers cannot be harmed by a tariff they had no say in developing.[54] This is consistent with prior Commission decisions that modified rates paid by special tariff customers. For example, in *In Re Portland General Electric*, docket UE 112, the Commission adopted its Staff's conclusion that any special contract should benefit, or at least not disadvantage, other customers, and reduced the special tariff rates only on the condition that the utility bear the risk of excess power costs incurred to serve the special tariff customer.[55]

The standard is that Wah Chang must show bad faith on the part of PacifiCorp. The bad faith focuses on whether PacifiCorp engaged in illegal activity that materially increased the wholesale market rates that Wah Chang paid under the special tariff. We adopt it because it is consistent with the law. First, we believe that in any tariff, just as in any written or oral contract, there is an implied covenant that the parties will not act in bad faith.[56] Second, the bad faith standard protects remaining customers, for if Wah Chang

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[54] The dissent claims we have misread ORS 757.230 because its provisions apply only to the initial approval of a special tariff, and not the subsequent review of those rates. The dissent reads the statute too narrowly. In enacting ORS 757.230, the legislature articulated a desire to avoid special tariff rates that are so low that they harm the utility or its remaining customers. Thus, in determining whether to modify a previously approved special tariff, the Commission must consider these same legislative considerations to ensure that any rate change does not result in the harm that ORS 757.230 was intended to prevent. Moreover, contrary to the dissent's assertion, nothing in the text of ORS 757.230 restricts its application to just the initial approval of the special tariff.

The dissent's reading of ORS 757.230 could also lead to absurd results. What if, for example, Wah Chang, one day after we approved the special tariff in September of 1997, had buyer's remorse and decided to file a complaint, under ORS 756.500, asking us to set aside the special tariff? According to the dissent, we would be precluded from looking at the statute we used on the previous day for approval of the special tariff.

And things can be even stranger if we use the dissent's view of the law. If Wah Chang had asked that the Commission set aside the special tariff the day after we approved it, the logic of the dissent would have required us to make—immediately—the same adjustment to the delivery component that it now advocates. Specifically, the dissent would have us: (1) ignore the standards in ORS 757.230; and (2) use ORS 756.040 to justify a finding that the price for delivery is not fair and reasonable and must be changed. And, interestingly, the dissent's reading of ORS 757.230 would require this result, even if there had been no Western Power Crisis. That is so because the dissent, like the majority opinion, offers no relief to Wah Chang with respect to the commodity price, but only with respect to the delivery component.

The bottom line is that we cannot conclude that, despite our approval of a special tariff for Wah Chang under ORS 757.230, its complaint under ORS 756.500 automatically entitles it to cost-based rates under ORS 756.040.

[55] Order No. 00-391. *See also In re Pacific Power and Light*, Advice No. 93-107, and *In re Pacific Power and Light*, Advice No. 94-111, where the Commission approved new special tariffs based on Staff's analyses under ORS 757.230 and considerations of whether the rate modifications would benefit other customers. The application of ORS 757.230 to modify the special contract rates in these cases also refute the dissent's conclusion that the statute applies only when a special contract is first approved.

[56] *See, e.g.*, ORS 71.1020(3).

succeeds in showing it, the Commission would hold PacifiCorp shareholders *solely* responsible for engaging in such conduct.

We do not agree that Wah Chang is entitled to relief simply because the market became dysfunctional. Any market can become dysfunctional. Wah Chang has not presented a sound argument for assigning the risk of market dysfunction to PacifiCorp or its remaining customers, nor has Wah Chang pointed to any language in the tariff that would make such an assignment. Moreover, the Commission does not act to ensure that special tariff customers that have asked for, and received, special tariffs, will always come out winners under their special tariffs. In short, the Commission will not rescue Wah Chang simply because it made a deal that turned out badly.

Our chief reason for not assigning the risk of market dysfunction to PacifiCorp is that, were we to do so, then remaining customers could face harm. During the period from November 1, 2000, through September 9, 2001, PacifiCorp was incurring approximately $260 million in excess power costs to serve its remaining customers. In docket UM 995, PacifiCorp asked for a deferred account under ORS 757.259, so it could recover from those customers some of its excess power costs. In evaluating PacifiCorp's request, we reduced the amount to be deferred by the amount of revenue PacifiCorp received from its tariff with Wah Chang during the deferral period. We then applied sharing mechanisms to the remainder and allowed PacifiCorp to recover about $130 million from its customers, or about half of its shortfall. If Wah Chang were to receive relief, it would reduce the revenues PacifiCorp received from Wah Chang, and by decreasing those revenues, we would have to increase the amount to which we applied the sharing mechanisms. Doing so would allow PacifiCorp more than the $130 million it has already recovered, and at least some of that additional recovery would be borne by remaining customers. Were we to do that, we would turn ORS 757.230 on its head, for it is clear that any special tariff we set under that statute (or, in this case, are asked to reset for the benefit of Wah Chang) must protect—not harm—remaining customers.[57]

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[57] The dissent attempts to bolster its reading of ORS 757.230 with legislative history and by pointing out that PacifiCorp agrees with it. The dissent misreads the legislative history and what PacifiCorp said.

The dissent argues that testimony in 1987 by then Representative and former Commission Chairman Ron Eachus, in favor of the measure that added the special tariff language to ORS 757.230, supports the position that the statute applies only when establishing the special tariff. According to the dissent, Representative Eachus explained that the measure "was intended to 'establish minimum considerations that the PUC must include in its deliberations on whether or not to approve a [special] contract.'" Representative Eachus was talking about what the Commission must do in establishing a special tariff, but he did not offer an opinion on the issue before us—whether to use ORS 757.230 when we are considering terminating or changing a special tariff.

As for PacifiCorp's position, it is obvious that the Company does not agree with the dissent, for its position is that Wah Chang is not entitled to any relief. Yet the dissent says that the Company has the same view of ORS 757.230 that it has. The utility stated:

> PacifiCorp does not believe that [ORS 757.230] is the proper statutory standard to be applied in reviewing whether Wah Chang's petition should be granted. ORS 757.230 is used in approving a special contract; however,

Therefore, the only way Wah Chang may recover from PacifiCorp is to show conduct amounting to bad faith on the part of the utility, so only the utilitiy's shareholders are exposed to the costs of any revision we make in the special tariff.[58] We believe that Wah Chang must also show that any bad faith on the part of PacifiCorp was material in directly affecting the wholesale price at which Wah Chang was taking service during the last two years of its special tariff.

In support of our position, we note that the U.S. Supreme Court has adopted a similar standard when it evaluated whether wholesale power contracts that parties entered into during the Western Energy Crisis were "just and reasonable" under federal law.

In *Snohomish PUD*, the court reviewed and applied the *Mobile-Sierra* doctrine, which deals with wholesale power contracts subject to regulation by the FERC. The doctrine holds: (1) that there is a presumption when two parties freely negotiate a wholesale power contract that the contract rates are "just and reasonable" under the FPA;[59] and (2) that the only way to overcome the presumption is for FERC to conclude that the contract harms the public interest.

Some power purchasers contended that the wholesale power markets had become so dysfunctional in 2000 and 2001 that FERC should modify the contracts, lowering the locked in prices they had agreed to pay, in order to make the contracts fit the "just and reasonable" standard of federal law. The court, applying *Mobile-Sierra*, held that the purchasers were not entitled to relief unless they could show that the contract rate would seriously harm the public interest. The court's rationale was that the purpose of the contracts was to replace cost-based regulation with contract-based regulation, so it refused to set aside a contract unless there was a finding of "unequivocal public necessity" or "extraordinary

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> it should not be the standard to determine whether a special contract, approved and adopted by the Commission as consistent with the statutory standard at the time the contract is entered into, is subsequently abrogated due to events not in existence at the time the contract was negotiated and executed.

PacifiCorp is saying that subsequent events, such as the Western Power Crisis, should not be a basis, under ORS 757.230, for terminating or changing the special tariff. It is not saying that the law prevents us from considering the purposes of the special tariff language in ORS 757.230 in deciding whether to terminate or change that tariff.

[58] The dissent claims that our conclusion to hold PacifiCorp shareholders harmless in the absence of bad faith is erroneous, because shareholders are not entitled to over recovery of costs, regardless of conduct. The dissent's position is refuted by the plain language of ORS 757.230(1)(a), which establishes a rate floor by requiring the special tariff to "generate revenues *at least sufficient* to cover the relevant short and long run costs of the utility." As the testimony of Bill Warren discussed above makes clear, the purpose of special tariffs is to allow the utility to offer a discounted rate in order to "keep the load at some profit." *See supra* at 22. Thus, ORS 757.230 allows a utility to profit from its service to a customer, albeit a lesser profit than what it might receive from a customer under a standard tariff.

[59] *See* 16 U.S.C. § 824d(a).

circumstances." The court then held that those terms do not mean that the purchaser is merely paying more than a rate that exceeds marginal cost.[60]

The court did, however, point out an example of a circumstance under which it would grant relief:

> We conclude, however, that if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission [i.e., FERC] should not presume that the contract is just and reasonable. Like fraud and duress, unlawful market activity that directly affects contract negotiations eliminates the premise on which the *Mobile-Sierra* presumption rests: that the contract rates are the product of fair, arms-length negotiations.[61]

The Commission is not bound to follow *Snohomish PUD*, and we are not adopting the *Mobile-Sierra* doctrine discussed in that case. We do, however, find *Snohomish* to be instructive.

Although the contracts at issue in *Snohomish PUD* were for wholesale power and the special tariff involved in this case was for retail service, PacifiCorp was, in essence, acting as a broker by providing Wah Chang access to wholesale power rates for the final two years of the special tariff. Moreover, *Snohomish PUD* dealt with wholesale contracts that were, like the special tariff, based on market rates, thus exposing the wholesale purchasers and Wah Chang to the risk that the contract rates might be subject to market dysfunction.

Like the U.S. Supreme Court, we believe that, absent a showing by Wah Chang of unlawful and material market activity by PacifiCorp that increased the Dow COB Index price, we will hold Wah Chang to the special tariff we approved.

We now turn to the question of whether Wah Chang has met its burden of showing: (1) that PacifiCorp acted in bad faith; and (2) that the actions of the Company were material in affecting the Dow COB Index price.[62]

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[60] 128 S Ct at 2749.

[61] *Id.* at 2750.

[62] Although we find the *Snohomish PUD* decision useful in supporting our analysis, we recognize that there are differences between that case and this case. But there are also similarities. Subject to one exception, *Snohomish PUD* used the *Mobile-Sierra* doctrine to support a deregulation approach—one that favors prices set in wholesale power contracts that sellers and buyers have negotiated over cost-based prices that a regulator has set. The exception is that in *Snohomish PUD*, the court said it will depart from *Mobile-Sierra* if the public interest requires it. The court recognized that customers of a utility purchasing power under a wholesale contract could be harmed by having high prices passed along to them in the retail rates of the utility, but it held that it would grant no relief except in extreme cases:

> As the Ninth Circuit put it, '[i]t is entirely possible that rates had increased so high during the energy crises because of dysfunction in the spot market

(1) PacifiCorp did not act in bad faith.

Since the Marion County Circuit Court granted Wah Chang's motion to hear additional evidence on manipulation of the western wholesale electricity markets in 2000 and 2001 by Enron and others and on complaints filed by PacifiCorp at the FERC, much more investigation has occurred into PacifiCorp's trading activities. At the time the Marion County Circuit Court issued its order to consider new evidence, neither the FERC nor PUC Staff had completed their respective investigations into PacifiCorp's trading activity during the 2000 through 2001 time period. Since that time, both FERC investigative staff and PUC Staff have finished investigations of PacifiCorp's trading activity during that time.

Regarding PacifiCorp's complaints at the FERC, it is undisputed that PacifiCorp was denied relief under Section 206 of the FPA to have the rates that it was paying under certain short-term contracts declared unjust and unreasonable. In any event, we do not find PacifiCorp's request for relief and the FERC's denial of relief to certain short-term contracts to constitute any bad faith on PacifiCorp's part.

> that, even with the acknowledged decrease in rates, consumers paid more under the forward contracts than they otherwise would have.' [Citation omitted.] If that is so, and if that increase is so great that, even taking into account the desirability of fostering market-stabilizing long-term contracts, the rates impose an excessive burden on customers or otherwise seriously harm the public interest, the rates must be disallowed. 128 S Ct at 2750.

Our approach, on the other hand, is one that involves regulation. We had a customer with a cost option lower than the utility's standard tariff; we approved a special tariff for that customer, so it would continue to buy from the utility, and thereby help keep rates for other customers lower by making a contribution to the fixed costs of the utility. We would not have approved the special tariff were we not convinced that it provided a benefit to other customers.

The goals of the *Mobile-Sierra* doctrine and of ORS 757.230 are similar in some respects. First, both *Mobile-Sierra* and our determination that this Commission has exclusive jurisdiction over Wah Chang's request to change rates are founded on the filed rate doctrine, which holds that rates remain lawful until they are changed and that any changes must be made by the regulatory agency with jurisdiction over those rates. Second, both the public interest exception to *Mobile-Sierra* and ORS 757.230 focus on protecting core customers. While *Mobile-Sierra* supports replacement of cost-based regulation with *deregulation*, with prices based on private contracts, the law turns to *regulation* to protect core customers whenever damage to them may be extreme. ORS 757.230, on the other hand, absolutely requires *regulation* to protect core customers whenever the Commission approves a special tariff.

Lastly, it is worth noting that although both the public interest exception to *Mobile-Sierra* and ORS 757.230 speak of protecting core customers of the public utilities involved, neither approach protects an individual customer that has willingly taken the risk of paying rates based on a market price at the expense of those core customers.

Despite the differences and similarities underlying the Snohomish decision and this case, the Supreme Court and this Commission are dealing with the same problem—whether to grant relief to entities purchasing power at rates tied to market prices that existed during the Western Energy Crisis of 2000-2001. We arrived at the same solution—to hold the purchaser to its agreement unless it could show bad faith on the part of the seller that materially affected the market price.

Earlier in these proceedings, and after the Marion County Circuit Court remand, we suggested that the type of evidence that may cause us to reconsider the MESA rates would be whether the California wholesale electricity market became dysfunctional because of PacifiCorp's manipulation, deceit, illegal conduct, or fraud in the market.[63] Stated another way, our standard requires Wah Chang to prove that PacifiCorp acted in bad faith.

We conclude that PacifiCorp did not act in bad faith. After the Marion County Circuit Court ordered the Commission to hear certain additional evidence, FERC thoroughly investigated PacifiCorp's trading activity in 2000 and 2001. Our Commission Staff also investigated PacifiCorp's trading activity. Even though these investigations were complete in 2003 and did not demonstrate bad faith on the part of PacifiCorp, we allowed Wah Chang another opportunity, through additional discovery and testimony, to prove that PacifiCorp acted in bad faith. At the end of this proceeding, we are left with the same basic facts—the extent of PacifiCorp's questionable trading activities are largely related to a small number of intermediary buy/sell transactions largely directed at the Cal-ISO market, not the COB market, that were entered into during a limited period of time and that were voluntarily terminated.

As PacifiCorp has demonstrated, buy/sell transactions at different points in the system is a common practice in the wholesale market and can serve a legitimate business purpose. In addition, and as our Staff investigation concluded, the transactions in question constitute less than 1 percent of PacifiCorp's wholesale purchases or sales for 2000. We conclude that this de minimus number of intermediary buy/sell transactions directed at the Cal-ISO market does not constitute bad faith on the part of PacifiCorp, who was in a net short position (net buyer in the market) and would have been economically disadvantaged by an increase in wholesale electric power purchases. We do not consider the trading activities of other entities as they are irrelevant to whether PacifiCorp acted in bad faith.

Apart from our standard of bad faith related to PacifiCorp's conduct, we note that Wah Chang saved several million dollars during the first three years of the MESA by paying a tariff price that gave PacifiCorp a lesser return than that provided by "remaining customers" under standard tariffs. Furthermore, during the period when Wah Chang was paying higher market prices under the MESA, its sister corporation (Oremet) was recognizing substantial net revenue gains by selling power into the same markets that Wah Chang claims were dysfunctional.[64]

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[63] Order No. 03-153 at 2.

[64] Oremet and Wah Chang were both part of the Allegheny Technologies family of companies. Oremet and Wah Chang may be separate corporations, and, therefore, separate persons under the law, but the reason for the separateness is to limit the liability of each. We are not, however, dealing with the liability of these companies in this case. In fact, it is Wah Chang that has come to us for relief. That being the case, there is no reason that we cannot consider the fact that the same market that harmed Wah Chang benefited its sister corporation and, thus, their common parent. Ultimately, the real parties in interest in Wah Chang's request for relief are its shareholders. They are the same shareholders, who through their ownership of Oremet, received a windfall from the Western Energy Crisis.

(2) Even if we assume that PacifiCorp was involved in a small amount of questionable wholesale trades, Wah Chang has failed to demonstrate that PacifiCorp's actions materially impacted the Dow COB Index price.

While we find that PacifiCorp did not act in bad faith, we also find that Wah Chang has failed to demonstrate that PacifiCorp's trading activity materially impacted the Dow COB Index price. FERC similarly concluded that PacifiCorp's trading practices during the energy crisis had little effect on market prices. FERC trial staff found that none of the alleged "Ricochet" transactions met the definition of a Ricochet and were unable to substantiate that PacifiCorp earned any revenue from alleged Death Star practices. FERC staff did find that PacifiCorp had engaged in six hours of the practice known as "Wheel Out," with total congestion earnings of $67,745. FERC Staff and PacifiCorp entered into a settlement requiring PacifiCorp to return all revenues from the "Wheel Out" activities.[65] FERC approved this settlement over the objections of Wah Chang and the California parties.[66]

We also agree with PacifiCorp that the trading activity addressed by Wah Chang is unlikely to have had any effect on the Dow COB Index, but instead the Cal-ISO. Even if we had concluded that PacifiCorp engaged in unlawful activities during the Western Energy Crisis, we would not grant Wah Chang relief without a showing that the unlawful

[65] *In re PacifiCorp*, 105 FERC ¶ 63,043 (Dec 15, 2003).
[66] *In re PacifiCorp*, 106 FERC ¶ 61,235 (Mar 8, 2004).

activities adversely affected the Dow COB Index price. Again, we note that our position is consistent with that of the U.S. Supreme Court in *Snohomish PUD* case:

> We emphasize that the mere fact of a party's engaging in unlawful activity in the spot market does not deprive its forward contracts of the benefit of the *Mobile-Sierra* presumption. There is no reason why FERC should be able to abrogate a contract on these grounds without finding a causal connection between unlawful activity and the contract rate. Where, however, causality has been established, the *Mobile-Sierra* presumption should not apply.[67]

Finally, and as we noted earlier in this order, there were many causes of the Western Energy Crisis of 2000-2001. While one of these causes was market manipulation, it was only one of many causes. In addition, we are only concerned with the actions of PacifiCorp, not entities such as Enron. Given the many causes of the Western Energy Crisis unrelated to market manipulation and PacifiCorp's very limited participation in what could be considered "questionable," but not illegal, trading activities, we cannot find that PacifiCorp's actions had any direct material impact on the Dow COB Index price.

b. Alternative Ground

ORS 757.230 also mandates our dismissal of Wah Chang's complaint under a different analysis than the one we have presented above. It is an economic analysis of PacifiCorp's costs to serve Wah Chang based on our reading of the statute. Due to the scope and complexity of PacifiCorp's operations, we note that any such economic analysis—particularly one eight years removed from the Western Energy Crisis—is a very difficult and speculative task and may be incapable of accurate quantification.[68] Nonetheless, we make the following conclusions regarding PacifiCorp's commodity and delivery costs.

Returning to ORS 757.230, we reiterate that, with respect to adoption of special tariffs, we must ensure: (1) that the rates that the utility and customer have presented to us for adoption will produce sufficient revenues to cover the utility's costs to serve the customer; and (2) that general rates for remaining customers remain just and reasonable. We believe that we cannot achieve these two goals set out unless we accurately measure PacifiCorp's *full* cost of serving Wah Chang, which we believe ORS 757.230 requires us to do to protect remaining customers.

When we approve a special tariff, we can best protect remaining customers by maximizing revenues that the utility will receive under it. Doing so reduces the utility's net cost of power by offsetting it with revenues the utility receives from wholesale sales to other utilities *and* from special tariffs like the one at issue here.

[67] 128 S Ct at 2751.

[68] The Supreme Court similarly noted the difficulty and speculative nature of evaluating market conditions during the Western Energy Crisis in *Snohomish PUD*, 128 S Ct at 2747.

Our economic analysis tells us that the best way to achieve compliance with ORS 757.230 is the use of what economists know as “opportunity costs,” which is the most accurate measure of PacifiCorp’s cost of service to Wah Chang.

In the initial determination that the MESA rates met these requirements, the Commission relied on its Staff’s comparison of the negotiated rates to PacifiCorp’s avoided cost. “Avoided cost” is the cost incurred to generate additional electricity when the utility has excess generating capacity, or the cost to purchase the electricity: (1) when no excess capacity is available, or (2) when it is available, but the purchase price is lower than the generating cost. Using estimates for avoided costs and projections of Wah Chang’s average load, Staff concluded that Wah Chang’s contribution to PacifiCorp’s fixed cost over the contract’s five-year term would be $5 to $6 million more than if Wah Chang had left the system.[69] Thus, the Commission concluded that the MESA rates covered PacifiCorp’s costs to serve Wah Chang.

In considering whether to modify the negotiated rates in this proceeding, we decline to rely again on an evaluation of PacifiCorp’s avoided costs. An avoided cost standard ignores a utility’s ability to sell power in the wholesale market at higher rates. Because, when the utility has excess generating capacity, avoided costs measure only the utility’s cost to generate additional electricity when the utility has excess generating capacity, the avoided costs standard fails to capture any increased value of that excess capacity if sold on the market.

Instead, to determine the costs to serve Wah Chang for purposes of ORS 757.230(1), we examine PacifiCorp’s opportunity cost. In general terms, “opportunity cost” is the cost of using a resource based on what could have been earned if the resource was used for the next best alternative.

In fact, opportunity cost is the market price. Either a utility can generate additional power at a cost less than the market price or it cannot. If it can, its opportunity cost is the value of the additional power sold on the market. If it cannot, then its opportunity cost is the cost of the utility purchasing additional power on the market. Thus, in hours when the utility’s incremental generating cost is $4 per MWh and the market price is $5 per MWh, the opportunity cost is $5.[70] In hours when the incremental generating cost is $6 per MWh and the market price is $5 per MWh, the opportunity cost is $5. Again, note that the opportunity cost equals market price.

We find that opportunity costs more accurately capture a utility’s relevant costs to serve a customer. Unlike avoided costs, a utility’s opportunity costs recognize any increased market value of excess generation. To illustrate, take our first example from the above paragraph. When the utility’s internal system cost per MWh is $4, but the utility can sell in the market at $5, we should use $5 as the cost because $4 does not reflect the added value that excess capacity could bring to the utility and other customers if sold on the market.

[69] *See* Staff Report at 3 (Sept 3, 1997).
[70] Note that the utility’s avoided cost in this instance would only be $4 per MWh.

We also find that prevailing wholesale market prices are a reasonable measure of PacifiCorp's opportunity costs to serve Wah Chang. PacifiCorp serves Wah Chang through self-generation or wholesale market purchases. During periods of resource deficiency, PacifiCorp buys power at market prices to serve the load; during periods of resource surplus, PacifiCorp uses electricity from its own resources that it would have otherwise sold into the market. In both instances, PacifiCorp is either paying market rates or foregoing sales at market rates to serve Wah Chang.

Thus, prevailing wholesale market rates reflect the minimum level of rates allowed under ORS 757.230(1). Any lower rate would fail to generate sufficient revenues to fully cover PacifiCorp's relevant costs to serve Wah Chang. Moreover, if PacifiCorp does not fully recover its costs, it would seek recovery of those costs from other customers, which would increase the rates charged to other customers under general tariffs.

Based on these findings, we conclude that the Dow COB Index remains an appropriate measure for determining the commodity rate to be paid by Wah Chang for the remaining 21 months of the MESA. Even though the market prices reported by the Dow COB Index reflected a dysfunctional and volatile market, they nonetheless represented PacifiCorp's relevant costs to serve Wah Chang. Wah Chang itself essentially acknowledged this fact when it noted that the COB prices represented a COB seller's opportunity cost. To meet the requirements of ORS 757.230(1), any cost increase in market rates must be passed on to Wah Chang, as the parties themselves negotiated. We note that the market prices reported by the Dow COB Index also reflect the same market rates Wah Chang would have paid had it left PacifiCorp's system and contracted for its power supply in the open market.

We further conclude that the delivery component included in the MESA remains just and reasonable. As discussed, the delivery component of the special tariff rates required Wah Chang to pay an adder of $11 per MWh for costs of transmission, distribution, ancillary, and other system support charges, as well as an adjustment for line losses. The MESA included the delivery component in part to help ensure that the negotiated rates would generate revenues at least sufficient to cover PacifiCorp's relevant costs and protect other customers.[71]

[71] The dissent complains that "PacifiCorp treats the amounts charged under the delivery component as *profit*." (Emphasis in original.) *See* dissent at 50. But as a private utility, PacifiCorp exists to earn a profit. And that is true with respect to special tariffs, as well as for other tariffs, as explained by our quote of the legislative testimony this Commission offered in support of the adoption of special tariff language ORS 757.230 in 1987. *See supra* at 22-23.

Moreover, we know that all tariffs are based on estimates. And we know that, upon review, all estimates turn out to be either too high or too low, so that in retrospect, every tariff will give the utility too much or too little money. In fact, the same is true of every component of every tariff. The dissent's belief, which we do not share, that PacifiCorp may have earned in excess of its estimated costs for delivery does not mean that the special tariff ceased to meet the fair and reasonable standard of ORS 756.040 as prescribed under ORS 757.230.

In order to meet the requirements of ORS 757.230(1), Wah Chang must continue to pay a delivery component for the remaining 21 months of the MESA. Although PacifiCorp is able to recover its opportunity costs through the commodity component, it will incur additional costs related to the delivery of electricity to Wah Chang. These additional costs include line losses, transaction costs, and ancillary services.

We have no evidence to support any adjustment to the delivery component. The entire rate, with all its component parts, was agreed to and negotiated between Wah Chang and PacifiCorp, and found to be just and reasonable by the Commission when it approved the MESA in 1997. Wah Chang has not challenged the reasonableness of the amount of the delivery component, and we decline to engage in single-issue ratemaking and modify it here.

PacifiCorp and Wah Chang brought the MESA rates to us as an integrated whole, and we converted the MESA rates into a special tariff that the Commission regarded as an integrated whole. We, therefore, cannot support the view that the special tariff is really two special tariff rates that we examine separately after the fact.

We acknowledge Commissioner Savage's belief that the amount of the delivery component is too high and should be reduced. He contends the delivery component was based on the incorrect assumption that PacifiCorp would serve Wah Chang's entire load through wholesale market purchases at COB. Commissioner Savage points out that PacifiCorp has acknowledged that this assumption is not always accurate, as the utility reported that it serves Wah Chang through a mix of resources, including self-generation and power purchases made throughout the region. Thus, Commissioner Savage contends that the delivery component allows PacifiCorp to recover more than its reasonable costs.

The record, however, does not provide any information that would allow us to calculate a different delivery component. Moreover, even if PacifiCorp does not serve Wah Chang through purchased power at COB at all times, we find it reasonable to assume that it would do so during the time period at issue in this proceeding. As noted above, shortly before Wah Chang filed this complaint, PacifiCorp filed a request to recover $260 million in excess power costs resulting from the Western Energy Crisis.[72] Because it incurred such large amounts of excess power costs, PacifiCorp was obviously resource deficient and, thus, a net buyer of electricity. We find it likely that PacifiCorp purchased power at COB during the relevant periods to serve Wah Chang. Under these circumstances, we will not modify the delivery component.

[72] *See supra* at 26.

VI. ORDER

IT IS ORDERED that the petition for relief filed by Wah Chang against PacifiCorp, dba Pacific Power, is denied.

Made, entered, and effective SEP 0 2 2009.

Lee Beyer Chairman	**Ray Baum** Commissioner

Commissioner Savage, dissenting in part.

The central questions presented in this case are whether the Commission must provide regulatory oversight to a special tariff customer like Wah Chang and, if so, under what standards. Because Wah Chang negotiated the rates it now challenges, it is tempting to conclude, as the majority does, that a deal is a deal, and Wah Chang should not be allowed to seek relief because that deal turned out badly. Such a conclusion, however, is based on the erroneous premise that the rates charged to Wah Chang are governed by private contract. As the majority itself recognizes, retail rates charged to all customers—even those under special tariff—are governed by tariff, not contract, and are subject to all rate protections afforded to tariffed service. Simply put, there is no such thing as a "deal is a deal" when it comes to utility regulation. The Commission is statutorily required to protect *all* customers from unjust and unreasonable rates, and once a rate is set, obligated to monitor those rates—including those set by special tariff—and, if necessary, modify them to ensure they remain just and reasonable.

The majority's reliance on ORS 757.230 and the *Mobile-Sierra* doctrine to conclude otherwise is misplaced. A plain reading of ORS 757.230 shows that the statute does not apply in this case, much less abrogate Wah Chang's right to a just and reasonable rate. Moreover, the rationale underlying the *Mobile-Sierra* doctrine is completely absent from Oregon's regulatory scheme governing retail rates, so the doctrine has no place in Oregon law.

Furthermore, there is no basis in ORS 757.230 or the federal *Mobile-Sierra* doctrine, or anywhere else in Oregon law, for the majority's conclusion that Wah Chang may only obtain relief if it can show that PacifiCorp engaged in bad faith that materially increased the rates charged under the special tariff. Contrary to the majority's assertion, the language of ORS 757.230 and cases applying the *Mobile-Sierra* doctrine contain no such standard.

This case should be decided under the only rate standard applicable to the review of retail tariff rates in Oregon—the "just and reasonable" standard set forth in ORS 756.040 and other statutes. Applying the just and reasonable standard in this case requires the Commission to examine what it cost PacifiCorp to serve Wah Chang, without regard to the parties' negotiated rate agreement, the conduct of either party, or the condition of power markets. Because such a review reveals that Wah Chang's rates are not just and reasonable, I dissent.

A. The Commission Must Treat the Special Tariff as a Tariff, Not a Contract, and Apply the Just and Reasonable Standard for Reviewing Retail Rates

The majority's primary analysis is half right. The majority rightly concludes that the retail rate charged to Wah Chang for electric service is governed by a tariff—not contract—and is therefore subject to the exclusive oversight and jurisdiction of this Commission. But then the majority gets it wrong by concluding, ironically, that because Wah Chang negotiated a special tariff, it effectively removed itself from the Commission's jurisdiction and the regulatory rate protections afforded other customers.

1. The Only Legal Standard is the Just and Reasonable Standard

This Commission has been delegated the broad legislative authority to set and review public utility rates. As made clear by the Oregon Court of Appeals, "[t]he *only* legislative standards for exercising that authority are that rates be 'fair and reasonable.'"[73] This "just and reasonable" standard derives from multiple statutory provisions.

ORS 756.040 expressly delegates to the Commission the duty to protect all customers of regulated utilities "from unjust and unreasonable exactions and practices and to obtain for them adequate service at *fair and reasonable rates*." ORS 757.210(1) provides that the Commission may conduct a hearing on any rate request to determine whether the rate or schedule is "*fair, just and reasonable*." The statute further provides that the utility bears the burden at the hearing of showing that the proposed rate "is *fair, just and reasonable*," and that the Commission "may not authorize a rate or schedule of rates that is not *fair, just and reasonable*." Finally, ORS 757.020 states that any charges for electric utility service "shall be *reasonable and just*, and every *unjust or unreasonable* charge for such service is prohibited."

2. Court and Commission Precedent Confirms that the Just and Reasonable Standard is the Only Standard that Applies

Many court opinions and Commission orders confirm that we have the duty to apply the just and reasonable standard, and only this standard, when implementing or reviewing any retail rate, including rates set by special tariff. In *American Can Co. v Davis*,[74] the Court of Appeals addressed a case much like this one involving the Commission's review of a special tariff rate that had been negotiated between PacifiCorp and

[73] *Multnomah County v. Davis*, 35 Or App 521, 526, 581 P2d 968 (1978) (emphasis added).
[74] 28 Or App 207, 224, 559 P2d 898 (1976), *rev den* 278 Or 393 (1977).

Crown Zellerbach Corporation, a large industrial customer. The court rejected all attempts to distinguish tariffs based on negotiated agreements from other tariffs, and clarified that the Commission had a statutory obligation to ensure that negotiated rates remained just and reasonable during the term of the contract:

> We conclude that the Commissioner had not only the right, *but indeed the duty*, in exercising his authority to set just and reasonable rates, to consider and, upon a proper showing, to change the Pacific-Crown contract with respect to the rate to be charged thereunder.[75]

The court also emphasized that the Commission's own rule specifically require "that rate schedules appearing in private contracts be treated identically with all other rate schedules."[76] The court observed that this rule, which still exists in its identical form today, states:

> Energy and telecommunications utilities within Oregon entering into special contracts with certain customers prescribing and providing rates, services, and practices not covered by or permitted in the general tariffs, schedules, and rules filed by such utilities are in legal effect tariffs and *are subject to supervision, regulation, and control as such*.[77]

Although *American Can* was decided prior to the passage of ORS 757.230, the statute's legislative history makes clear that nothing in the statute was intended to affect the court's holding or create an exception to the just and reasonable rate standard for special tariff customers. In statements made before the Oregon House of Representative, a representative of the Department of Justice testified that House Bill 2144, introduced at the request of this Commission, was "simply a clarification of existing law" and was designed to make explicit the Commissioner's authority to approve special tariffs.[78] Similarly, Representative Ron Eachus, who supported the bill and later became a Commissioner, explained that the bill represented a combination of guidelines that had already been established in Commission orders.[79]

Recently, this Commission confirmed that the "just and reasonable" standard applied to the review of special tariff rates. In Order No. 05-726, we examined the reasonableness of rate discounts provided under historical contracts to irrigators in the Klamath River Basin. We rejected arguments that the Commission could not modify the special tariff rates prior to the expiration of the negotiated contracts and confirmed that we had an ongoing duty to ensure the rates were just and reasonable:

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[75] *Id*. (emphasis added).
[76] *Id*. at 222.
[77] *Id.* (citing OAR 860-022-0035) (emphasis added).
[78] Tape Recording, House Environment and Energy Committee, HB 2144, Mar 30, 1987, Tape 77, Side A (Statement of Assistant Attorney General Paul Graham).
[79] Tape Recording, House Environment and Energy Committee, HB 2144, Jun 1, 1987, Tape 184, Side B.

> The Commission's ratemaking power constitutes the broadest delegation of legislative authority. Utilities and customers cannot limit this power by private contract. Although the Commission previously approved the [Klamath River Basin] Contracts, we have the continuing authority and obligation to review the appropriateness of the rates contained in those contracts. Thus, regardless of the expiration term of either contract, this Commission has the duty to examine the rates contained therein and, upon a proper showing, modify them.[80]

As these cases make clear, the Commission is obligated to ensure that *all* regulated rates are just and reasonable, and this duty cannot be abrogated or modified by private agreement.

B. The Majority's New Legal Standard has No Basis in the Law

The majority creates a new legal standard to examine the special tariff in this case, concluding that this new standard is required by ORS 757.230 and supported by the principles underlying the federal *Mobile-Sierra* doctrine. But ORS 757.230 does not apply to this case, much less supercede ORS 756.040 and other statutes that embody the just and reasonable standard for reviewing retail rates. Neither do the principles underlying the federal *Mobile-Sierra* doctrine apply to the review of retail rates in Oregon.

1. ORS 757.230 Does Not Apply

The majority misreads ORS 757.230 in two critical ways. First, ORS 757.230(1)(a) and (b) apply only to the initial review of a special tariff filed under ORS 757.205 to create a new rate classification. The statute does not apply to resolve a complaint filed under ORS 756.500 challenging an existing and previously approved special tariff. Second, ORS 757.230 does not create a unique legal standard for reviewing special tariff rates, but rather codifies traditional regulatory principles requiring the Commission to balance the interests of the public utility and its customers in establishing just and reasonable rates.

a. ORS 757.230(1)(a) and (b) Apply Only to the Initial Review of a Tariff Filing Designed to Create a New Rate Classification

ORS 757.230 is entitled: "Control of commission over classification of services and forms of schedules; rules." The purpose of the statute is to require the Commission to group customers with similar characteristics for the purpose of setting of utility rates. ORS 757.230 provides, in its entirety:

> (1) The Public Utility Commission shall provide for a comprehensive classification of service for each public utility,

[80] Order No. 05-726 at 4, Docket UE 171 (citations omitted). *See also* Order No. 05-1202, Docket UE 170 (Confirming that special tariff rates for Klamath irrigators must be examined under the "just and reasonable" standard).

> and such classification may take into account the quantity used, the time when used, the purpose for which used, the existence of price competition or a service alternative, the services being provided, the conditions of service and any other reasonable consideration. Based on such considerations the commission may authorize classifications or schedules of rates applicable to individual customers or groups of customers. The service classifications and schedule forms shall be designed consistently with the requirements of ORS 469.010. Each public utility is required to conform its schedules of rates to such classification. *If the commission determines that a tariff filing under ORS 757.205 results in a rate classification primarily related to price competition or a service alternative, the commission, at a minimum, shall consider the following:*
>
> *(a) Whether the rate generates revenues at least sufficient to cover relevant short and long run costs of the utility during the term of the rates;*
>
> *(b) Whether the rate generates revenues sufficient to insure that just and reasonable rates are established for remaining customers of the utility;*
>
> (c) For electric and natural gas utilities:
>
> (A) Whether it is appropriate to incorporate interruption of service in the utility's rate agreement with the customer; and
>
> (B) Whether the rate agreement requires the utility to acquire new resources to serve the load; and
>
> (d) For electric utilities, for service to load not previously served, the effect of the rate on the utility's average system cost through the residential exchange provision of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, Public Law 96-501, as amended.
>
> (2) The commission may prescribe such changes in the form in which the schedules are issued by any public utility as may be found to be expedient. The commission shall adopt rules which allow any person who requests notice of tariff filings described under subsection (1) of this section to receive such notice. (Emphasis added.)

The majority relies on the italicized language found in subsections (1)(a) and (b), which was added as part of House Bill 2144 passed by the 1987 Legislative Assembly.

That language explicitly authorizes the Commission to establish a special rate classification for purposes of providing an incentive rate to customers with service alternatives, but requires the Commission to consider certain factors when approving the classification. The majority claims this language governs this complaint and serves the basis for requiring Wah Chang to show PacifiCorp acted in bad faith that materially affected market rates.

A plain reading of this language, however, shows that ORS 757.230(1)(a) and (b) only apply "[i]f the commission determines that *a tariff filing under ORS 757.205* results in a rate classification primarily related to price competition or a service alternative[.]"[81] ORS 757.205 requires public utilities to file all rate schedules, or tariffs, with the Commission. In other words, ORS 757.230(1)(a) and (b) only apply if two triggering events occur: (1) the filing of a tariff under ORS 757.205; and (2) a Commission finding that the tariff results in a rate classification primarily related to price competition or a service alternative.

To put this statute in the context of Wah Chang's special tariff, after reaching an agreement with Wah Chang in 1997, PacifiCorp filed a tariff designed to implement the terms of that agreement under ORS 757.205. The Commission then reviewed the tariff and determined that the tariff created a rate classification primarily related to price competition or a service alternative. PacifiCorp's filing under ORS 757.205 and the Commission's determination that it sought a rate classification related to price and service competition triggered the application of ORS 757.230(1)(a) and (b) *during the initial tariff review proceedings*.

This case is not a continuation of that initial review proceeding—it is an entirely separate proceeding—and the statute does not apply in the circumstances presented here. PacifiCorp has made no "tariff filing under ORS 757.205." Rather, Wah Chang has filed a petition under ORS 756.500 and seeks relief under ORS 756.040 from an existing special tariff. Moreover, the question presented is whether the special tariff rates are too high—not too low. The provisions of ORS 757.230 have not been triggered and do not apply in this case.[82]

Legislative history supports the conclusion that ORS 757.230(1)(a) and (b) apply only during the initial review and approval of a special tariff filed under ORS 757.205. In legislative testimony, then Representative Eachus explained that the language codified in ORS 757.230 was intended to "establish minimum considerations that the PUC must include in its deliberations on whether or not to approve a [special] contract."[83]

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[81] ORS 757.230(1) (emphasis added).

[82] The dissent claims that this reading of ORS 757.230 could lead to absurd results, and provides an example of a rate challenge to a special tariff that was approved one day earlier. *See supra* at 25, n 53. I disagree with the majority. The date a complaint is filed does not affect our statutory duty to protect all customers. If a special tariff customer's rates unexpectedly skyrocket one day after the special tariff was approved, the Commission is statutorily obligated to reexamine those rates under ORS 756.040 and take all necessary actions to ensure they remain just and reasonable. Indeed, it is the majority's analysis, which would provide no rate relief regardless of how exorbitant the rate and how large the utility's profit, that produces an untenable result.

[83] Tape Recording, House Environment and Energy Committee, HB 2144, June 1, 1987, Tape 184, Side B. The majority attempts to minimize Rep. Eachus' testimony by noting that he did not address the use of ORS 757.230 to modify a special tariff. *See supra* at 26, n 56. But that is exactly the point. Rep. Eachus was explaining the

Even PacifiCorp recognizes the limited purpose of ORS 757.230 and the inapplicability of its minimum standards to this proceeding:

> PacifiCorp does not believe that [ORS 757.230] is the proper statutory standard to be applied in reviewing whether Wah Chang's petition should be granted. ORS 757.230 is used in approving a special contract; however, it should not be the standard applied to determine whether a special contract, approved and adopted by the Commission as consistent with the statutory standard at the time the contract is entered into, is subsequently abrogated due to events not in existence at the time the contract was negotiated and executed.[84]

In short, there is nothing in the text, context, or history of ORS 757.230 to support the majority's conclusion that the minimum standards set forth in subsections (1)(a) and (b) apply beyond the initial review of a special tariff filed under ORS 757.205.

The majority asserts that ORS 757.230 had been addressed in at least three prior Commission proceedings involving the modification of a special tariff, implying that those cases support the statute's application here.[85] All three of those prior decisions, however, actually involved "a tariff filing under ORS 757.205" and therefore fell squarely within the terms of ORS 757.230. Again, this docket involves no such tariff filing.

Moreover, contrary to the majority's assertion, the Commission never conclusively determined in any of those cases that ORS 757.230 applied when modifying a special tariff. Each of the three referenced cases were uncontested, and, although the Commission Staff discussed ORS 757.230 in its Staff Reports, the Commission approved the tariff filings at public meetings without fully clarifying the applicable legal standard. In fact, in one of those filings, *In Re Portland General Electric,* docket UE 112, the Commission's legal counsel advised the Commission that the filing was an expedited matter and that there was not enough time to even determine whether ORS 757.230 applied.[86] In other words, none of the three dockets cited by the majority invited close review of our statutory obligations with respect to special tariff rates.

That the Commission reached no conclusive determination as to the applicability of ORS 757.230 is reflected by the fact that the Commission applied inconsistent legal and policy standards to those tariff filings and came up with different

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purpose of the legislation, which he identified as to provide minimum considerations the Commission must consider when *approving* a special tariff. The fact that he did not discuss the use of ORS 757.230 to modify a special tariff is consistent with the interpretation that the statute applies only when approving a special tariff.

[84] PacifiCorp Response to ALJ Data Request 4, at 1 (Jul 30, 2008); WC/1304 (Oct 14, 2008). The majority creates its own interpretation of what PacifiCorp meant. *See supra* at 26-27, n 56. PacifiCorp's statement is clear: ORS 757.230 does not apply.

[85] *See In re Portland General Electric*, Docket UE 112, Order No. 00-391; *In re Pacific Power and Light*, Advice No. 93-107, and *In re Pacific Power and Light*, Advice No. 94-111.

[86] *See* Minutes, July 20, 2000, Public Meeting (statement of Assistant Attorney General Michael Weirich).

results. In one case, the Commission approved a new tariff to modify an existing special tariff based on the condition that the utility bear the risk of any excess power costs incurred to serve the customer.[87] In the other two cases, the Commission allowed a special tariff customer to return to the general tariff rate if the customer could show that returning to the standard tariff would provide more benefits to the utility than service to either a new or returning customer.[88]

More importantly, none of the cases cited by the majority support the adoption of the legal standard that the majority imposes on Wah Chang here—that Wah Chang must prove that PacifiCorp acted in bad faith that materially contributed to the prices charged under the special tariff. Given the lack of any legal analysis and inconsistent holdings in those prior decisions, they do not alter my conclusion that ORS 757.230 does not apply to resolve a complaint challenging an existing special tariff.

b. ORS 757.230 Does Not Create a New Legal Standard for Special Tariff Rates

Although I strongly disagree with the majority that ORS 757.230 applies to our review of an existing special tariff, even if the majority were correct on this point, its interpretation of the statute is still wrong. The majority holds that ORS 757.230 provides the only standard for assessing a special tariff rate. In essence, the majority claims that, by enacting ORS 757.230, the legislature created an exception to the just and reasonable standard, and that any customer to a special tariff may not seek rate relief unless the utility acted in bad faith, no matter how high the rate or the cost of service.

This overstates the significance of the statute. ORS 757.230 simply provides minimum considerations to help ensure that a special tariff rate is not too low to be just and reasonable. The statute does not displace the just and reasonable standard, and it provides no standard for determining when a special tariff rate is unlawfully high, as Wah Chang contends here. As explained in a letter from the Department of Justice to the Commission shortly after ORS 757.230 was enacted: "All service must be offered under reasonable rates and terms, but rates and terms that are not offered to everyone in the class [incentive rates] must meet the additional tests of ORS 757.230[.]"[89]

Some background for ORS 757.230 makes this clear. As the majority notes, in certain circumstances the utility and its customers benefit from the utility's retention of a customer with service alternatives, even if that customer is served at a lower rate than other customers. To encourage the retention of such customers, ORS 757.230 allows the Commission to approve special tariffs with negotiated rates. In determining whether the special tariff rate is just and reasonable, subsections (1)(a) and (b) of ORS 757.230 require the Commission to consider whether the special tariff is adequate to cover utility expenses

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[87] *In re Portland General Electric*, Docket UE 112, Order No. 00-391.
[88] *See* Staff Report, Item No. 1, Aug 31, 1993 Public Meeting; Staff Report, Item No. 3, Sept 27, 1994 Public Meeting.
[89] Letter dated June 27, 1989, from Assistant Attorney General John Socolofsky to Commissioners Eachus, Ryles, and Katz at 2.

and generate sufficient revenues to prevent the rates of the utility's other customers from becoming unjust and unreasonable.

The majority finds that ORS 757.230(1)(a) and (b) immunize the remaining customers from any rate increases associated with the special tariff, and similarly immunize the public utility's shareholders unless the utility had acted in bad faith. Even if ORS 757.230 applied, there is nothing in that statute that supports such a broad interpretation. The minimum considerations set forth in subsections (1)(a) and (b) do not establish a new, independent rate standard for special tariff rates, but rather incorporate traditional regulatory concepts to ensure the standard tariff rates are just and reasonable. Thus, ORS 757.230(1)(a) and (b) merely make explicit what is already implicit given the Commission's general regulatory authority: the Commission must balance the interests of the utility and the utility's other customers in deciding whether to approve a special tariff for a particular customer.[90]

The majority supports its conclusion that ORS 757.230 supplants the just and reasonable standard by citing the statutory maxim that the more specific provision controls over the general.[91] That rule of statutory construction, however, applies only where there is an irreconcilable conflict between the two provisions.[92] No such conflict exists here. As explained above, the minimum considerations set forth in ORS 757.230(1)(a) and (b) help inform whether a special tariff rate is just and reasonable under ORS 756.040 and other statutes. In fact, unlike the majority's view, this interpretation meets our duty to give meaning to all relevant statutory provisions.[93]

2. The Federal Mobile-Sierra Doctrine Does Not Apply

The majority cites the federal *Mobile-Sierra* doctrine as support for its holding that a party's agreement to a rate supersedes our duty to ensure rates are just and reasonable. But, as I have explained, our statutes do not support such an assertion. In any case, the policies behind the *Mobile-Sierra* doctrine do not apply in Oregon. The *Mobile-Sierra* doctrine is designed to uphold the sanctity of wholesale power contracts in the federal regulatory scheme, where private contracts serve a vital role in setting wholesale rates. This role of private contract is completely absent from Oregon's retail regulatory scheme, making the majority's reliance on principles derived from *Mobile-Sierra* misguided.

a. Unlike the Federal Power Act, Oregon Law Does Not Recognize Ratesetting by Private Contract

[90] *See* ORS 756.040(1) ("The commission shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates.").
[91] *See* ORS 174.020(2).
[92] *See Olsen v. Deschutes County*, 204 Or App 7, 47, 127 P3d 655, *rev den*, 341 Or 80 (2006).
[93] *See* ORS 174.010; *City of Eugene v. Nalven*, 152 Or App 720, 725-26, 955 P3d 263, *rev den*, 327 Or 431 (1998) (Obligation to interpret statutes to give effect to all relevant provisions).

The *Mobile-Sierra* doctrine was created in connection with two federal laws regulating wholesale commodities—the Natural Gas Act and the Federal Power Act (FPA).[94] As the majority notes, the doctrine creates a presumption that a rate set out in a freely negotiated contract between wholesale buyers and sellers meets the just and reasonable requirement imposed by federal law.[95] In other words, if a wholesale buyer and seller agree to a specific contractual rate for power, that rate is presumed under federal law to be just and reasonable. The Federal Energy Regulatory Commission (FERC) may modify that rate "only when the mutually agreed-upon contract rate seriously harms the consuming public."[96]

The rationale for the *Mobile-Sierra* doctrine is wholly inapplicable to the review of retail rates in Oregon because it is grounded in the critical role that contracts play in the federal regulatory scheme. As the United States Supreme Court has noted, "[t]he regulatory system created by the [FPA] is *premised on contractual agreements voluntarily devised by the regulated companies.*"[97] The FPA was based originally on the Interstate Commerce Act, which required all rates to be set via agency-approved tariff. As the Supreme Court has explained, however, the FPA "departed from the scheme of purely tariff-based regulation" and "acknowledged that contracts between commercial buyers and sellers could be used in ratesetting."[98] As a result, the FPA allows rates between two wholesale parties to be set "by contract and not just by tariff."[99] Relying on the critical role of contracts in the federal scheme, the FERC and the courts have recognized and refined the *Mobile-Sierra* doctrine for over 50 years, making it extremely difficult for a party to unilaterally modify a wholesale contract.[100] As Justice Scalia noted in *Snohomish PUD*, allowing parties to unilaterally abrogate long-term wholesale contracts when market prices rise "has no support in our case law *and plainly undermines the role of contracts* in the FPA's statutory scheme."[101]

Private contracts play no such role in Oregon's regulatory scheme. Unlike the PA, Oregon law has not "departed from the scheme of purely tariff-based regulation." To the contrary, Oregon law requires that all rates be set through a Commission-approved tariff. While parties are certainly free to agree between themselves to a specific rate, private agreements have no legal ratemaking effect. As the majority concedes, PacifiCorp was required to propose and seek Commission approval of its special tariff implementing the Master Electric Service Agreement (MESA) before the rates agreed to by PacifiCorp and Wah Chang could go into effect. Once approved, the special tariff became subject to the

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[94] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 US 332, 76 S Ct 373, 100 L Ed 373 (1956); *Federal Power Comm'n v. Sierra Pacific Power Co*., 350 US 348, 76 S Ct 368, 100 L Ed 388 (1956).
[95] *Morgan Stanley Capital Group v. Public Util. Dist. No. 1 of Snohomish County, et al. (Snohomish PUD)*, 544 US ___ 128 S Ct 2733, 171 L Ed 607 (2008).
[96] *Snohomish PUD*, 128 S Ct at 2746.
[97] *Permian Basin Area Rate Cases*, 390 US 747, 822, 88 S Ct 1344, 20 L Ed 312 (1968) (emphasis added).
[98] *Snohomish PUD*, 128 S Ct at 2738 (quoting *Verizon Communications, Inc. v. FCC*, 535 US 467, 479, 122 S Ct 1646, 152 L Ed 2d 701 (2002)).
[99] *Id.* at 2749.
[100] *Id.* at 2739.
[101] *Id.* at 2747 (emphasis added). The exception is when the parties include a so-called "Memphis clause" in their contract, a specific reservation by the parties of the right to unilaterally seek revisions to the contracts under FPA Sections 205 or 206. *See id*. at 2739.

Commission's ongoing jurisdiction.[102] So, although the Oregon retail market provides a role for private agreements like Wah Chang's and PacifiCorp's, that role is both limited and regulated.

The critical distinction is this: in contrast to FERC's ratemaking function—which is to a large degree dependent on the independent decisions of private actors—the legislative ratemaking function in Oregon is exclusively the Commission's. As part of that function, the Commission must ensure that rates comply with ORS 756.040.[103] By adopting a hands-off approach to retail customer rates, the majority abdicates this Commission's oversight role and statutory responsibilities.

In short, the policies underlying the *Mobile-Sierra* doctrine—the federal recognition of privately negotiated prices as "rates" and the critical reliance of the federal market on private contracts—are simply absent here.

b. Oregon Case Law Does Not Recognize the Mobile-Sierra Doctrine

Oregon case law confirms the inapplicability of the federal doctrine to Oregon's regulatory scheme. In *American Can Co.*, the Oregon Court of Appeals rejected the proposition that the *Mobile-Sierra* doctrine applies to special tariffs. As the court explained, the *Mobile-Sierra* doctrine "does not purport to restrict the right of the regulatory agency to control the rates charged and other protections by law afforded *to the ultimate consumer*," meaning that the doctrine does not apply at the state level to the review of retail rates. [104] The court concluded that a private agreement may not deprive the Commission of the flexibility necessary to discharge its statutory duty to review the reasonableness of rates in a meaningful way.[105]

In summary, the *Mobile-Sierra* standard makes no sense in Oregon. Even assuming it applied, ORS 757.230 says nothing that would support the imposition of a federal *Mobile-Sierra*-type standard here. Nor does the Oregon regulatory scheme possess the

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[102] The Commission not only scrutinized the MESA before it went into effect, but also modified the agreement. Acting on the recommendation of its Staff, the Commission approved the MESA with the condition that a provision authorizing termination for stranded and other costs be deleted. *See* Staff Report at 4 (Sept 9, 1997, Public Meeting). Such an intrusion would be impossible under federal law, underscoring the differences between the two regulatory approaches.

[103] The difference between FERC's role and this Commission's is understandable. As the Supreme Court has explained, in wholesale markets like FERC's, "the principal regulatory responsibility [is] not to relieve a contracting party of an unreasonable rate, but to protect against potential discrimination by favorable contract rates [between affiliates]." *Verizon Communications, Inc. v. FCC*, 535 US at 479. Regulation of retail rates at the state and local levels, by contrast, "focused more on the demand for 'just and reasonable' rates to the public than on the perils of rate discrimination." *Id.* at 480.

[104] *American Can Co.*, 28 Or App at 225 (emphasis added). Similarly, in *Pacific Northwest Bell Tel. Co. v. Sabin*, the court held that the Commission's prior approval of a private contract between a utility and an affiliated interest could not deprive the Commission of authority to modify the contract if necessary to ensure rates remained just and reasonable. The court explained that even though the Commission had previously approved the contract, subsequent scrutiny of those contracts "should not be limited in any way by those decisions." 21 Or App 200, 228 (1975).

[105] *Id.*

characteristics that led the courts and federal regulators to adopt the *Mobile-Sierra* doctrine in the first place. Wah Chang's retail tariff is not akin to a private wholesale contract under the FPA, where parties freely set rates among themselves and buy and sell under the contracts without prior regulatory approval. *Mobile-Sierra* provides no rationale for departing from the requirements of ORS 756.040.

3. The Majority Adopts an Impossible Standard for Relief

The majority acknowledges Wah Chang's right to a fair rate, but then articulates a standard that gives Wah Chang (and other customers of special tariffs) no avenue for relief from excessive rates under any circumstances. The majority claims that it is not ignoring ORS 756.040 and states that Wah Chang is entitled to a just and reasonable rate. The majority concludes, however, that the just and reasonable standard is different for Wah Chang, because it "differs" from the utility's other customers[106] and because it negotiated a special tariff rate that assigned it the risk of high prices. In practical effect, the majority concludes that Wah Chang made a deal that effectively removed itself from the scope of the Commission's rate protections and that it is not the Commission's job to "rescue Wah Chang simply because it made a deal that turned out badly."

The standard articulated by the majority is that a party may "contract out" of the Commission's regulatory protections, and that the Commission is somehow bound by a private contract. These assertions are incorrect. As *American Can Co.,* and other cases discussed previously, make clear, the Commission's broad ratemaking authority—*and obligation to protect all customers*—cannot be limited by private agreement. No utility and retail customer can privately agree to remove a customer from the Commission's statutorily required oversight and rate protections required under ORS 756.040 and other applicable statutes. In short, a customer simply cannot assume the risk of an unjust and unreasonable rate by entering into a special tariff.[107]

The new legal standard crafted by the majority is not a just and reasonable rate standard. Invoking the concept of a "zero sum game," the majority concludes that lowering the special tariff rate will always "harm" other customers and no relief can ever be obtained at the expense of other customers under ORS 757.230(1)(b).[108] But ORS 757.230 does not support the majority's decision to immunize PacifiCorp's other customers from any increase in rates that is attributable to a special tariff. ORS 757.230, when applicable, does not

[106] Wah Chang was different from most of the utility's other customers because it had viable alternatives for electric service that gave Wah Chang the bargaining power to negotiate a discounted rate with PacifiCorp. But Wah Chang was not the only customer with viable service alternatives. At the time Wah Chang's special tariff was approved, PacifiCorp had negotiated rate discounts with 10 other similarly situated customers. These included Roseburg Forest Products, Willamette Industries, Boise Cascade, and Weyerhaeuser.

[107] Even at the FERC, parties may not contract out of regulatory oversight completely. *See Lockyer v. FERC,* 383 F 3d 1006, 1014-15 (9th Cir. 2004) (although parties may set rates via private contract under the FERC's market-based tariff system, the FERC must exert regulatory oversight over the market to ensure that market-based rates remain "just and reasonable" and that market forces are truly determining negotiated prices).

[108] The majority mislabels this proceeding as a "zero sum game," and ignores the fact that PacifiCorp and other customers enjoyed an estimated $5 to $6 million in benefits under the special tariff that they would not have received had no special tariff been approved and Wah Chang had left PacifiCorp's system.

insulate other ratepayers from *any* rate increase. It only requires that resulting rates remain just and reasonable.

To insulate other customers, the majority concludes that any relief is limited to PacifiCorp's shareholders, and that it would be unfair to hold the shareholders liable unless PacifiCorp had acted in bad faith. This standard completely ignores the fact that PacifiCorp is only entitled to recover its reasonable costs of service.[109] Shareholders are not entitled to over recovery of costs, regardless of PacifiCorp's conduct. Further, under the logic of the majority's opinion, the higher Wah Chang's rate climbs, the more a request for relief threatens PacifiCorp's other customers, and relief for Wah Chang becomes less and less likely. As a consequence, even if Wah Chang's special tariff rates exceeded $5,000 per MWh, and PacifiCorp and its other customers realized significant net benefits under those rates, Wah Chang would have no right to relief under the majority's standard, absent the ability to prove that PacifiCorp acted in bad faith.

By adopting a standard that prevents a customer being served under a regulated tariff from obtaining relief no matter how high its rates climb, the majority has effectively deprived Wah Chang of the rate protections afforded by ORS 756.040 and related statutes. The majority's decision cannot be sustained.

C. The Commission Must Determine Whether the Rates Charged to Wah Chang are Just and Reasonable Based on an Examination of PacifiCorp's Costs

Our regulatory responsibilities require an examination of whether the rates charged to Wah Chang under the special tariff, as a whole, remain just and reasonable. To answer that question, the Commission must examine PacifiCorp's costs to provide service to Wah Chang.

Because PacifiCorp's service to Wah Chang is comprised of two primary cost components, it is reasonable to separately examine, as the majority does under its "Alternative Ground" discussion, PacifiCorp's commodity costs (power supply) and its delivery costs (transmission, distribution, ancillary, and other system support charges). For reasons stated above, however, I find that any economic analysis of these costs is required by ORS 756.040, not ORS 757.230.

1. PacifiCorp's Cost of Power Supply

Wah Chang claims that the dysfunctional and manipulated markets during the Western Energy Crisis rendered the commodity charges based on the Dow COB Index to become unjust and unreasonable. Although the majority inherently acknowledges that market manipulation occurred, it does not directly respond to that allegation, and instead upholds the special tariff based on its reading of ORS 757.230. As an alternative holding, the majority uses an opportunity cost analysis to determine that the Dow COB Index remained a suitable measure of PacifiCorp's cost of power supply to serve Wah Chang.

[109] These include operating expenses and capital costs, with a return to the equity holder. *See* ORS 756.040(1).

I offer no opinion as to whether the extreme increase in market rates that occurred during the Western Energy Crisis caused Wah Chang's rates to become unjust and unreasonable. I instead focus on PacifiCorp's costs to serve Wah Chang, and generally agree with the majority that opportunity costs are a reasonable measure of a utility's relevant commodity costs to serve a customer. During periods of either resource sufficiency or deficiency, the utility is either incurring the cost of purchasing power in the market or the revenues foregone from not selling power into the market. I also agree that, in theory, a utility's opportunity costs is the market price. Given the complexities and scope of PacifiCorp's actual power transactions, however, I cannot conclude that PacifiCorp's opportunity costs were, in fact, equal to the market prices reflected by the Dow COB Index. Indeed, they could have been lower.

2. PacifiCorp's Cost of Delivery

In addition to the commodity component, Wah Chang's special tariff included a significant delivery component. As PacifiCorp reported in response to a bench request:

> During the final two years of the contract, the Wah Chang contract charged market prices, plus 8.04% for line losses, and added 1.1 cents/kWh for the cost transmission and ancillary services. This 1.1 cent adder was adjusted for inflation each month. This total margin averaged approximately 2.12 cents/kWh over the final two years of the contract.[110]

This delivery component was based on the premise that PacifiCorp would *always* serve Wah Chang's entire load through wholesale market purchases at COB. That, however, was a false assumption. As PacifiCorp points out, "[t]he Company served its customers, including Wah Chang, from a portfolio of thermal, hydro, and purchased power resources."[111] PacifiCorp further explains that it "made purchases and sales primarily at the major market hubs in the Pacific Northwest, the California-Oregon border (COB) and the Mid-Columbia."[112]

a. The Delivery Component Overstates PacifiCorp's Costs of Delivery

Because the delivery component was based on a false assumption, the adder for line losses, transmission, and ancillary services overstate PacifiCorp's costs of delivery. To properly calculate the true costs of serving Wah Chang, we must compare PacifiCorp's system costs with service to Wah Chang and the utility's system costs if it were not required to serve Wah Chang. PacifiCorp's system costs will vary under each situation depending on different factors, such as whether the utility has excess generating capacity that it could sell into the market if not used to serve its retail customers.

[110] PacifiCorp Response to ALJ Data Request 1; WC/1301 at 2 (Mar 31, 2008).
[111] PacifiCorp Response to ALJ Data Request 2; WC/1302 at 1 (Jul 30, 2008).
[112] *Id.*

There are two scenarios to consider—when PacifiCorp is resource deficient and when it is resource sufficient. PacifiCorp incurs delivery costs to provide service to Wah Chang during periods of resource deficiency because PacifiCorp is required to buy power and transport it to Wah Chang. During periods of resource sufficiency, PacifiCorp either uses its own resources to serve Wah Chang or, if Wah Chang were not a customer, sells the power that would otherwise serve Wah Chang into the wholesale market. Whether it sells the power to Wah Chang or into the wholesale market, PacifiCorp incurs line losses and transmission service charges. Thus, on balance, the delivery costs associated with either supplying Wah Chang or making a power sale could cancel each other out in a net revenue analysis.[113] In fact, during periods of resource sufficiency, it is possible that PacifiCorp incurs fewer line losses or less transmission-related charges by serving Wah Chang than it would by selling the equivalent amount of power on the wholesale market.[114] For this reason, it is simply unreasonable to add a delivery cost component to the commodity cost for all power supplied to Wah Chang and then call it the true cost of serving Wah Chang. Doing so overstates PacifiCorp's costs.

Further, the delivery component also appears to overstate PacifiCorp's delivery costs by including a provision that adjusted the 1.1 cent per MWh adder each month for inflation. There is no evidence on the record that this charge—even when appropriately applied in a net revenue analysis—increased such amounts during the period of the special tariff.

I acknowledge the majority's point that all tariffs are based on estimates, and that the delivery component was based on PacifiCorp's estimated costs of a hypothetical transaction. This, however, is not a question whether the estimated cost was too low or too high. Because the delivery component was based on an incorrect premise, the resulting estimate is systematically high and, as a result, unreasonable.

b. The Evidence Supports an Adjustment to the Delivery Component

The majority claims "we have no evidence to support any adjustment to the delivery component." To the contrary, PacifiCorp's own responses to Commission bench requests provide that evidence.

On two occasions, the ALJ asked PacifiCorp to provide information regarding the utility's costs to serve Wah Chang under the special tariff.[115] Specifically, the ALJ sought confirmation of how PacifiCorp provided service to Wah Chang and "the difference

[113] In other words, if the cost of delivery from PacifiCorp's generation is the same whether the power is provided to Wah Chang or sold at a market hub, then the net revenue from serving Wah Chang is the same as from selling into the market *if* the delivered price charged to Wah Chang is the market rate. Charging Wah Chang an additional amount for line losses and delivery would increase net revenues to PacifiCorp and its customers dollar-for-dollar.

[114] In actuality, the delivery costs associated with supplying power to Wah Chang could differ from the delivery costs associated with a wholesale market sale. But there is nothing in the record that would allow us to determine whether and to what extent these costs are, indeed, different.

[115] ALJ Rulings (Feb 7, 2008, and Jun 26, 2008).

between the company's net revenue with service to Wah Chang, and its likely net revenue in the absence of any service by [PacifiCorp] to Wah Chang."[116]

PacifiCorp reported the difference between the Company's net revenue with service to Wah Chang and its likely net revenue in the absence of service to Wah Chang. According to PacifiCorp, the Company received approximately $6.1 million in net revenue during the last two years of the contract.[117]

PacifiCorp's *own* analysis ignores the delivery component to estimate the net revenues generated under the special tariff. The only evidence in this record, provided by PacifiCorp itself, is that these delivery charges should not be counted as a relevant cost of serving Wah Chang. In other words, PacifiCorp treats the amounts charged under the delivery component as *profit*.

To be fair, I assume that PacifiCorp incurred *some* net delivery costs in serving Wah Chang during the period under consideration. Nevertheless, logic dictates and the record shows that the delivery component does not accurately reflect the utility's actual costs to provide service and should be reduced to more accurately reflect PacifiCorp's costs to serve Wah Chang.[118]

The majority ignores PacifiCorp's own analysis in favor of anecdotal information that PacifiCorp must have been resource deficient and a net purchaser of power during the Western Energy Crisis because it incurred excess net power costs during that time period. The majority's inference that PacifiCorp was a *net* buyer during that period is reasonable, but that does not mean that PacifiCorp was *at all times* during the period buying power to serve Wah Chang. To the contrary, PacifiCorp's own statements, as well as FERC's investigation of PacifiCorp's trading activities, shows that PacifiCorp did, in fact, sell substantial amounts of power into the market during the Western Energy Crisis.

[116] ALJ Ruling at 1 (Feb 7, 2008).
[117] WC/1301 at 3 (Mar 31, 2008).
[118] To be clear, reducing the delivery component does not result in a rate that would be so low that other customers would be required to unfairly subsidize Wah Chang's utility service. To the contrary, the special tariff rate, as modified, would allow PacifiCorp the ability to recover its opportunity costs, while remaining appropriately low to satisfy the just and reasonable standard.

The majority's conclusion that no adjustment to the delivery component is necessary is not supported by substantial evidence.

John Savage
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 by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.