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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1002

WAH CHANG,)	
)	
Petitioner,)	
)	
vs.)	ORDER
)	
PACIFICORP,)	
)	
Respondent.)	

**DISPOSITION: MOTION TO REOPEN DOCKET
AND PERMIT DISCOVERY APPROVED**

Introduction and Background

On December 1, 2000, Wah Chang filed a petition for relief from market-indexed rates under a special contract for electric service, called the Master Electric Service Agreement (MESA), with PacifiCorp. Wah Chang requested interim relief from the rates specified in the special contract, as well as permanent relief from those rates. On February 21, 2001, the Commission denied Wah Chang's request for interim relief in Order No. 01-185. The Commission subsequently denied Wah Chang's request for permanent relief on October 15, 2001, in Order No. 01-873.

Wah Chang appealed Order No. 01-873 to the Marion County Circuit Court (Circuit Court). On May 23, 2002, Wah Chang filed a motion with the Circuit Court requesting permission to present additional evidence to the Commission pursuant to ORS 756.600.¹

On June 18, 2002, Circuit Court Judge Don Dickey issued a letter ruling granting Wah Chang's motion to present additional evidence to the Commission. The letter

¹ ORS 756.600 provides in pertinent part:

(1) If, upon the trial of a suit, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the Public Utility Commission, the court may order that the additional evidence be taken by the commission and shall stay further proceedings in the suit for such time as the court considers appropriate.

ruling characterized the additional evidence to be presented as consisting of evidence within two categories, as follows:

- (i) evidence of manipulation of the Western wholesale electricity markets in the years 2000 and 2001; and (ii) complaints filed by PacifiCorp with the Federal Energy Regulatory Commission (FERC).

Judge Dickey found no dispute that the additional evidence was not available at the time of the Commission's hearing. Concluding that the Commission had the authority "to make adjustments in contracts based upon extraordinary circumstances which at least logically include fraud and other extraordinary facts of the type proposed as additional evidence," he also found the additional evidence to be material.²

Judge Dickey directed the Commission to reopen the record in the above referenced docket to allow Wah Chang the opportunity to present the additional evidence, "[u]nless the Commission should rule that under no foreseeable circumstances could such evidence obtain a different result" than that set forth in Order No. 01-873.³ On July 22, 2002, Judge Dickey signed an order granting Wah Chang's motion to present additional evidence.

In September 2002, the parties filed documents with the Commission raising issues about the nature and scope of the Circuit Court's order directing the Commission to take additional evidence. The parties subsequently briefed the issues in December 2002.

Wah Chang took the position that the Circuit Court's order mandated reopening the proceeding for the purpose of receiving and considering evidence of manipulation in Western energy markets in the years 2000 to 2001, and evidence relating to PacifiCorp's complaints to the FERC regarding market manipulation. Wah Chang also noted the then ongoing investigations by the FERC and the Oregon Attorney General of the Western electric wholesale market and requested that the Commission hold the proceeding in abeyance until the conclusion of the FERC investigation. Wah Chang expected information relevant to this proceeding to be developed by those investigations and anticipated presenting some of this information to the Commission in a later hearing. With the exception of certain discovery that it requested permission to conduct while the proceeding was held in abeyance, Wah Chang also anticipated an opportunity to conduct discovery subsequent to the conclusion of the FERC investigation and the reopening of this proceeding.

PacifiCorp took the position that the Circuit Court's ruling, issued pursuant to ORS 756.600, authorized the Commission to reopen the proceeding to consider only the specific evidence that Wah Chang presented to the Circuit Court and did not authorize the Commission to allow additional discovery. On November 15, 2002, PacifiCorp also filed a motion for summary affirmance of Order No. 01-873, to which Wah Chang responded on December 6, 2002. PacifiCorp asked the Commission to issue an order stating that the

² Letter Ruling from Hon. Don A. Dickey, Circuit Court Judge, to Richard Williams, Lane, Powell, Spears, Lubersky LLP, et al., *Wah Chang v. PUC, Marion County Circuit Court Case No. 01C20598*, (June 18, 2002).

³ *Id.*

Commission would not change its determination made in Order No. 01-873 regarding the just and reasonableness of the MESA rates, regardless of the nature of future evidence that might be presented by Wah Chang.

On March 13, 2003, the Commission issued Order No. 03-153 holding the proceeding “in abeyance until the Commission issues an order reopening or permanently closing this docket, or an Administrative Law Judge issues a procedural Ruling relating to possible future events in this proceeding.” The order also denied PacifiCorp’s Motion for Summary Affirmance on the basis that the Commission was not willing to rule out the possibility that future consideration of evidence about the manipulation of the wholesale electricity market, on which the subject MESA rates were based, would change the Commission’s determination in Order No. 01-873.

The Commission indicated, in Order No. 03-153, that it wanted to reconsider its determination in Order No. 01-873 based on all the relevant information that can be produced. Order No. 03-153 provided that at the conclusion of the FERC investigation, Wah Chang may, if it determines that it can present evidence that might cause the Commission to change the outcome of the proceeding, file a motion to reopen the record to receive evidence. The order indicated that an evidentiary hearing would be subsequently held, with discovery issues being resolved upon the reopening of the docket.

Petitioner’s Motion

On January 15, 2004, Wah Chang filed a Motion for Order Reopening Docket and Permitting Discovery (Motion). Wah Chang’s Motion provides information regarding the status of the FERC proceedings investigating the operation of Western energy markets.⁴ The Motion indicates that these FERC proceedings have concluded or are nearing conclusion, subject to appeals or further orders clarifying or reconsidering the underlying the FERC orders. The investigation of PacifiCorp resulted in a settlement.⁵ The Motion also indicates that complaints brought by PacifiCorp relating to market manipulation and dysfunction have been denied by the FERC,⁶ as has PacifiCorp’s request for reconsideration,⁷ based on conclusions that PacifiCorp was a sophisticated player in Western markets, not a “victim.” According to the Motion, the Commission’s “abeyance order has served its

⁴ The Motion represents that the FERC Staff issued a final investigation report in late March 2003. See Final Report on Price Manipulation in Western Markets, *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, Docket No. PA02-2-000 (FERC, March 26, 2003). FERC acted on this report by, among other actions, issuing two orders initiating investigations with regard to whether certain market participants, including PacifiCorp, realized profits due to market manipulation. See Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior, *American Electric Power Service Corporation*, 103 FERC ¶ 61,345 (2003); Order to Show Cause Concerning Gaming and Other Arrangements and Directing Submission of Information, *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346 (2003).

⁵ Certification of Contested Settlement, *PacifiCorp*, 105 FERC ¶ 63,043 (2003). On March 9, 2004, PacifiCorp filed a letter with the Commission providing information that FERC adopted the proposed settlement on March 8, 2004 and closed all related proceedings involving PacifiCorp. See Order Approving Contested Settlement Agreement, *PacifiCorp*, 106 FERC ¶ 61,235 (2004).

⁶ Order on Initial Decision, Requests for Rehearing, and Motion to Reopen Record, *PacifiCorp v. Reliant Energy Services, et al.*, 103 FERC ¶ 61,355 (2003).

⁷ Order on Rehearing and Clarification, *PacifiCorp v. Reliant Energy Services, et al.*, 105 FERC ¶ 61,184 (2003).

purpose,” with pertinent evidence of PacifiCorp’s trading activities in a dysfunctional market having emerged, and the case should be reopened.

The Motion also requests permission to conduct discovery within the scope of the Circuit Court order. Wah Chang represents that Order No. 03-153 held discovery in abeyance along with the case and that the reason for proscribing discovery ends when the case is reopened. Wah Chang asserts that it is entitled to inquire into “any matter not privileged which appears reasonably calculated to lead to the discovery of evidence relevant to the issues involved in the pending proceeding,” citing OAR 860-014-0065(6), and also referring to OAR 860-014-0070.

PacifiCorp’s Opposition

On February 13, 2004, PacifiCorp filed an Opposition to Petitioner’s Motion to Reopen Docket and Permit Discovery (Opposition). The Opposition asserts that thorough investigations conducted by the FERC did not generate evidence justifying the reopening of this proceeding: “Put simply, the evidence that Wah Chang was hoping for has not materialized, and there is no reason to reopen these proceedings.” PacifiCorp contends that the FERC, after considering extensive evidence, concluded that PacifiCorp did not engage in market manipulation and, accordingly, agreed “to release all claims against PacifiCorp relating to *any* activities engaged in by PacifiCorp that may be alleged to constitute gaming and/or anomalous market behavior or other conduct in violation of the California ISO and California PX tariffs, or any regulation or statute, during the period January 1, 2000, to June 20, 2001” (*emphasis in original*). On the basis of the FERC’s conclusions, PacifiCorp asks the Commission to reaffirm Order No. 01-873 without further proceedings.

In the event, however, that the Commission reopens this docket to take additional evidence, the Opposition reargues PacifiCorp’s position in earlier briefings, that ORS 756.600 only allows the Commission to consider evidence specifically identified by the Circuit Court and does not permit parties to conduct supplementary discovery. PacifiCorp also argues that ORS 756.600 does not allow the Commission to conduct a hearing to collect and consider the new evidence.

The Opposition asserts that the limited scope of ORS 756.600 may be discerned by statutory interpretation:

On its face, the meaning of this statute is clear: the Commission is empowered only to consider ‘*the additional evidence*’ that the Circuit Court ordered the Commission to take, not to consider *any* additional evidence that may be discovered. If the parties were permitted to discover additional evidence during proceedings pursuant to ORS 756.600, and if the Commission were allowed to review and consider such evidence, the language of ORS 756.600(1) would be meaningless, because the Commission would be able to consider evidence that the Circuit Court has not determined to be material or that there are ‘good and substantial reasons’ why the evidence was not presented to the Commission earlier.

(*emphasis in original*). The Opposition also argues that Wah Chang's request for additional discovery must be rejected because:

The Circuit Court has not 'remanded' this matter to the Commission following a full consideration of the merits, as provided for in ORS 756.598; rather, it has asked the Commission to 'consider' some specific evidence pursuant to ORS 756.600.

PacifiCorp further argues that, pursuant to ORS 756.600, the Commission may "consider" the specific evidence, but may not conduct a "rehearing" to do so. PacifiCorp contends that there is a distinction between "reconsideration" and "rehearing," as illustrated by the Court of Appeals interpretation of ORS 183.482(6), a statute that PacifiCorp asserts is similar to ORS 756.600. *Gritter v. Adult & Family Servs. Div.*, 182 Or App 249, 48 P3d 195 (2002).⁸ PacifiCorp avers that the Court of Appeals held that ORS 183.482(6), a statute allowing a particular agency to "reconsider" its opinion, limits the scope of reconsideration of an order to the existing record. *Gritter*, 182 Or App at 255. PacifiCorp also argues that the Seventh Circuit Court of Appeals found federal statutory language that is "nearly identical to ORS 756.600" to allow an agency to consider "specific additional evidence," but not to undertake a "full and fresh" or "entirely new" proceeding.

Wah Chang's Reply to PacifiCorp's Opposition

On March 3, 2004, Wah Chang filed a Reply to PacifiCorp's Opposition (Reply). The Reply contends that PacifiCorp exaggerates the import of resolution of the FERC proceedings. Wah Chang further argues that "PacifiCorp's proposed settlement with the FERC does not provide a basis for the Commission to revisit its prior rejection of PacifiCorp's arguments." Wah Chang observes that the Commission already rejected PacifiCorp's "Motion for Summary Affirmance" in Order No. 03-153.

Wah Chang argues that the purpose of Order No. 03-153 was not to await conclusions by the FERC, but to allow the FERC to develop potentially relevant evidence, as has been done. Moreover, the settlement of the FERC proceedings does not bear on the resolution of this proceeding for two reasons. Wah Chang represents that the scope of the FERC's investigation of, and settlement with, PacifiCorp is narrower than, and otherwise different from, the issues presented by Wah Chang in this proceeding. As characterized by Wah Chang, the FERC merely reviewed one type of market behavior for a limited time frame that overlaps one month of the entire period Wah Chang puts at issue. Additionally, Wah Chang notes that settlement of issues in another jurisdiction is not adjudication before the Commission, the decision maker in this proceeding, and has no preclusive or preemptive effect.

⁸ *Gritter* was vacated for mootness when the Court of Appeals learned that the parties had settled the underlying dispute prior to issuance of the original decision by the Court of Appeals. See *Gritter v. Adult & Family* 183 Or App 578 (2002).

Wah Chang also asserts that the Commission has already determined that if the proceeding should be reopened, the Commission's normal rules and procedures would be employed, including discovery and a hearing. Wah Chang observes that the Commission expressed anticipation, in Order No. 03-153, about receiving future evidence and holding a hearing. Wah Chang also discredits PacifiCorp's interpretation of ORS 756.600 that the Commission cannot conduct a hearing based on the statutory language, arguing that the language and context of the statute support the Commission having the authority to take post-hearing evidence by hearing.

Analysis and Decision

Reopening the Docket

In Order No. 03-153, we decided to consider post-hearing evidence regarding manipulation of the wholesale electricity market, but at the request of Wah Chang, we decided to wait until the conclusion of the FERC's then ongoing investigation before proceeding with the presentation of evidence. Accordingly, we held the case in abeyance and directed Wah Chang to file a motion to reopen the proceeding at a time deemed appropriate by Wah Chang. Wah Chang exercised that option by filing its Motion. In so doing, Wah Chang determined that it was ready to present evidence that might cause the Commission to change the outcome of the case.

The parties expend considerable effort arguing the merits of evidence considered by the FERC and the value of the settlement of the FERC's proceedings. Such efforts are premature prior to the docket being reopened. Order No. 03-153 did not make reopening the proceeding dependent upon an evaluation by the Commission of whether sufficient evidence exists to cause it to change its determination in Order No. 01-873. Rather, we will conduct that evaluation after reopening the docket and upon taking the additional evidence from Wah Chang. The purpose of the abeyance was to take advantage of the FERC's fact-finding efforts. It was not "to wait and see what conclusions the FERC would derive from its investigation," as PacifiCorp asserts.

The Circuit Court directed the Commission to take and consider additional evidence and the judgment of the Commission may not be substituted for. As Wah Chang points out, "the decision in this case is obviously the Commission's to make." Resolution by the FERC, in any manner, of proceedings addressing related issues, regardless of the similarity of their scope, does not supplant our jurisdiction to act in this proceeding. In any case, the FERC proceedings were resolved by settlement, which is not the same as adjudicatory review.

Discovery

While we recognized that Wah Chang might want to present some of the information produced in the FERC proceedings, we did not limit Wah Chang to presenting only that information. In Order No. 03-153, we clearly expressed the desire to make a decision about whether to revise Order No. 01-873 "based on all the relevant information that can be produced," and anticipated taking evidence not yet identified that was within the parameters of the Circuit Court's order. The purpose of holding the proceeding in abeyance

during the FERC proceedings was to obtain evidence not then available and to prevent duplicative discovery, not to supplant all discovery in this proceeding.

PacifiCorp correctly observes that ORS 756.600(1) limits the Commission to considering only the additional evidence that the Circuit Court directed the Commission to take. However, the Circuit Court characterized Wah Chang's "proposed evidence" very broadly, as follows:

- (i) evidence of manipulation of the Western wholesale electricity markets in the years 2000 and 2001; and (ii)
- complaints filed by PacifiCorp with the Federal Energy Regulatory Commission (FERC).

Rather than identifying specific pieces of evidence, the Circuit Court deemed evidence falling into two categories as material and previously unavailable. Although the latter category is confined to particular proceedings at the FERC, the former category is wide ranging and limited only by a general subject matter and a time frame. PacifiCorp has never alleged that the Circuit Court further defined or otherwise limited the evidence it gave Wah Chang leave to present to the Commission. Discovery within the categorical parameters defined by the Circuit Court is appropriate.

Hearing

In Order No. 03-153, we ruled that "[i]f this proceeding is reopened, the Commission's normal rules and procedures will be used." Having addressed the timing of a hearing in the reopened docket, we anticipated holding a hearing as part of the normal rules and procedures to be used.

From a practical standpoint, a hearing to take and consider the additional evidence is needed. The categorical nature of the Circuit's Court direction to the Commission to take evidence requires evaluation of whether proposed evidence falls within one of the two authorized categories. Moreover, the Commission cannot evaluate the legal sufficiency of proffered evidence without subjecting the evidence to review in a hearing. Presumably, PacifiCorp will want due process to address to such issues.

With regard to statutory authorization, ORS 756.600 authorizes the Commission to do more than "reconsider" a prior decision. A separate statute, ORS 756.561, permits the Commission to reconsider, or rehear, an order pursuant to request by any party to the case. ORS 756.600, on the other hand, provides for the Commission's consideration of a prior order in light of additional evidence, at the direction of a court after institution of judicial review.⁹ ORS 756.600 does not prescribe a method to take and consider the additional evidence. Conducting a rehearing is generally recognized as an appropriate method, however, to do so.

⁹ Still another statute, ORS 756.568, authorizes the Commission to rescind, suspend, or amend any order, at any time, after providing proper notice and an opportunity to be heard, pursuant to ORS 756.500 to 756.610, to an affected utility. Under this statute, the Commission could reevaluate Order No. 01-873, in light of additional evidence, with no restrictions on the scope and nature of such evidence.

In *Gritter*, the Court of Appeals indicated that the purpose of a rehearing is to present additional evidence and quoted an explanation of the nature of a rehearing by *The Oregon Attorney General's Administrative Law Manual* (2001) (Attorney General's Manual) as follows:

[Rehearing] occurs when an agency either holds an entirely new hearing and re-decides the case based solely on the new hearing record, or the agency holds a supplementary hearing.¹⁰

Gritter, 182 Or App at 255. In contrast, the Court of Appeals noted that the Attorney General's manual indicates that reconsideration of an order by an agency does not involve taking new evidence:

Reconsideration occurs when, *based on the existing record in the case*, an agency reexamines the factual or legal basis for its order or reexamines the adequacy of its finding of fact, conclusions of law or its order.¹¹

Id. (*emphasis* in original). The Court of Appeals further explained that use of the term, "reconsideration," in subsection ORS 183.482(6) implies that an agency is "limited to rethinking its decision based on the existing record." *Id.* We cannot limit our action in this docket to reconsideration, as so defined, because the Circuit Court has directed this Commission to supplement the record with additional evidence. Conducting a rehearing whose scope is to take additional evidence within the parameters specified by the Circuit Court is both necessary and appropriate.¹²

¹⁰ *The Oregon Attorney General's Administrative Law Manual* (2004) includes identical language.

¹¹ *supra*.

¹² The scope of such a hearing would be consistent with the scope of remand allowed by the Seventh Circuit Court of Appeals in *Travis v. Sullivan*. See *Travis v. Sullivan*, 985 F.2d 919, 923-24 (7th Cir. 1993). Interpreting language in 42 U.S.C. § 405(g), a federal statute providing for remand of a decision by the Secretary of Health and Human Services for the purpose of taking additional evidence, the Seventh Circuit distinguished taking additional evidence on remand—without commenting on the specificity of the additional evidence to be taken—from conducting a "brand new proceeding." *Id.*

ORDER

IT IS ORDERED that the Motion for Order Reopening Docket and Permitting Discovery filed by Wah Chang is granted. The above referenced docket is reopened and discovery within the scope of the Marion County Circuit Court order may proceed.

Made, entered, and effective _____.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.