

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1002

WAH CHANG,)	
)	
Petitioner,)	
)	RULING
v.)	
)	
PACIFICORP,)	
)	
Respondent.)	

DISPOSITION: MOTION DENIED

Background

On May 18, 2007, Wah Chang filed a motion requesting that the Commission exclude “assumption of risk” as a defense that might be asserted by PacifiCorp in this proceeding. Wah Chang bases its motion on a recent decision by the Oregon Court of Appeals in regard to civil litigation between these same two parties involving the same subject matter (the Decision). (*Wah Chang v. PacifiCorp*, 212 Or. App. 14, ___ p.3d ___ (2007))

According to Wah Chang, the Decision supports its motion for two reasons: “*First*, it establishes that under the common law of contracts, Wah Chang’s mere acceptance of the risk of price variability is no basis to deny Wah Chang relief from the parties’ contract. . . . “*Second*, the Court of Appeals’ decision establishes that the Commission should *not* consider such issues, because their resolution is plainly for the circuit court.” Wah Chang argues that “[t]he circuit court’s primary jurisdiction to decide the ‘conventional common law contract issues’ presented in Wah Chang’s lawsuit – including those pertaining to allocation of risk – must be respected.”

Wah Chang further argues that this Commission’s own recent decisions establish that the focus in this proceeding should be on whether the “exceedingly high and volatile rates” were just and reasonable, citing several decisions regarding PacifiCorp’s Klamath Basin irrigator rates. Thus, Wah Chang concludes, the Commission should not deny it relief in this case on the grounds of assumption of risk, even had the Court of Appeals not issued the Decision.

PacifiCorp opposes Wah Chang's motion. PacifiCorp argues that Wah Chang's request is "unreasonable, impractical, and unfair."

According to PacifiCorp, the Commission's authority to approve special contracts necessarily extends to contract interpretation, including the application of common law principles. PacifiCorp argues that the Decision has no effect on the scope of the Commission's authority: "The Court of Appeals merely affirmed the trial court's ruling that there may be material issues of fact concerning the allocation of risk in the MESA."

PacifiCorp states that "Wah Chang cites no authority for its assertion that . . . the Commission should not consider all of the terms within a special contract." PacifiCorp quotes language from an earlier decision in this docket in which this Commission explicitly considered assumption of risk as one of the factors it took into account in denying relief to Wah Chang.

PacifiCorp states that Wah Chang will again argue that it did not bargain for the risk that the market prices would rise as high as they did, while PacifiCorp will argue to the contrary. PacifiCorp argues that "there is no legal basis" for the Commission to decide whether the subject rates were just and reasonable, without examining the risks assumed by Wah Chang.

PacifiCorp argues that the Decision has no effect on this proceeding: "All that has happened in the civil case is that the trial court has ruled (and the Court of Appeals has agreed) that there may be material issues of fact regarding the MESA's allocation of risk to Wah Chang." PacifiCorp states that it will continue to raise the assumption of risk defense in the civil case.

Discussion

The motion is denied. As stated by Circuit Court Judge Murphy in his letter opinion dated May 2, 2001, "the court has concurrent jurisdiction over this dispute and there is no basis at this time to defer to the PUC on contract issues." Implied in his use of "concurrent jurisdiction" is the understanding that this Commission also may consider "contract issues" in its resolution of this matter. Issues relating to concurrent or exclusive jurisdiction are reserved for the final decision in this case – and any collateral proceedings.

Dated at Salem, Oregon, this 7th day of June, 2007.

Patrick Power
Administrative Law Judge