

-BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH-

In the Matter of the Petition of) DOCKET NO. 04-035-04
Desert Power, L.P. for Approval)
of a Contract for the Sale of Capacity)
and Energy from its Proposed QF) PROTECTIVE ORDER
Facilities)

ISSUED: March 23, 2004

By the Commission:

Desert Power, L.P. ("Desert Power"), on March 12, 2004, submitted a Motion and Proposed Order to the Commission in the above-entitled proceeding seeking a Protective Order. Desert Power states in its Motion that the entry of a Protective Order will expedite the production of documents and other information to parties seeking to prepare for hearings in this matter, and will afford necessary protection to valuable confidential, trade secret, and business information.

The Commission finds that sufficient grounds exist for entry of a Protective Order.

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. (A) Confidential Information. All documents, data, information, studies and other materials furnished, or made available pursuant to any interrogatories, or requests for information, subpoenas, depositions, or other modes of discovery that are claimed by the parties to be of a trade secret or confidential nature shall be furnished pursuant to the terms of this Order, and shall be treated by all persons accorded access thereto pursuant to this Order as constituting trade secret, confidential commercial, or otherwise protected information (hereinafter referred to as "Confidential Information"), and shall neither be used nor disclosed except for the purpose of this proceeding, and solely in accordance with this Order. All material

claimed to be Confidential Information shall be so marked by the party or its affiliates by stamping the same with the designation, **“CONFIDENTIAL - - SUBJECT TO PROTECTIVE ORDER”** or **“CONFIDENTIAL - - SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. 04-035-04.”** All copies of documents so marked will be made on yellow paper. Parties filing electronically should file both a confidential and non-confidential version clearly marked as such. For purposes hereof, notes made pertaining to or as the result of a review of Confidential Information shall be considered Confidential Information and subject to the terms of this Order.

(B) Use of Confidential Information and Persons Entitled to Review. All Confidential Information made available pursuant to this Order shall be given solely to counsel for the parties (including counsels’ paralegals, administrative assistants and clerical staff to the extent necessary for performance of work on this matter) which shall include the Division of Public Utilities (“Division”) and the Committee of Consumer Services (“Committee”), and shall not be used nor disclosed except for the purpose of this proceeding; provided, however, that access to any specific Confidential Information may be authorized by counsel, solely for the purpose of this proceeding, to those persons indicated by the parties as being their experts in this matter (including such experts’ administrative assistants and clerical staff, and persons employed by the parties, to the extent necessary for performance of work on this matter). However, persons designated as experts shall not include persons employed by the parties who could use the information in their normal job functions to the competitive disadvantage of the party providing the Confidential Information. Any member of the Public Service Commission and its staff, under and pursuant to the applicable provisions of Title 54, Utah Code Ann., the Rules of

Civil Procedure and the Rules of the Commission, may have access to any Confidential Information made available pursuant to this Order and shall be bound by the terms of this Order, except for the requirement of signing a nondisclosure agreement. Further, nothing herein shall prevent disclosure as required by law pursuant to interrogatories, administrative requests for information or documents, subpoena, civil investigative demand or similar process, provided, however, that the party being required to disclose Confidential Information shall promptly give prior notice by telephone and written notice of such requirement of disclosure by facsimile and overnight mail to the party that provided such Confidential Information, addressed to the attorneys of record for such party, so that the party that provided the Confidential Information may seek an appropriate protective order. The disclosing party will not oppose action by, and will cooperate with the party that provided the Confidential Information to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded the Confidential Information.

(C) Nondisclosure Agreement. Prior to giving access to Confidential Information, as contemplated in paragraph 1(b) above to counsel or any expert designated to testify in this proceeding, counsel for the party seeking review of the Confidential Information shall deliver a copy of this Order to such person and, prior to disclosure such person shall agree in writing to comply with and be bound by this Order. Confidential Information shall not be disclosed to any person who has not signed a Nondisclosure Agreement in the form which is attached hereto and incorporated herein as Appendix A. The Nondisclosure Agreement (Appendix A) shall require the person to whom disclosure is to be made to read a copy of this Protective Order and to certify in writing that he or she has reviewed the same and has consented

to be bound by its terms. The agreement shall contain the signatory's full name, permanent address and employer, and the name of the party with whom the signatory is associated. Such agreement shall be delivered to counsel for the providing party prior to the expert gaining access to the Confidential Information.

(D) Additional protective measures. A provider of documents and information may claim that additional protective measures, beyond those required under this Protective Order, are warranted for certain confidential material, referred to as highly sensitive documents and information. In such case, the provider shall identify such documents and information and shall inform the requester of such documents and information of their claimed highly sensitive nature as soon as possible. The provider of the requested information shall also petition the Commission for an order granting additional protective measures which the petitioner believes are warranted for the claimed highly sensitive documents and information that is to be produced in response to an information request. The provider shall set forth the particular basis for: the claim, the need for the specific, additional protective measures, and the reasonableness of the requested, additional protection. A party who would otherwise receive the documents and information under the terms of this Protective Order, may respond to the petition and oppose or propose alternative protective measures to those requested by the provider of the claimed highly sensitive documents and information. Disputes between the parties shall be resolved pursuant to Commission Order pursuant to Paragraph 2 of this Protective Order.

2. (A) Challenge to Confidentiality or Proposed Additional Protective Measures.

This Order establishes a procedure for the expeditious handling of Confidential Information; it shall not be construed as an agreement, or ruling on the confidentiality of any document.

(B) In the event that the parties hereto are unable to agree that certain documents, data, information, studies, or other matters constitute Confidential Information, are highly sensitive documents and information referred to in paragraph 1(d) above, or agree on the appropriate treatment of highly sensitive documents and information, the party objecting to the classification as Confidential Information or the party claiming highly sensitive documents and information and the need for additional protective measures shall forthwith submit the said matters to the Commission for its review pursuant to this Order. When the Commission rules on the question of whether any documents, data, information, studies, or other matters submitted to them for review and determination are Confidential Information, are highly sensitive documents and information, or the appropriate additional protection to be afforded for specific highly sensitive documents and information, the Commission will enter an order resolving the issue.

(C) Any party at any time upon ten (10) days prior notice may seek by appropriate pleading, to have documents that have been designated as Confidential Information, or which were accepted into the sealed record in accordance with this Order, removed from the protective requirements of this Order, or from the sealed record and placed in the public record. If the confidential, or proprietary nature of this information is challenged, resolution of the issue shall be made by the Commission after proceedings *in camera* which shall be conducted under circumstances such that only those persons duly authorized hereunder to have access to such confidential matter shall be present. The record of such *in camera* hearings shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN CASE NO. 04-035-04." It shall be transcribed only upon agreement by the parties, or Order of the Commission, and in that event shall be separately bound, segregated, sealed, and withheld from inspection by any person not

bound by the terms of this Order, unless and until released from the restrictions of this Order, either through agreement of the parties, or after notice to the parties and hearing, pursuant to an Order of the Commission. In the event the Commission should rule in response to such a pleading that any information should be removed from the protective requirements of this Order, or from the protection of the sealed record, such Order of the Commission shall not be effective for a period of ten (10) days after entry of the Order.

3. (A) Receipt into Evidence. Provision is hereby made for receipt of evidence in this proceeding under seal. At least ten (10) days prior to the use of or substantive reference to any Confidential Information as evidence, the party intending to use such Confidential Information shall make that intention known to the providing party. The requesting party and the providing party shall make a good faith effort to reach an agreement so that the Information can be used in a manner which will not reveal its trade secret, confidential or proprietary nature. If such efforts fail, the providing party shall separately identify, within five (5) business days, which portions, if any, of the documents to be offered or referenced on the record containing Confidential Information shall be placed in the sealed record. Only one (1) copy of documents designated by the providing party to be placed in the sealed record shall be made and only for that purpose. Otherwise, parties shall make only general references to Confidential Information in these proceedings.

(B) Seal. While in the custody of the Commission, these materials shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN CASE NO.04-035-04," and due to their nature they shall not be considered as records in the possession of or retained by the Commission within the meaning of the open meetings or public records statutes.

(C) In Camera Hearing. Any Confidential Information that must be orally disclosed to be placed in the sealed record in this proceeding shall be offered in an *in camera* hearing, attended only by persons authorized to have access to the Confidential Information under this Order. Similarly, cross-examination on or substantive reference to Confidential Information, as well as that portion of the record containing references thereto, shall be marked and treated as provided herein.

(D) Appeal. Sealed portions of the record in this proceeding may be forwarded to any court of competent jurisdiction on appeal in accordance with applicable rules and regulations, but under seal as designated herein, for the information and use of the court.

(E) Return. Unless otherwise ordered, Confidential Information, including transcripts of any depositions to which a claim of confidentiality is made, shall remain under seal, shall continue to be subject to the protective requirements of this Order, and shall be returned to counsel for the providing party within 30 days after final settlement, or conclusion of this matter including administrative, or judicial review thereof. Alternatively, a party receiving Confidential Information pursuant to the terms of this Order may certify, within 30 days after final settlement, or conclusion of this matter including administrative, or judicial review thereof, that the Confidential Information has been destroyed. Counsel who are provided access to Confidential Information pursuant to the terms of this Order may retain their notes, work papers or other documents which would be considered the attorneys' work product created with respect to their use and access to Confidential Information in this docket. An expert witness, accorded access to Confidential Information pursuant to this Order, shall provide to counsel for the party on whose behalf the expert was retained or employed, the expert's notes, work papers or other

documents pertaining or relating to any Confidential Information. Counsel shall retain these expert's documents with counsel's documents. In order to facilitate their ongoing regulatory responsibility, this paragraph shall not apply to the Commission, the Division or the Committee, which may retain Confidential Information obtained under this Order subject to the other terms of this Order. The Division may release or disclose Confidential Information obtained in this docket to other parties in subsequent Commission dockets or proceedings, pursuant to the terms of applicable protective orders issued in such other subsequent Commission dockets or proceedings. The providing party shall be notified in advance by any state regulatory agency which intends to use, release or disclose any of the retained Confidential Information in any subsequent case.

4. Use in Pleadings. Where reference to Confidential Information in the sealed record is required in pleadings, cross-examinations, briefs, arguments, or motions, it shall be by citation of title, or exhibit number, or by some other nonconfidential description. Any further use of, or substantive references to Confidential Information shall be placed in a separate section of the pleading, or brief and submitted to the Commission under seal. This sealed section shall be served only on counsel of record (one copy each), who have signed a Nondisclosure Agreement. All the protections afforded in this order apply to materials prepared and distributed under this paragraph.

5. (A) Use in Decisions and Orders. The Commission will attempt to refer to Confidential Information in only a general, or conclusionary form and will avoid reproduction in any decision of Confidential Information to the greatest possible extent. If it is necessary for a determination in this proceeding to discuss Confidential Information other than in a general, or

conclusionary form, it shall be placed in a separate section of this Order, or Decision, under seal. This sealed section shall be served only on counsel of record (one copy each) who have signed a Nondisclosure Agreement. Counsel for other parties shall receive the cover sheet to the sealed portion and may review the sealed portion on file with the Commission once they have signed a Nondisclosure Agreement.

6. Segregation of Files. Those parts of any writing, depositions reduced to writing, written examination, interrogatories and answers thereto, or other written references to Confidential Information in the course of discovery, if filed with the Commission, will be sealed by the Commission, segregated in the files of the Commission, and withheld from inspection by any person not bound by the terms of this Order, unless such Confidential Information is released from the restrictions of this Order, either through agreement of the parties, or after notice to the parties and hearing, pursuant to the Order of the Commission and/or final order of a court having jurisdiction.

7. Preservation of Confidentiality. All persons who may be entitled to receive, or who are afforded access to any Confidential Information by reason of this Order shall neither use, nor disclose the Confidential Information for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of this proceeding, and then solely as contemplated herein, and shall take reasonable precautions to keep the Confidential Information secure in accordance with the purposes and intent of this Order.

8. Reservation of Rights. The parties hereto affected by the terms of this Protective Order further retain the right to question, challenge, and object to the admissibility of any and all data, information, studies and other matters furnished under the terms of this Protective Order in

response to interrogatories, requests for information, other modes of discovery, or cross-examination on the grounds of relevancy or materiality. This Order shall in no way constitute any waiver of the rights of any party to contest any assertion by a party, or finding by the Commission that any information is a trade secret, confidential, or privileged, and to appeal any assertion or finding.

9. The provisions of this Order are specifically intended to apply to data, or information supplied by or from any party to this proceeding, and any non-party that supplies documents pursuant to process issued by this Commission

DATED at Salt Lake City, Utah, this 23rd day of March, 2004.

/s/ Ric Campbell, Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#37481

**APPENDIX A TO PROTECTIVE ORDER
IN DOCKET NO. 04-035-04**

I have reviewed the Protective Order entered by the Public Service Commission of Utah in Docket No.04-035-04 with respect to the review and use of confidential information and agree to comply with the terms and conditions of the Protective Order.

Signature

Name (Type or Print)

Residence Address

Employer or Firm

Business Address

Party Represented

Date Signed