

August 28, 2007

**BY ELECTRONIC MAIL (*PUC.FilingCenter@state.or.us*)
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Public Utility Commission of Oregon
Attention: Filing Center
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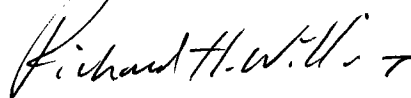
Re: *Wah Chang, Petitioner v. PacifiCorp, Respondent*
Docket UM 1002

Dear Sir or Madam:

Enclosed for filing is Wah Chang's Motion for Leave to File Reply in Support of Motion for Finding Regarding PacifiCorp's Participation in Electricity Market Manipulation, along with the Certificate of Service.

Wah Chang's proposed reply is attached to the motion. If the motion is granted, Wah Chang will separately file the reply in the attached form.

Very truly yours,



Richard H. Williams

Enclosures
cc (w/enc): Service List
ALJ Patrick Power

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4 **BEFORE THE PUBLIC UTILITY COMMISSION**
5 **OF THE STATE OF OREGON**

6 **UM 1002**

7 WAH CHANG,

8 Petitioner,

9 vs.

10 PACIFICORP,

11 Respondent.


)
) **WAH CHANG'S MOTION FOR**
) **LEAVE TO FILE REPLY IN SUPPORT**
) **OF MOTION FOR FINDING REGARDING**
) **PACIFICORP'S PARTICIPATION IN**
) **ELECTRICITY MARKET**
) **MANIPULATION**

12 Wah Chang hereby moves for leave to file the attached reply memorandum in support of
13 its motion for a finding that PacifiCorp participated in electricity market manipulation schemes.
14 A reply is necessary to correct factual mistakes contained in PacifiCorp's response to the motion,
15 and to clarify the standard of decision. This motion, and its accompanying reply memorandum,
16 have been filed promptly, within less than seven days after the filing of PacifiCorp's response,
17 and Wah Chang believes the reply memorandum will assist the Commission in resolving the
18 underlying motion.

19 If the motion is granted, Wah Change will separately file the reply in the form attached
20 hereto.

21 DATED: August 28, 2007.

22 LANE POWELL PC

23
24 By 
25 Richard H. Williams, OSB No. 72284
Milo Petranovich, OSB No. 81337
Stephanie Hendricks, OSB No. 03573

26 Attorneys for Petitioner Wah Chang

**PAGE 1 - WAH CHANG'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION
FOR FINDING REGARDING PACIFICORP'S PARTICIPATION IN ELECTRICITY
MARKET MANIPULATION (UM 1002)**

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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1002

WAH CHANG,)	
)	
vs.)	WAH CHANG’S REPLY IN SUPPORT OF MOTION FOR FINDING REGARDING PACIFICORP’S PARTICIPATION IN ELECTRICITY MARKET MANIPULATION
PACIFICORP,)	
)	
Respondent.)	

Wah Chang submits this reply in support of its motion for a finding by the Commission regarding PacifiCorp’s participation in electricity market manipulation. In contrast to PacifiCorp’s improper attempt to argue the underlying merits of the case, Response at 1-3, Wah Chang confines itself to the issue presented by the motion: whether PacifiCorp’s willful suppression of evidence warrants a finding that it knowingly participated in the manipulation of the electricity market that led to the unjust and unreasonable prices Wah Chang was forced to pay under the MESA. As shown below, the record permits no debate. PacifiCorp has effectively acknowledged its willful suppression of evidence, and has left the Commission no option but to grant Wah Chang’s motion.

I. REPLY ON THE FACTS

PacifiCorp makes no effort to contradict Wah Chang’s evidentiary showing and thus concedes that (1) retention of tape recordings of its traders’ transactions is necessary to its business; (2) the tapes it claimed for years never existed did, in fact, exist; and (3) its explanation to both FERC and Wah Chang for the tapes’ non-existence was not only false, but nonsensically

1 so—as mere passing acquaintance with the operation of PacifiCorp’s WordNet recording device
2 reveals. *See* Motion at 2-9.

3 PacifiCorp strangely believes its position is aided by the fact that it gave FERC the same
4 unfounded explanation for the missing tapes that it gave Wah Chang, Response at 3-4, but a false
5 representation does not become true through repetition. In this regard, Wah Chang did *not* state
6 in its motion that PacifiCorp failed to advise FERC that the tapes were missing. Response at 4.
7 What Wah Chang asserted—accurately—was that while PacifiCorp claimed to have discovered
8 that the tapes were missing when it “prepare[d] its response to FERCs data request dated May 8,
9 2002,”¹ it failed to disclose that fact to FERC when it responded to “the *referenced* FERC data
10 request”—that is, the *May 8, 2002* data request.² Instead, it offered FERC “a sampling” of audio
11 recordings from the relevant period, but omitted to point out that it was *missing* recordings from
12 that period.³ If, in fact, the tapes were then missing—and there is no evidence that they were,
13 save for PacifiCorp’s claim to that effect—one would think that PacifiCorp would have advised
14 FERC of that fact at that time.

15 But it did not do so. Not until FERC and the California Parties specifically *asked*
16 PacifiCorp whether any information had been destroyed did PacifiCorp volunteer that the tapes
17 were missing, offering the same impossible explanation it later offered Wah Chang. Response
18 at 3-4 & nn.4, 5 and Attachments 1-3. It made that disclosure in January 2003 and again in June
19 2003, *id.*, several months after responding to the May 8, 2002 data request.

20 PacifiCorp now concedes, as it must, that its explanation, to FERC and to Wah Chang,
21 was flawed, but attempts (in a footnote) to excuse itself:

22

23 ¹ Motion at 5 (quoting WC/1112, p. 12 (Response to Wah Chang DR 81)).

24 ² Motion at 6.

25 ³ *Id.*

26

1 PacifiCorp inquired of the personnel responsible for custody of the tapes, and the
2 best explanation of what may have occurred was a tape machine malfunction, as
3 disclosed in the FERC proceedings. While this explanation may now be revealed
4 to have been in error, at the time PacifiCorp was not aware of any evidence
5 indicating that the tapes may have existed at some point in time.

6 Response at 9 n.6. Thus, even while acknowledging that its original explanation was “in error,”
7 PacifiCorp steadfastly claims that that was “the best explanation” it could manufacture at the
8 time. That, frankly, is as incredible an assertion as the original explanation.

9 The “personnel responsible for custody of the tapes” were, of course, *PacifiCorp*
10 personnel, and included persons with extensive experience with PacifiCorp’s trading activities
11 and recording of those activities. Response, Attachment 1 at 10. The documents Wah Chang
12 has submitted to show that the tapes existed would have been one of the first places such
13 personnel would have looked to determine whether the tapes existed: the “Check Out Sheets”
14 and “blotters” were and are routinely used by PacifiCorp to reconcile disputed trades.⁴ Those
15 documents confirmed that, contrary to PacifiCorp’s explanation to FERC and to Wah Chang, the
16 WordNet recording device *was* turned on and functioning properly. And even a rudimentary
17 understanding of the WordNet device—something certainly possessed by many of the
18 “personnel” responsible for preparing the response to FERC’s data request—also would have led
19 one to reject PacifiCorp’s explanation concerning the claimed loss of the tapes.

20 In the face of the undisputed evidence, PacifiCorp’s present assertions that (1) its prior
21 explanation was “the best” it could offer, and (2) it was “not aware of any evidence indicating
22 that the tapes may have existed at some point,” cannot be accepted. The tapes are PacifiCorp’s
23 “most reliable data” for “[r]esolv[ing] discrepancies in trade transactions.”⁵ Resort to those tapes
24 was and is a commonplace, and if the recordings had not existed, PacifiCorp would have learned

25 ⁴ See Motion at 7-9; Affidavit of Deborah J. Stare in Support of Motion (“Stare Aff.”), Ex. 1;
26 Affidavit of Robert M. McCulloch in Support of Motion, ¶¶ 2-4, Ex. 1.

⁵ Stare Aff., Ex. 2 at 1.

1 that fact long before May 2002: indeed, it would have learned that fact mere days after any
2 “malfunction” of the WordNet device, when it attempted to reconcile disputed transactions.

3 II. ARGUMENT

4 PacifiCorp’s opposition to Wah Chang’s motion is founded on the premise that Wah
5 Chang must present “actual, direct evidence of intentional destruction” of the tapes. Response
6 at 8; see also *id.* at 2, 5-6, 9-10 (relying on same premise). PacifiCorp is mistaken. Wah Chang
7 has shown that evidence in PacifiCorp’s custody no longer exists, and that the evidence is such
8 that it ordinarily would continue to exist. That showing requires PacifiCorp to come forward
9 with at least *some* proof that it did not destroy the evidence:

10 Requiring an eyewitness to testify to the act of destruction is surely
11 too stiff a burden; such a requirement would make proof of the
12 spoliation inference all but impossible. Rather, the fact of
13 destruction can appropriately be established in many cases by
14 circumstantial evidence. *Proof that the evidence once existed, that
it is no longer available, and that it would ordinarily have been
retained, should suffice to shift the burden of persuasion to the
alleged spoliator to establish that the evidence was not destroyed.*

15 Gorelick, Marzen & Solum, *Destruction of Evidence* § 2.21 at p. 54 (1989) (emphasis added).
16 Here, PacifiCorp has come forward with no evidence whatsoever to show that the tapes were not
17 destroyed. The only available conclusion is that they were.

18 The same analysis reveals that PacifiCorp’s destruction of evidence was intentional, or,
19 under the Oregon standard, that its “suppression” of evidence was “willful.” See OEC 311(1)(c)
20 (requiring presumption that “[e]vidence willfully suppressed would be adverse to the party
21 suppressing it”). Again, Wah Chang’s showing requires PacifiCorp to come forward with
22 evidence that the tapes’ suppression was *not* willful:

23 The fact that records which under normal circumstances
24 would have been retained were missing *puts the burden on their
custodian to demonstrate that their disappearance was innocent.
25 Absent an adequate explanation, the spoliation inference may be
drawn even without direct proof of intentionality.*

1 Gorelick § 2.21 at p. 55 (emphasis added). Wah Chang has shown that under normal
2 circumstances, the tapes would have been retained—indeed, all other tapes *were* retained.⁶ And,
3 as even PacifiCorp concedes, the only explanation it has offered for the absence of the tapes is
4 decidedly *inadequate*. Thus, Wah Chang’s showing is undisputed, and yields but one
5 conclusion: PacifiCorp willfully suppressed the tapes.

6 In light of the undisputed record before the Commission, PacifiCorp’s effort to seek
7 sanctuary in federal case law is mystifying. Even if there *were* agreement among the federal
8 courts as to the necessity of showing a spoliator’s “bad faith”—and there is none, *see, e.g.*,
9 Gorelick, § 3.11 at p. 106 (2000 Cum. Supp.) (and cases cited therein)—and even if that standard
10 *did* apply in Oregon—and it does not, *see, e.g., Booher v. Brown*, 173 Or. 464, 474, 146 P.2d 71
11 (1944) (requiring spoliator to show that “the evidence was destroyed under circumstances which
12 free the party from suspicion of intentional fraud,” *and* that the party “was without neglect or
13 default in the premises”)—it would be to no end. PacifiCorp has not shown that its destruction
14 of the tapes was “inadvertent” or the consequence of “[m]ere negligence.” Response at 6
15 (*quoting Vick v. Texas Employment Comm’n*, 514 F.2d 734, 737 (5th Cir. 1975)).

16 Nor is the destruction “wholly unexplained.” *Id.* (*quoting Bashir v. Amtrak*, 119 F.3d
17 929, 932 (11th Cir. 1997)). PacifiCorp did offer an explanation, but one it now concedes is
18 baseless.⁷ And yet, *it has offered no further explanation*. This, by itself, establishes PacifiCorp’s
19 “bad faith.” PacifiCorp complains that *Wah Chang* “has produced no evidence whatsoever that
20 would justify the extraordinary relief that Wah Chang requests,” Response at 3, but it is
21 *PacifiCorp* that has produced no evidence when it was obligated to do so. That failure inevitably
22 leads to the conclusion that Wah Chang’s request for relief should be granted.

23 ⁶ *Stare Aff.*, Ex. 3 at 7:19-23 (Testimony of John Apperson).

24 ⁷ The *Bashir* court did *not* hold that parties need not explain missing evidence; rather, it deemed
25 the absence of an explanation irrelevant in that case because the inference sought from the
26 missing evidence—that a train’s speed exceeded 80 miles per hour—was belied by “exceedingly
strong” evidence to the contrary. *Id.* A similar situation does not exist in this case.

1 By the same token, PacifiCorp has no basis for suggesting that the record “supports an
2 inference of *inadvertent* destruction as strongly as any other,” Response at 10 (emphasis in
3 original)—not when the only explanation proffered for that destruction has been shown to be a
4 false one. Indeed, on this record, the Commission *cannot* infer that the destruction was
5 inadvertent: PacifiCorp had its opportunity to explain itself and failed to do so. In that light, the
6 remedy Wah Chang seeks is neither “extreme” nor “plainly disproportionate,” Response at 10; it
7 is the only just result.

8 Misconceived for the same reason is PacifiCorp’s demand that before its destruction of
9 evidence can support an inference against it, one must first determine that it had a “duty” to
10 preserve the evidence. That argument is a red herring: PacifiCorp does not claim that it
11 destroyed the tapes as a matter of “routine,” and it offers no evidence to support its new-found
12 view that the tapes were of “limited long-term value or significance” to it. Response at 9. In
13 fact, PacifiCorp has acknowledged that tapes from the period *were* preserved; indeed, it
14 produced all of them (except for the missing ones) years after they were made.⁸ That alone
15 establishes that it *does* view the tapes of “long-term value or significance”: otherwise, why
16 would it retain them?

17 PacifiCorp does not in any case explain why its “duty” to maintain evidence would not
18 have arisen until Wah Chang filed its May 2002 motion for leave to present additional evidence.
19 Wah Chang filed this proceeding, and a circuit court action against PacifiCorp, on December 1,
20 2000. In both cases, Wah Chang sought relief from the outrageous prices it was paying under
21 the MESA. While *Wah Chang* was not aware in December 2000 that PacifiCorp was involved in
22 conduct affecting the prices it paid, *PacifiCorp* cannot suggest that the recordings were not then
23 relevant to Wah Chang’s claims. And again, it is undisputed that PacifiCorp *did* retain its tape
24 recordings, in 2000, in 2002, and thereafter.

25 ⁸ See WC/900-WC/904.

26

1 Finally, even if it was *not* until May 2002 that PacifiCorp had “reason to believe that it
2 would become involved in legal proceedings in which the tapes might be relevant,” Response
3 at 8, it has no basis for claiming that the evidence shows the tapes were destroyed “long before”
4 then. Response at 7. The only evidence is that the tapes existed, and PacifiCorp asserts that it
5 was not until May 2002 that it “discovered” that the tapes did *not* exist. Nothing in the record
6 shows that the tapes were destroyed “long before” that discovery. If PacifiCorp has evidence of
7 such a thing, it should have presented it.

8 Thus, Wah Chang has shown that PacifiCorp intentionally destroyed evidence. That
9 showing, in turn, “raises an unfavorable presumption against the party who destroyed [the
10 evidence].” *Booher*, 173 Or. at 474; *see also Stephens v. Bohlman*, 138 Or. App. 381, 386, 909
11 P.2d 208 (1995) (“wilful suppression of evidence raises an unfavorable presumption against the
12 party who suppressed it”); OEC 311(1)(c). PacifiCorp *might* have attempted to show that “the
13 evidence was destroyed under circumstances which free the party from suspicion of intentional
14 fraud,” *Booher*, 173 Or. at 474; had it done so, *and* had it also shown that it “was without neglect
15 or default in the premises,” *then* it might have submitted secondary evidence to establish that the
16 missing tapes would not have supported Wah Chang’s case. *Id.* But it has done none of those
17 things.

18 On this record, then, the inference Wah Chang has asked the Commission to draw is the
19 only one that can be drawn. A presumption, after all, “imposes on the party against whom it is
20 directed the burden of proving that the nonexistence of the presumed fact is more probable than
21 its existence.” OEC 308 (codified at ORS 40.120). PacifiCorp has failed to show that the
22 nonexistence of the presumed fact—that the missing tapes were adverse to it—is more probable
23 than the existence of that fact. As the Oregon Supreme Court explained in *Booher*:

24 After careful consideration of all the evidence, however, we are not
25 satisfied that the plaintiff overcame the inference which arose from
26 her destruction of the written evidence upon which she relied.
That inference is that, if the letters had been produced they would
have been unfavorable to her contentions * * *.

1 173 Or. at 475.

2 Finally, PacifiCorp cannot seriously contend that the Commission should assume that the
3 absence of the tapes “is of no practical consequence to Wah Chang’s ability to present its case.”
4 Response at 10. True enough, as PacifiCorp says, Wah Chang has been able to establish that
5 PacifiCorp participated in various market manipulation schemes, but describing the absence of
6 the tapes as nothing more than a pesky “irritation” to Wah Chang, *id.*, is silly. Among other
7 things, it ignores that the period at issue is a critical one—a period in which PacifiCorp took
8 PGE’s place in assisting Enron with its price manipulation schemes. *See* Motion at 7, 12. Given
9 the destruction of the audio recordings, PacifiCorp surely must perceive the irony of its
10 proclamation that its “part” in the “Enron play” was a “non-speaking role.” Response at 3 n.3.⁹

11 On the record that has been made, the Commission cannot assume that the loss of the
12 tapes is “harmless,” Response at 10; to the contrary, the Commission must assume that the tapes
13 from this critical period would have shed a sharp spotlight on PacifiCorp’s “role” in the “Enron
14 play.” Unfortunately, the tapes do not exist—that, at least, is what PacifiCorp says, without
15 offering any evidence that their nonexistence can be innocently explained. And that is why, on
16 this record, the Commission must find that the missing tapes would have established
17 PacifiCorp’s knowing, direct, and active participation in the electricity price manipulation
18 schemes that contributed to the tremendous escalation of prices in the market, and, ultimately,
19 caused Wah Chang to pay exorbitant prices for electricity pursuant to the MESA.

20 III. CONCLUSION

21 The Commission should find that PacifiCorp participated in electricity market
22 manipulation schemes during 2000-2001; that its participation was direct, active and knowing;

23 ⁹ PacifiCorp points out that it is not mentioned “even once” as a counterparty to Enron schemes
24 in the Initial Decision in *Enron Power Marketing*, 119 FERC ¶ 63,013 (June 21, 2007).
25 Response at 3 n.3. But that omission is meaningless: FERC’s focus was on Enron, not
26 PacifiCorp (which earlier settled with FERC for different actions during a different period). As
Wah Chang has shown, PacifiCorp unquestionably was a counterparty to Enron’s schemes.

1 and that it contributed to the inflated prices that Wah Chang was forced to pay pursuant to the
2 MESA.

3 DATED: _____

4 LANE POWELL PC

5

6

By _____

7

Richard H. Williams, OSB No. 72284

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Attorneys for Petitioner Wah Chang

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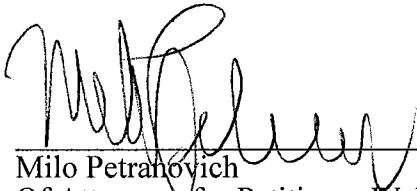
1 **CERTIFICATE OF SERVICE**

2 I certify that on August 28, 2007, I served WAH CHANG'S MOTION FOR LEAVE TO
3 FILE REPLY IN SUPPORT OF MOTION FOR FINDING REGARDING PACIFICORP'S
4 PARTICIPATION IN ELECTRICITY MARKET MANIPULATION upon all parties of record
5 in this proceeding, by delivering a copy in person or by mailing a copy properly addressed with
6 first class postage prepaid, or by electronic mail pursuant to OAR 860-013-0070, to the
7 following parties or attorneys of parties:

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