



CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
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SALEM, OREGON 97309-0869

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JUN 18 2002

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Don A. Dickey
Circuit Court Judge
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June 18, 2002

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Public Utility Commission of Oregon
Administrative Hearings Division

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Re: Wah Chang v. PUC
Marion County Circuit Court Case No. 01C20598

Counsel:

This matter came before the Court on the Plaintiff's Motion for Leave to Present Additional Evidence to the Commission. The Plaintiff appeared by and through Richard Williams, Defendant appeared by and through Assistant Attorney General Jason Jones and the Intervener appeared by and through Lawrence Reichman.

Plaintiff requests an order permitting it to present additional evidence to the defendant, PUC and staying further proceedings pending the Commission's consideration of the evidence. Defendant PUC and Intervener object.

Plaintiff wishes to reopen the PUC hearing for (i) evidence of manipulation of the Western wholesale electricity markets in the years 2000-2001 and (ii) complaints filed by the intervener with FERC.

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The parties do not appear to disagree on this Court's standard to determine this Motion. The evidence is limited to the evidence in the Commission records. ORS 756.598(1). The Court may direct the Commission to take additional evidence if "it is shown to the satisfaction of the Court that the additional evidence is material and there were good and substantial reasons for failure to present it" to the Commission. ORS 756.600(1). In such an instance, the Court shall stay further proceedings in the present suit.

There appears to be no argument that the proposed evidence was not then available for presentation. Thus, there is good reason why it was not then presented.

The dispute focuses on whether the proposed evidence is material. It appears that the Commission denied Plaintiff's petition because of its reluctance to alter Commission approved contracts in the absence of fraud or some other extraordinary basis:

"The Commission's policy has been to uphold agreements negotiated by parties at arm's length. In Order No. 95-857 the Commission stated that

"* * * It is our policy that only the most compelling circumstances justify retroactive modification of a Commission order adopting a fully negotiated agreement. Such circumstance might include facts constituting mistake, fraud, impossibility, or some other extraordinary basis for modifying an executed agreement. We do not agree that new evidence alone is a sufficiently compelling circumstance to retroactively modify the terms of the fully negotiated agreement."

The Commission determined here that Plaintiff could have limited its future risk by contract terms such as a price cap or collar. Thus, reasoned the Commission, the Plaintiff assumed the risk of future price increases. The Commission determined it was unclear whether relief for Plaintiff would affect the other PacifiCorp customers. This potential suggested that the Commission be cautious in revising an executed contract.

The Commission declined to determine the causes of the price increases despite certain theories thereof by Plaintiff, the FERC and others. The commission simply noted that the prices in 2000 were volatile and at some times high.

The Commission heard some evidence of such theories. Although the commission stated that it declined to determine the theories or causes of the price fluctuations is not clear whether they did

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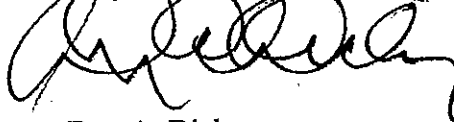
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so because of the insufficiency of the evidence. Whether evidence of third party wrongdoing would be sufficient in any case before the Commission to justify acceptance of facts in support of a potential change in the terms or application of an executed and approved contract is uncertain. But it does appear to be within the authority of the Commission to make adjustments in contracts based upon extraordinary circumstances which at least logically could include fraud and other extraordinary facts of the type proposed as additional evidence.

Under the law and the circumstances, the proposed evidence is material. Unless the Commission should rule that under no foreseeable circumstances could such evidence obtain a different result here, the Commission should reopen its record to include such evidence and then apply its rules and law in arriving at the correct application, here. This case will be stayed pending further proceedings at the Commission.

Very truly yours,

A handwritten signature in black ink, appearing to read "Don A. Dickey", written over the typed name below.

Don A. Dickey
Circuit Court Judge

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