

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1002

WAH CHANG)	
)	
Petitioner,)	RULING
)	AND
v.)	CONFERENCE REPORT
)	
PACIFICORP,)	
)	
Respondent.)	

**DISPOSITION: MOTION TO STRIKE DENIED; LEAVE TO FILE
SUR-REBUTTAL GRANTED; CROSS-
EXAMINATION SCHEDULE ADOPTED**

By motion dated July 18, 2007, PacifiCorp moves to strike portions of Wah Chang’s rebuttal testimony or, in the alternative, for leave to submit limited sur-rebuttal testimony. The testimony that is the subject of the motion is the “Howard Study” that is sponsored by Wah Chang witness, Berne Martin Howard.

In support of its motion PacifiCorp argues that the Howard study is “new evidence,” presented for the first time in rebuttal. According to PacifiCorp, admission of the study would deprive it of an opportunity to respond and would violate due process. PacifiCorp likens its admission to the consideration of an argument raised for the first time in a reply brief. It characterizes this Commission’s role as not merely “an arbiter of a private dispute between two parties,” but also “as a guardian of the public interest.” PacifiCorp states: “The Commission’s ability to fulfill that function is inhibited when one party manipulates the proceedings to prevent balanced argument and analysis.”

In a footnote PacifiCorp states that it first learned of the Howard study in April, 2007, and was provided the study in mid-May, 2007. PacifiCorp states that it did not address the study in its reply testimony because it considered the study to be “out-of-date, incomplete and unsophisticated” and had “no reason to believe that Wah Chang would choose to offer it as part of its case.”

In the event its motion to strike is denied, PacifiCorp requests the opportunity to present sur-rebuttal testimony at the hearing. According to PacifiCorp, that procedure “will accommodate both the Commission’s interest in developing arguments and PacifiCorp’s due process right to respond.

PacifiCorp also presents extensive argument regarding the scope of this proceeding and the sufficiency of Wah Chang's evidence to satisfy its burden of proof. That argument is not relevant to the disposition of this motion and will not be considered further.

In its response to PacifiCorp's motion, Wah Chang states that the Howard study is "proper rebuttal because it answers Dr. Cichetti's testimony that market manipulation in general and PacifiCorp's transactions in particular did not affect the Dow COB index." Wah Chang also provides a timeline for its preparation of the Howard study that explains why the information could not have been provided at the time it made its initial filing. According to Wah Chang, "PacifiCorp's own discovery misconduct prevented Wah Chang from submitting the study in its direct case."

Wah Chang points out that PacifiCorp admits that it was provided the study in May, 2007. Wah Chang will let the Commission decide whether the study is "out-of-date, incomplete and unsophisticated."

If PacifiCorp is allowed to present sur-rebuttal, Wah Chang requests that the testimony be pre-filed in writing, with Wah Chang afforded the opportunity to conduct discovery and to offer additional testimony, as necessary.

PacifiCorp's motion to strike is denied. PacifiCorp concedes the testimony is relevant, even given PacifiCorp's argument regarding the scope of the proceeding.

Wah Chang has explained why the testimony was not submitted earlier. Even if the testimony were to be construed as properly part of Wah Chang's direct case, PacifiCorp was provided a copy of the study prior to filing of its reply testimony and had the opportunity to address the substance of the study at that time.

Nevertheless, PacifiCorp is granted leave to offer sur-rebuttal testimony. However, as argued by Wah Chang, that testimony shall be submitted as written pre-filed testimony and Wah Chang shall have the right to conduct discovery and the opportunity to reply through written testimony of its own.

On July 27, 2007, I conducted a telephone conference call with attorneys for both parties. I adopted the following schedule for the filing of testimony and discovery:

July 30, 2007	PacifiCorp submits prepared sur-rebuttal testimony
August 1, 2007	Wah Chang propounds discovery
August 1, 2007	Wah Chang indicates whether it will submit reply testimony
August 3/6, 2007	PacifiCorp responds to discovery
August 7, 2007	Hearing

If Wah Chang intends to offer additional testimony, it may do so either orally or in writing. I reserve for PacifiCorp the right to conduct discovery on Wah Chang's reply testimony. An additional day of hearing will be scheduled, as necessary, to afford each of the parties its right to a fair hearing.

In a notice dated July 18, 2007, I directed the parties to submit their cross-examination estimates and indicted that I would prescribe an order of the witnesses. The order of the witnesses shall be as follows: McCullough, Howard, Cichetti.

I am advised by PacifiCorp that it intends to offer witnesses Cichetti and Dubin to sponsor the sur-rebuttal testimony. Their testimony will follow the cross-examination of Dr. Cichetti.

Dated at Salem, Oregon, this 27th day of July, 2007.

Patrick Power
Administrative Law Judge