

December 3, 2008

VIA ELECTRONIC <*PUC.FilingCenter@state.or.us*>
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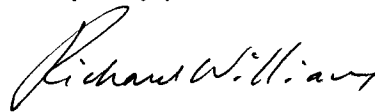
Attention: Filing Center
Public Utility Commission of Oregon
550 Capitol Street NE #215
PO Box 2148
Salem, OR 97308-2148

Re: *Wah Chang, Petitioner v. PacifiCorp, Respondent*
Docket UM 1002

Dear Sir or Madam:

Enclosed for filing is the original of Wah Chang's Request for Official Notice, with attached Exhibits A, B and C and the Certificate of Service.

Very truly yours,



Richard H. Williams

Enclosure

cc (*by electronic and regular mail*):
The Honorable Patrick Power
Ms. Natalie Hocken
Mr. Paul Graham
Mr. Robert L. Aldisert
Mr. Lawrence H. Reichman

006854.0164/752936.1

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1002

7 WAH CHANG,)	
)	
8 vs.)	WAH CHANG'S REQUEST
)	FOR OFFICIAL NOTICE
10 PACIFICORP,)	
)	
11 Respondent.)	
12 _____)		

13 Pursuant to OAR 860-014-0050, Wah Chang requests that the Commission take official
14 notice of the following facts:

15 1. By Order dated November 26, 2008, the Oregon Supreme Court denied
16 PacifiCorp's petition for a writ of mandamus (the "Mandamus Petition"). A copy of the Order is
17 attached hereto as Exhibit A.

18 2. The Mandamus Petition sought a writ directing the Linn County Circuit Court to
19 stay or abate the action entitled *Wah Chang v. PacifiCorp*, Linn County Circuit Court Case No.
20 00-2578 (the "Linn County Action") pending the Commission's decision in UM 1002. A copy
21 of the Mandamus Petition is attached hereto as Exhibit B.

22 3. In the Linn County Action, Wah Chang alleges, among other claims, (a) that Wah
23 Chang is entitled at common law to rescind the Master Electric Service Agreement dated
24 September 11, 2000 and (b) that PacifiCorp's trading activities during the western electricity
25 tortiously breached the covenant of good faith and fair dealing. A copy of Wah Chang's Second
26 Amended Complaint filed in the Linn County Action is attached hereto as Exhibit C.

1 **DISCUSSION**

2 The Commission may take official notice of “[a]ll matters of which the courts of the State
3 of Oregon take notice.” OAR 860-014-0050(1)(a). Courts may take notice of a fact “ * * * not
4 subject to reasonable dispute in that it is * * * [c]apable of accurate and ready determination by
5 resort to sources whose accuracy cannot reasonably be questioned.” ORS 40.065. Such facts
6 include court orders and the existence of pleadings filed with a court. *Niman and Niman*, 206
7 Or App 259, 275 n. 10, 136 P3d 105 (2006)(court order); *Petersen v. Crook County*, 172 Or App
8 44, 51, 17 P3d 563 (2001)(court may notice that certain statements were made in court records,
9 but not the truth of the statements). The noticed facts identified above are not subject to
10 reasonable dispute, and they qualify for official notice by the Commission.

11 The noticed facts are relevant to show that the contract and tort issues to be decided in the
12 Linn County Action are different from the public utility rate issues to be decided in UM 1002.
13 PacifiCorp asserted in the Mandamus Petition that UM 1002 and the Linn County Action
14 presented the “same or similar claims” (Petition, paragraph 4) and that “[t]he issues raised in the
15 [Linn County] Action by Wah Chang are already before the PUC by virtue of a Petition [in
16 UM 1002]” (Petition, paragraph 9). According to PacifiCorp “the Linn County Court [had]
17 committed clear and fundamental legal error” in failing to stay or abate the Linn County Action
18 based on the Commission’s primary jurisdiction, and the Supreme Court’s order “directing” such
19 a stay was therefore “required” (Petition, paragraphs 4, 10).

20 The Supreme Court’s denial of the Mandamus Petition is consistent with Wah Chang’s
21 position that the claims before the Commission and the circuit court, as well as the body of law
22 to be applied and the facts relevant to those claims, are different. The Commission will decide
23 whether Wah Chang’s COB-indexed rate was just and reasonable. “To be just and reasonable,
24 rates must be cost-based and non-discriminatory.” *In re Klamath River Basin Irrigator Rates*,
25 Order No. 06-172 at 8. The court, on the other hand, will decide issues such as whether
26 Wah Chang contractually “assumed the risk” of fraudulent market manipulation and whether

1 Wah Chang must prove, as an element of its tort claim, a direct causal connection between
2 PacifiCorp's participation in trading schemes and Wah Chang's rates. The court is the
3 appropriate forum to decide those issues. If the Commission erroneously considers them to be
4 critical to its decision, the Commission ought to recognize that the court has primary jurisdiction
5 and defer to it. See cases cited in Wah Chang's Post-Hearing Opening Brief at pages 9-11.

6 The Linn County Action is scheduled for trial in July 2009.

7 DATED: December 3, 2008

8 LANE POWELL PC

9
10 By *Richard H. Williams*
11 Richard H. Williams, OSB No. 72284
Milo Petranovich, OSB No. 81337

12 Attorneys for Petitioner Wah Chang

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IN THE SUPREME COURT OF THE STATE OF OREGON

WAH CHANG,
Plaintiff-Adverse Party,

v.

PACIFICORP,
Defendant-Relator.

Linn County Circuit Court
002578

S056615

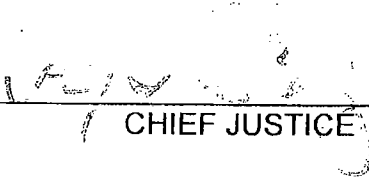
ORDER DENYING PETITION FOR WRIT OF MANDAMUS

Upon consideration by the court.

The petition for writ of mandamus is denied.

November 26, 2008

DATE


CHIEF JUSTICE

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Adverse Party

No costs allowed

c: Richard H Williams
Milo Petranovich
Robert L Aldisert
Christopher L Garrett
Banurekha Ramachandran
Thomas W Sondag
Hon. Daniel R Murphy

Vb/S056615odpw081126

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

Page 1 of 1

EXHIBIT A
PAGE 1 of 1

IN THE SUPREME COURT OF THE STATE OF OREGON

WAH CHANG,

Plaintiff-Adverse
Party,

v.

PACIFICORP,

Defendant-Relator.

Linn County Circuit Court

Case No. 00-2578

Supreme Court No. S _____

**PETITION FOR PEREMPTORY
WRIT OF MANDAMUS OR,
ALTERNATIVELY, FOR
ALTERNATIVE WRIT OF
MANDAMUS**

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Attorneys for Plaintiff-Adverse Party
Wah Chang

October 2008

24878-0008/LEGAL14734631.2

**PETITION FOR PEREMPTORY WRIT OF MANDAMUS OR,
ALTERNATIVELY, FOR ALTERNATIVE WRIT OF MANDAMUS**

Defendant-Relator PacifiCorp alleges as follows:

1.

This Court has jurisdiction under Article VII (Amended), section 2, of the Oregon Constitution, ORS 34.120(2), and ORS 34.250.

2.

Defendant-Relator PacifiCorp is the defendant in a Linn County Circuit Court action entitled *Wah Chang v. PacifiCorp*, Linn County Circuit Court Case No. 00-2578 (the "Action"). PacifiCorp is a public utility company subject to the regulation and supervision of the Public Utility Commission of Oregon ("PUC" or the "Commission"). ORS 756.040, 756.060, 757.005.

3.

Plaintiff-Adverse Party Wah Chang is the plaintiff in the Action. Wah Chang is a large industrial customer of PacifiCorp.

4.

The same day it filed the Action that is the subject of this Petition, Wah Chang filed a Petition with the PUC raising the same or similar claims. Wah Chang's claims before both the PUC and the Linn County Court ultimately require determination of the proper price for energy purchased from PacifiCorp. Determining an appropriate price for energy purchased from PacifiCorp is, by definition, rate-setting. As Wah Chang concedes, rate-setting is an activity within the exclusive purview of the PUC.

The PUC has primary jurisdiction over the issues raised in the Action because the remedy sought is none other than rate-setting. The PUC undeniably has specialized expertise in monitoring and setting retail energy prices, is intimately familiar with the history of the parties' negotiations, originally approved the special contract at issue, and is in the best position to address both the pertinent policy considerations and complex technical questions presented by this dispute. Because the PUC has primary jurisdiction over the dispute between the parties, the Linn County Court is required by this Court's decision in *Dreyer v. Portland General Elec. Co. ("PGE")*, 341 Or 262, 142 P3d 1010 (2006), to stay or abate the Action until the proceeding before the PUC is resolved.

5.

The statutes creating and authorizing the PUC direct the PUC to supervise and approve the entry by public utility companies such as PacifiCorp into special contracts for the supply of power to certain customers. ORS 757.230, OAR 860-022-0035. In 1997, Wah Chang and PacifiCorp asked the PUC to approve a special contract providing Wah Chang with non-tariff rates for power, and the PUC approved the special contract for a term of five years.

6.

The special contract provided that for its first three years, Wah Chang would enjoy a fixed and discounted rate for power, and that for its final two years, Wah Chang would pay rates based upon a published market index known as the DOW COB index.

7.

The Action involves a claim asserted by Wah Chang for a partial refund (in money) of its costs for energy for the final two years of the special contract. Wah Chang's claim against PacifiCorp is based on dysfunction in the energy markets in the Western United States elevating the DOW COB index, and on acts by PacifiCorp allegedly contributing to this dysfunction and the concomitant elevation of the DOW COB index and the contractual rate Wah Chang was therefore required to pay.

8.

On January 18, 2008, in the Linn County Action, PacifiCorp filed Motions to Stay or Dismiss Wah Chang's Second Amended Complaint, and a supporting memorandum. The Motion to Stay was made on the ground that the PUC had primary jurisdiction over the dispute and that this doctrine, as well as the interest in judicial economy, should lead the Linn County Court to stay the Action. On February 27, 2008, the Linn County Court heard oral argument on the Motions. On September 24, 2008, the Linn County Court, by letter, stated the action was to proceed and requested Wah Chang to draft an appropriate order. On September 29, 2008, PacifiCorp sent to the Court a letter requesting reconsideration of the Court's decision, and on October 2, 2008, the Linn County Court, by email, denied the request for reconsideration.¹ On October 8, 2008, the Linn County Court entered its order denying PacifiCorp's Motion to Stay. The Court has scheduled a pretrial conference on November 13, 2008. No trial date has yet been set.

¹ On October 8, 2008, by letter, the Court denied PacifiCorp's motion in the alternative to dismiss Wah Chang's claim for "tortious breach" of the duty of good faith and fair dealing.

9.

The issues raised in the Action by Wah Chang are already before the PUC by virtue of a Petition that Wah Chang filed with the Commission on December 1, 2000. The claims have been extensively briefed and argued before the PUC, a Commission ALJ has conducted an evidentiary hearing, including extensive expert testimony, and asked for and received additional information, bringing its receipt of evidence and briefing to thousands of pages. Final oral argument before the Commission itself is set for November 12, 2008, at 1:30 P.M., less than three weeks from the date of this filing. Accordingly, the PUC is far closer to resolving the dispute than is the Linn County Court.

10.

The doctrine of primary jurisdiction requires (and the interest in judicial economy overwhelmingly favors) allowing the PUC to be the body to accomplish initial resolution of this dispute. This case is indistinguishable in this respect from *Dreyer v. PGE*, 341 Or 262, 142 P3d 1010 (2006), in which this Court issued a peremptory writ of mandamus requiring the Marion County Circuit Court to abate the case before it pending resolution of the same dispute before the PUC. Therefore, in ordering the Action to proceed before resolution of the PUC proceeding, the Linn County Court committed clear and fundamental legal error. "[F]undamental legal error" warrants mandamus relief. See *State ex rel Keisling v. Norblad*, 317 Or 615, 623, 860 P2d 241 (1993) (abrogation on other grounds recognized by *League of Oregon Cities v. State*, 334 Or 645, 56 P3d 892 (2002)).

11.

Defendants do not have a plain, speedy, and adequate remedy in the ordinary course of the law. There is no provision under state law for an interlocutory appeal of the Linn County Court's erroneous order that the Action proceed at this time. See ORS 19.205 (authorizing appeals of judgments and certain types of orders not applicable here); ORS 19.225 (authorizing interlocutory appeals of certain orders in class actions); ORS 36.730 (authorizing interlocutory appeals of certain orders in arbitration cases). Indeed, this Court has issued mandamus requiring abatement of an action in Circuit Court when the same claims are pending before the PUC and are best addressed initially by the PUC. *Dreyer*, 341 Or 262. Without mandamus relief, the Linn County Court's order that the Action proceed without allowing the PUC the opportunity to address the claims cannot be remedied on appeal or otherwise.

12.

In addition to the lack of an adequate remedy that will result if the Linn County Court allows Wah Chang to present its claims to a jury before the PUC is able to address the technical and specialized questions presented by the claims, the Linn County Court's order that the Action proceed, regardless of the pending PUC proceeding, is legally erroneous. Even the discretionary judgments of a lower court may be reached by mandamus where those judgments rest on "fundamental legal error." *Keisling*, 317 Or 615.

13.

Granting a writ of mandamus is appropriate where the relator seeks relief from the harm of litigation in the wrong forum, such as where a court lacks jurisdiction or

where the venue selected by a plaintiff is improper. *See, e.g., Circus Circus Reno, Inc. v. Pope*, 317 Or 151, 854 P2d 461 (1993) (en banc) (granting writ of mandamus to compel dismissal where court lacked jurisdiction); *Nibler v. Oregon Dept. of Transportation*, 338 Or 19, 105 P3d 360 (2005) (granting writ of mandamus to compel grant of motion for change of venue). Here, PacifiCorp seeks relief from the harm of litigation in the wrong forum—the Linn County Court—when the same dispute, between the same parties, is already pending, and indeed, is nearing resolution, before the proper tribunal—the PUC.

14.

This petition is timely because it is being filed within 30 days after the Linn County Court entered its order denying PacifiCorp's Motion for a Stay, on October 8, 2008. The time for filing a mandamus petition is governed by the doctrine of laches. *State ex rel Fidanque v. Paulus*, 297 Or 711, 717-18, 688 P2d 1303 (1984). Laches is guided by the "most closely analogous statute of limitations." *Oregon State Bar v. Wright*, 309 Or 37, 41, 785 P2d 340 (1990). The most analogous statute of limitations here is ORS 19.255(1), which provides for a period of 30 days following entry of judgment in which to file an appeal in a civil action. *Cf. State ex rel Redden v. Van Hoomissen*, 281 Or 647, 576 P2d 355 (1978) (holding that the time in which the State may seek mandamus challenging a trial judge's order in a criminal case is limited to 30 days, the length of time in which a criminal appeal could be taken).

15.

PacifiCorp is entitled to recover its reasonable attorney fees, costs, and disbursements incurred in this mandamus proceeding pursuant to ORS 34.210.

16.

WHEREFORE, defendant-relator PacifiCorp petitions the Court to issue a peremptory writ of mandamus or, alternatively, an alternative writ of mandamus directed to the Honorable Daniel R. Murphy, directing him to stay or abate the Action in the Linn County Court pending resolution of Wah Chang's claims by the PUC.

DATED: October 24th 2008.

PERKINS COIE LLP

By: 

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Attorneys for Defendant-Relator PacifiCorp

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

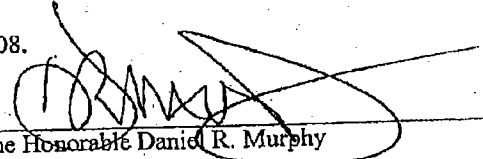
WAH CHANG,
Plaintiff,
vs.
PACIFICORP,
Defendant.

Case No. 002578
**ORDER DENYING DEFENDANT'S
MOTION TO STAY**

Defendant's motion to stay proceedings in this case came on for hearing before the Court on February 27, 2008. Defendant appeared by and through its attorneys, Robert L. Aldisert and Banu Ramachandran. Plaintiff appeared by and through its attorney, Milo Petranovich. The Court now being fully advised,

IT IS HEREBY ORDERED that defendant's motion is denied and the case shall proceed in the normal course.

DATED this 6 day of Oct, 2008.


The Honorable Daniel R. Murphy

Presented by:
Milo Petranovich, OSB No. 81337
Attorneys for Plaintiff Wah Chang

PAGE 1 - ORDER DENYING DEFENDANT'S MOTION TO STAY

006854.0167741240.1
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PORTLAND, OREGON 97204-3158
503.778.2100 FAX: 503.778.2200

EXHIBIT B
PAGE 9 of 10

NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on October 24, 2008, I filed the foregoing **PETITION FOR PEREMPTORY WRIT OF MANDAMUS OR, ALTERNATIVELY, FOR ALTERNATIVE WRIT OF MANDAMUS** with the Oregon Supreme Court by causing to be delivered the original thereof plus nine (9) true and complete copies, contained in a sealed package, hand-delivered to:

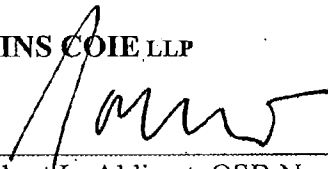
State Court Administrator
Records Section
Supreme Court Building
1163 State Street
Salem, Oregon 97310

I further certify that on the same date, I served the foregoing **PETITION FOR PEREMPTORY WRIT OF MANDAMUS OR, ALTERNATIVELY, FOR ALTERNATIVE WRIT OF MANDAMUS** on the following attorneys by causing to be hand-delivered two true and complete copies thereof, contained in a sealed package, to:

Hon. Daniel R. Murphy
Linn County Circuit Court
Linn County Courthouse
300 Fourth Avenue SW
Albany, OR 97321

Milo Petranovich
Lane Powell P.C.
601 S.W. Second Avenue, Ste. 2100
Portland, OR 97204

DATED: October 24, 2008.

PERKINS COIE LLP
By: 
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Christopher L. Garrett, OSB No. 031000
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Attorneys for Defendant-Relator PacifiCorp

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF LINN

Wah Chang,

v.
PacifiCorp,

Plaintiff,

Defendant.

Case No. 002578
SECOND AMENDED COMPLAINT
(Declaratory Relief; Rescission; Breach
of Duty of Good Faith and Fair Dealing;
Tortious Breach of Good Faith and Fair
Dealing; Money Had and Received;
Unjust Enrichment)
JURY TRIAL DEMANDED
NOT SUBJECT TO MANDATORY
ARBITRATION

Plaintiff alleges:

- 1.
- 2.
- 3.

Plaintiff is a division of TDY Industries, Inc., a California corporation.

Defendant is an Oregon corporation that generates, transmits, buys and sells electricity in Oregon as a public utility.

Plaintiff operates a plant in Millersburg, Oregon that manufactures specialty metals and chemicals. Plaintiff's plant and the City of Millersburg are located within defendant's public utility service territory. Historically and to date, defendant has supplied all of the electricity needs of plaintiff's Millersburg plant.

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4.

In 1997, plaintiff studied the possibility of cooperating with the City of Millersburg to form a municipal electric system to replace defendant as the seller of electricity to plaintiff and to City residents and businesses. The study concluded preliminarily that a municipal system was feasible and that a municipal system would enable plaintiff to take advantage of bulk power purchases in the wholesale market through competitive bids and negotiations at prices lower than defendant's scheduled rates. The study projected defendant's market-based power supply cost per megawatt hour for the five years 1998 through 2002 as follows:

<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>
\$14.80	\$15.30	\$16.20	\$19.60	\$24.40

The projections of market-based rates for the years 1998 through 2002 were based on estimates developed and published by defendant.

5.

When plaintiff informed defendant of its intent to cooperate with the City of Millersburg to form a municipal system, defendant proposed to enter into a five year contract to supply electricity to plaintiff at prices more favorable than defendant's scheduled rates.

6.

As a result of defendant's proposal, plaintiff and defendant entered into a Master Electric Service Agreement as of September 1, 1997. In the Master Electric Service Agreement, defendant agreed to sell, and plaintiff agreed to buy, all plaintiff's electric needs for its Millersburg facilities during the five year term of the Agreement. The Oregon Public Utility Commission approved the Agreement and it became effective on September 11, 1997. A copy of the Agreement is attached hereto as Exhibit A.

7.

In negotiating the terms of the Agreement, the parties had sought to identify a price that would cover defendant's marginal cost of producing electricity, and provide it a reasonable profit

1 in addition. For the first three contract years, the parties agreed to a fixed price per megawatt
2 hour that was based on defendant's estimate of its production costs. For the final two contract
3 years, defendant suggested that the production cost component be based on indices of firm on-
4 peak and firm off-peak prices (collectively, the "Dow COB index") published daily in *The Wall*
5 *Street Journal*.

6 8.

7 At the time the Agreement was executed, the Dow COB index stated the aggregate
8 average price of certain spot market bulk power purchases and sales negotiated by participating
9 wholesale buyers and wholesale sellers and reported to Dow-Jones. The transactions reflected
10 by the index were those calling for delivery of one-day (16 hour on-peak and 8 hour off-peak)
11 firm electricity at the California-Oregon border or the Nevada-Oregon border the day after the
12 transaction. Plaintiff was informed that the index reflected a market based on actual sales of
13 electricity. In addition, defendant provided plaintiff with a history of the index's prices showing
14 that the index did provide a rough approximation of the cost of producing electricity. That
15 correlation was consistent with the understanding in the marketplace.

16 9.

17 Plaintiff and defendant agreed not to fix a price for the fourth and fifth contract years
18 because regulation of the wholesale power markets was in a state of flux, moving from
19 traditional rate regulation to market-based pricing mechanisms. In particular, the California
20 electric industry was undergoing restructuring. In 1996, the California legislature enacted
21 legislation and the California Public Utilities Commission finalized an order to create an entity
22 known as the California Power Exchange ("CalPX") to act as an auction house for purchases and
23 sales of electricity by and to utilities regulated by the California Commission, and to create an
24 entity known as the Independent System Operator ("ISO") to reliably control transmission of that
25 electricity. The CalPX and the ISO, and the rules governing their operation, were designed to
26 reduce electricity prices by authorizing sales of electricity at market-based prices and by

1 facilitating reliable delivery of the electricity so purchased. In 1997, the Federal Energy
2 Regulatory Commission (“FERC”) approved the California restructuring, and the ISO and
3 CalPX began operation in March 1998.

4 10.

5 The restructuring of the California electricity market proved to be disastrous due to
6 serious market design flaws and behavior of market participants that resulted in extremely high
7 and volatile wholesale bulk power prices in California and elsewhere. After investigating, FERC
8 determined that many market participants engaged in unlawful manipulative trading schemes
9 that caused prices to increase throughout the West. These manipulative schemes occurred during
10 at least part of the period of indexed pricing under the Master Electric Service Agreement.

11 11.

12 The manipulative schemes went by various names. Under one scheme known as a
13 “Ricochet,” an entity inside California would purport to export electricity purchased in
14 California’s “day-ahead” market to an entity outside California, and then “import” the electricity
15 back to sell to the ISO in the “real-time” market without being subjected to ISO-imposed price
16 caps. Both transactions were a fiction, however, as no power was exported or imported: no
17 power flowed in either direction. For Ricochets to work, the California seller had to “park” the
18 fictitious export of electricity purchased day-ahead with a participant outside California, who
19 would then “return” it for sale in the real-time market as power coming from outside California.
20 Defendant provided a “parking” spot in numerous instances, often for Enron, charging a fee for
21 the service.

22 12.

23 Defendant played significant roles in other manipulative strategies developed by Enron,
24 including “Death Stars.” “Death Star” trading created a circular and self-canceling flow of
25 power to take advantage of the ISO’s “congestion management” system, which paid entities for
26 relieving congestion at transmission interfaces. Again, these transactions did not involve the

1 actual transmission of electricity. Some of the individuals who participated in these
2 manipulative schemes during the relevant period have admitted that their conduct was criminal.

3
4 13.

5 In May 2002, following published reports about possible illegal “megawatt laundering”
6 and the commencement of FERC’s investigation into conduct in the California markets,
7 defendant admitted to FERC that “[i]n a limited number of cases,” it had participated in “a buy
8 and sell transaction with a single counterparty at a single interface for a small fee.” Defendant
9 did not admit any wrongdoing in such transactions, but declared in a sworn statement to FERC
10 that it “was not the entity initiating the ricochet; rather, it acted as the intermediary for these
11 transactions.” It further claimed that “[b]y mid-November 2000,” it had “instructed its real time
12 personnel and advised counterparties that it would no longer facilitate such transactions,”
13 because it was concerned “the transactions might have elements of megawatt laundering.”
14 Defendant said it told employees and counterparties that it would participate in such transactions
15 only if the transaction were “unbundled” and completed as “two separate transactions” at
16 defendant’s system prices.

17
18 14.

19 But defendant’s traders did not stop participating in such transactions in “mid-November
20 2000.” Contrary to defendant’s sworn assertions to FERC, the transactions continued, not in an
21 “unbundled” manner and not at defendant’s system prices, but at “prices” arbitrarily and simply
22 set to account for the “parking” fee to be paid to defendant. Defendant engaged in many
23 hundreds of such transactions with Enron and others who sought to manipulate the California
24 markets or the trading rules in those markets. Defendant would “buy” electricity at COB from a
25 counterparty and immediately “resell” it to the same counterparty, but at a higher price. Again,
26 no electricity was actually transmitted, and defendant simply charged a fee to the counterparty
for the sham “buy and sell” transaction.

1
2 The Dow COB index was influenced by real and sham transactions in the spot market for
3 wholesale bulk power in California, and manipulations of the California market were reflected in
4 extremely high and volatile Dow COB index prices. Ricochets, Death Stars, and other sham and
5 manipulative transactions occurred at COB in large numbers, and defendant participated in such
6 transactions. Defendant's traders spoke favorably of "flipping energy at COB," noting that the
7 income generated was well worth "the small amount of work needed to put the buy in one
8 account and the sell in another." One of defendant's traders found the practices "sort of funny,"
9 even as he asked his superiors whether such conduct might harm Northwest consumers by
10 "get[ting] the NW prices bumped up to a level just below what the ISO is willing to pay oom
11 [out-of-market]." The trader's superior responded that "NW market prices should be related to
12 what the CISO [California ISO] will pay," and that "we need to do what makes sense for us, and
13 the exchange seems to be a relatively low profile approach to take." That communication took
14 place in December 2000. That same month, plaintiff paid an average of \$504.19 per megawatt
15 hour under the Master Electric Service Agreement.

16
17 From the inception of the Dow COB index in June 1995 to the date of the Agreement, the
18 index generally varied between \$10 and \$16 per megawatt hour and averaged approximately \$14
19 per megawatt hour. As a result of manipulative conduct and its effect on the index, the prices
20 payable by plaintiff under the Master Electric Service Agreement from and after September 11,
21 2000 rose dramatically. Dow COB index pricing became effective under the Agreement during
22 the billing period from August 31, 2000 to October 2, 2000, applying to electricity used on and
23 after September 11, 2000 as calculated by pro ration. A copy of defendant's invoice to plaintiff
24 for that billing period is attached hereto as Exhibit B-1. As shown by Exhibit B-1, the Dow COB
25 index price for the billing period was \$119.13 per megawatt hour, resulting in a total contract
26 price of \$141.37 per megawatt hour for the period on and after September 11, 2000, more than

1 500% higher than the rate in effect for periods before September 2000. Attached hereto as
2 Exhibit B-2 is a copy of defendant's invoice to plaintiff for the billing period from October 2,
3 2000 to October 31, 2000. As shown by Exhibit B-2, the Dow COB index price for the billing
4 period was \$101.26 per megawatt hour, resulting in a total contract price of \$121.92 per
5 megawatt hour, approximately 435% higher than the rate in effect for periods before September
6 2000. Pricing for several months thereafter was similar or worse.

7 17.

8 Defendant reaped large windfall profits from plaintiff's payments based on Dow COB
9 index pricing.

10 FIRST CLAIM

11 (Declaratory Relief)

12 18.

13 Plaintiff realleges paragraphs 1 through 17.

14 19.

15 A principal purpose of plaintiff's in entering into the Master Electric Service Agreement
16 was to purchase electricity at prices below defendant's scheduled rates. Defendant understood
17 plaintiff had that purpose. In selecting the Dow COB index as the basis for the Agreement's
18 price during the fourth and fifth contract years, the parties assumed that that index would reflect
19 a market in which electricity was actually purchased and sold, and would approximate the
20 marginal cost of producing electricity of the least efficient generator in that market. In fact, the
21 market during those contract years was not based only on actual sales and purchases of
22 electricity, but included and was heavily influenced by sham sales and purchases, and other
23 manipulative trading practices. In addition, the index did not approximate the marginal cost of
24 producing electricity, but greatly exceeded that cost. Those supervening circumstances, the non-
25 occurrence of which were basic assumptions on which the Master Electric Service Agreement
26

1 was made, frustrated plaintiff's purpose of purchasing electricity at prices below defendant's
2 scheduled rates.

3 20.

4 Due to the foregoing frustration of purpose, plaintiff is entitled to a declaration that it had
5 no obligation from and after September 11, 2000 to perform under the Agreement.

6 SECOND CLAIM

7 (Rescission)

8 21.

9 Plaintiff realleges paragraphs 1 through 20.

10 22.

11 Because plaintiff had no obligation from and after September 11, 2000 to perform under
12 the Agreement, defendant should be required to return to plaintiff the sums plaintiff paid under
13 the Agreement for electricity after September 11, 2000—at least \$36.8 million—less the amounts
14 plaintiff would have paid for that electricity had it not entered into the Agreement. Defendant
15 has had the use of those funds since the time of each payment after September 11, 2000, and
16 their amount is readily ascertainable. Accordingly, plaintiff is entitled to interest on each
17 payment it made to defendant for electricity, as reduced by the amount plaintiff would have paid
18 for that electricity had it not entered into the Agreement, at a rate of 9 percent per annum from
19 the time of each payment.

20 23.

21 The Oregon Public Utility Commission has exclusive jurisdiction to set rates for
22 intrastate retail purchases of electricity. In the event liability is established or relief is awarded
23 under any claim alleged herein, the court should request that the Commission set a rate for
24 plaintiff's electricity purchases from defendant for the period beginning September 2000 and
25 ending September 2002, to establish the amounts plaintiff would have paid for that electricity
26 had it not entered into the Agreement.

1 THIRD CLAIM

2 (Breach of Duty of Good Faith and Fair Dealing)

3 24.

4 Plaintiff realleges paragraphs 1 through 17 and 23 above.

5 25.

6 In selecting the Dow COB index as the price index for the final two years of the
7 Agreement, the parties had objectively reasonable expectations that neither party would engage
8 in manipulative conduct that influenced the index, or would cause the index to yield a price that
9 did not approximate the marginal cost of producing electricity. The parties also had objectively
10 reasonable expectations that each would act honestly in its dealings with the other under the
11 Agreement, and in litigation over it.

12 26.

13 Plaintiff performed all of its obligations under the Master Electric Service Agreement.
14 Defendant did not. Defendant engaged in manipulative, sham transactions that increased the
15 price of electricity in the California markets and at COB, thereby leading to increases in the Dow
16 COB index and in the prices plaintiff paid under the Agreement. Thus, while plaintiff was
17 paying exorbitant prices for electricity, defendant was knowingly participating in sham sales that
18 drove up that price, and concealing from plaintiff its participation and the participation of others
19 in such manipulative conduct. Defendant's actions were contrary to plaintiff's subjectively and
20 objectively reasonable expectations under the Agreement, and breached the obligation of good
21 faith and fair dealing implied in the Agreement.

22 27.

23 Defendant's obligation of good faith and fair dealing extended to litigation over the
24 Agreement's enforcement. After plaintiff filed this action to resolve the parties' rights under the
25 Agreement, defendant continued to participate in manipulative transactions that influenced the
26 index the parties had selected to establish the price plaintiff was to pay under the Agreement.

1 Defendant failed to advise plaintiff of its conduct, or of the manipulative conduct of others.
2 Defendant also filed false and misleading statements with FERC concerning its conduct, and
3 failed to correct them when it knew plaintiff was relying on them. These actions, too, were
4 contrary to plaintiff's subjectively and objectively reasonable expectations under the Agreement,
5 and materially breached the obligation of good faith and fair dealing implied in the Agreement.

6 28.

7 Defendant's breaches of the Agreement were material, defeating the object of the
8 Agreement and of the price index the parties had selected for use during the final two years of
9 the Agreement. Defendant should not be permitted to retain the benefits it received from
10 plaintiff during those years. Plaintiff is entitled to the return from defendant of the amounts
11 plaintiff paid under the Agreement for electricity during those years, at least \$36.8 million, less
12 the amounts plaintiff would have paid for that electricity had it not entered into the Agreement.
13 Plaintiff also is entitled to interest on each payment it made to defendant for that electricity,
14 reduced by the amount plaintiff would have paid for that electricity had it not entered into the
15 Agreement, at a rate of 9 percent per annum from the time of each payment.

16 FOURTH CLAIM

17 (Tortious Breach of Duty of Good Faith and Fair Dealing)

18 29.

19 Plaintiff realleges paragraphs 1 through 17 and 23 above.

20 30.

21 Defendant has been granted a privilege by the State of Oregon: a monopoly on the sale
22 and distribution of electricity in various geographical territories within the State, including the
23 territory in which plaintiff's operating facilities are located. As a consequence, defendant was
24 plaintiff's sole supplier of electricity during the term of the Master Electric Service Agreement.
25 Plaintiff could not simply cease purchasing electricity from defendant and obtain supply from
26 another seller. A continuous supply of electricity is vital to plaintiff's business, and plaintiff was

1 thus dependent on defendant acting in good faith in matters relating to the supply of that
2 electricity. Moreover, in agreeing to a price index that defendant could influence by its market
3 conduct, plaintiff had a right to and did rely on defendant to act in good faith in engaging in such
4 conduct. Due to its special relationship with plaintiff, defendant owed plaintiff these duties of
5 good faith independent of the Master Electric Service Agreement.

6 31.

7 Defendant breached the duties it owed to plaintiff by participating in the manipulative,
8 sham transactions described above, which increased the price of electricity at COB, increased the
9 Dow COB index, and increased the prices plaintiff paid for electricity under the Agreement.
10 Defendant further breached its duties to plaintiff by concealing from plaintiff its participation
11 and the participation of others in such acts even as plaintiff sought relief from obligations under
12 the Agreement that became extraordinarily onerous as a consequence of those acts.

13 32.

14 Defendant's breaches of its duties defeated the object of the Agreement and the price
15 index the parties agreed to use during the final two years of the Agreement, and defendant should
16 not retain the benefits it received from plaintiff during those years. Plaintiff is entitled to the
17 return from defendant of the amounts plaintiff paid under the Agreement for electricity during
18 those years, at least \$36.8 million, less the amounts plaintiff would have paid for that electricity
19 had it not entered into the Agreement. Plaintiff also is entitled to interest on each payment it
20 made to defendant for that electricity, reduced by the amount plaintiff would have paid for that
21 electricity had it not entered into the Agreement, at a rate of 9 percent per annum from the time
22 of each payment.

23 FIFTH CLAIM

24 (Money Had and Received)

25 33.

26 Plaintiff realleges paragraphs 1 through 17 and 23 above.

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34.

During the final two years of the Master Electric Service Agreement, defendant concealed from plaintiff facts that would have excused plaintiff from performing its obligations under the Agreement. Defendant participated in the manipulation of the market that inflated the index establishing the prices plaintiff paid under the Agreement, concealed such manipulation from plaintiff, and was unjustly enriched thereby.

35.

Plaintiff is entitled to the return from defendant of the amounts plaintiff paid under the Agreement for electricity during those years, at least \$36.8 million, less the amounts plaintiff would have paid for that electricity had it not entered into the Agreement. Plaintiff also is entitled to interest on each payment it made to defendant for that electricity, reduced by the amount plaintiff would have paid for that electricity had it not entered into the Agreement, at a rate of 9 percent per annum from the time of each payment.

SIXTH CLAIM
(Unjust Enrichment)

36.

Plaintiff realleges paragraphs 1 through 17 and 23 above.

37.

Plaintiff paid defendant under protest at the price specified in the Master Electric Service Agreement for invoiced billing periods from and after September 11, 2000.

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Defendant has been unjustly enriched by the payments plaintiff made to it for electricity from and after September 11, 2000, and should not retain the benefits of those payments. Plaintiff is entitled to the return from defendant of the amounts plaintiff paid for that electricity, at least \$36.8 million, less the amounts plaintiff would have paid for that electricity had it not entered into the Agreement. Plaintiff also is entitled to interest on each payment it made to defendant, reduced by the amount plaintiff would have paid for that electricity had it not entered into the Agreement, at a rate of 9 percent per annum from the time of each payment.

NOW, THEREFORE, plaintiff prays for judgment:

- 1. Declaring that plaintiff had no obligation from and after September 11, 2000 to perform under the Master Electric Service Agreement;
- 2. Requesting the Oregon Public Utility Commission to establish a rate for plaintiff's electricity purchases from defendant from September 11, 2000 through September 10, 2002;
- 3. Awarding plaintiff damages in an amount to be determined at trial and believed to be at least \$36.8 million, less the amount plaintiff would have paid for electricity from defendant from September 11, 2000 through September 10, 2002 had it not entered into the Master Electric Service Agreement, which amount shall be based on the Oregon Public Utility Commission's determination of a rate for plaintiff's purchases from September 11, 2000 through September 10, 2002;
- 4. Awarding plaintiff interest on each payment made under the Agreement since September 11, 2000, less the amount plaintiff would have paid for electricity had it not entered into the Master Electric Service Agreement, at 9 percent per annum from the time of payment;
- 5. Awarding plaintiff its costs of suit; and

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6. Granting plaintiff such additional or other relief as may be just.

DATED: December 14, 2007

LANE POWELL PC

By 

Richard H. Williams, OSB No. 72284
Milo Petranovich, OSB No. 81337
601 SW Second Avenue, Suite 2100
Portland, OR 97204
Telephone: (503) 778-2100
Facsimile: (503) 778-2200


Attorneys for Plaintiff

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on December 14, 2007, I caused to be served a copy of the foregoing
3 **SECOND AMENDED COMPLAINT** on the following person(s) in the manner indicated
4 below at the following address:

5 Robert L. Aldisert
6 Perkins Coie LLP
7 1120 NW Couch Street, Tenth Floor
8 Portland, OR 97209-4128
9 Telephone: (503) 727-2056
10 Facsimile: (503) 727-2222
11 E-Mail: raldisert@perkinscoie.com

- 12 by CM/ECF
- 13 by Electronic Mail
- 14 by Facsimile Transmission
- 15 by First Class Mail
- 16 by Hand Delivery
- 17 by Overnight Delivery

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Milo Petranovich

Linn County Circuit Court Other
Attorney: M. Petronovich Our File No. 006754-107
Case No. 002578

Wah Chang v. Pac F Corp

(Title of Case)
Second Amended Complaint

(Title of Document)

Was signed _____, by _____
 Was entered 12-14-07, by _____
 Was filed 12-14-07, by _____
 Other _____

Remarks _____

(Judge) (Deputy) (Clerk) CM

1 CERTIFICATE OF SERVICE

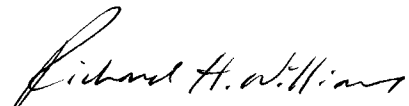
2 I certify that on December 3, 2008, I served the foregoing WAH CHANG'S REQUEST
3 FOR OFFICIAL NOTICE upon all parties of record in this proceeding, by delivering a copy in
4 person or by mailing a copy properly addressed with first class postage prepaid, or by electronic
5 mail pursuant to OAR 860-013-0070, to the following parties or attorneys of parties:

6 Paul Graham
7 Assistant Attorney General
8 Department of Justice
9 Regulated Utility & Business Section
10 1162 Court Street NE
11 Salem, OR 97301-4096
12 paul.graham@state.or.us

13 Natalie Hocken
14 Vice President & General Counsel
15 PacifiCorp
16 825 NE Multnomah, Suite 2000
17 Portland, OR 97232
18 natalie.hocken@pacificorp.com

19 Robert L. Aldisert
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27 
28 _____
29 Richard H. Williams
30 Of Attorneys for Petitioner Wah Chang