

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

REBUTTAL TESTIMONY OF BRUCE W. GRISWOLD

August 25, 2006

1 **Q. Please state your name, business address and position with**
2 **PacifiCorp dba Rocky Mountain Power (the “Company”).**

3 A. My name is Bruce W. Griswold. My business address is 825 N. E.
4 Multnomah, Suite 600, Portland, Oregon 97232. I am a Manager in the
5 Origination section of the Company’s Commercial and Trading
6 Department.

7 **Qualifications**

8 **Q. Are you the same Bruce Griswold who previously prepared and**
9 **submitted testimony in this proceeding?**

10 A. Yes, with regard to the Stipulation dated May 20, 2004 and related
11 proceedings.

12 **Purpose of Testimony**

13 **Q. What is the purpose of your testimony?**

14 A. I will respond to the direct testimony of Mr. Charles Darling and
15 portions of the testimony of Mr. Roger Swenson. Specifically, the
16 portions of Mr. Swenson’s testimony that address the commercial
17 aspects of the Power Purchase Agreement dated September 24, 2004 (the
18 “Agreement”) between the parties. A copy of the Agreement is attached
19 to my testimony as RMP Exhibit BWG-1.

20 **Q. Mr. Darling states that PacifiCorp has not been responsive to Desert**
21 **Power to resolve this dispute. Do you agree?**

22 A. No. PacifiCorp has worked openly and in earnest with Desert Power
23 regarding the issues surrounding Desert Power missing its Scheduled
24 Commercial On-line Date as set forth in the Agreement. In fact,
25 Company personnel at all levels and in multiple business units, including
26 the presidents of PacifiCorp Energy and Rocky Mountain Power, have
27 attempted over the past six months to resolve our differences and find an
28 equitable solution that accommodates Desert Power's need to complete
29 its facility, but also preserves the rights and interests of the Company and
30 our customers.

31 **Q. Why are the parties bringing a contractual dispute to the**
32 **Commission?**

33 A. The Commission initiated and presided over *In the Matter of the*
34 *Application of PacifiCorp for Approval of an IRP-Based Avoided Cost*
35 *Methodology For QF Facilities Larger than One Megawatt* (Docket No.
36 03-035-14). Based on the Commission's approval of the Stipulation
37 dated May 20, 2004, a copy of which attached hereto as RMP Exhibit
38 BWG-2, PacifiCorp and Desert Power, L.P. ("Desert Power") entered
39 into the Agreement. The Agreement and the terms and conditions

40 contained therein were reviewed and approved by the Commission's
41 Order Approving Desert Power's Qualifying Facility Contract dated
42 October 7, 2004. Correspondingly, any subsequent amendment to the
43 Agreement will require Commission approval. Further, the Commission
44 has jurisdiction over all retail rate matters, and the outcome and
45 determination of the issues in dispute could affect customer retail rates.
46 Finally, the terms of the Agreement require that the parties submit all
47 disputes under the Agreement to the Commission for determination.
48 Thus, PacifiCorp believes that the Commission has jurisdiction over the
49 terms and provisions of the Agreement, including the interpretation
50 thereof.

51 **Q. Please describe the basis of the commercial dispute of the parties as**
52 **it relates to the Agreement.**

53 A. Fundamentally, the disagreement is fairly straightforward. Desert Power
54 argues that an event of force majeure has occurred with respect to
55 PacifiCorp's efforts to interconnect the facility to PacifiCorp's electrical
56 system. PacifiCorp disputes Desert Power's claim of force majeure. The
57 issues related to the facts and circumstances surrounding the
58 interconnection and alleged force majeure are discussed in more detail
59 by PacifiCorp witnesses Kenneth Houston and Doug Bennion.

60 Notwithstanding the alleged force majeure, Desert Power believes that
61 the event of force majeure suspends and otherwise relieves them of any
62 further obligation under the terms of the Agreement. PacifiCorp believes
63 that even assuming for sake of argument an event of force majeure did
64 occur, that event does not alleviate Desert Power of its obligations under
65 the Agreement, including its obligation to post Default Security,¹ as that
66 term is defined by the Agreement, and provide additional adequate
67 assurances under the Agreement.

68 **Q: Why have the parties been unable to reach resolution?**

69 A. There have been a number of issues. Desert Power claims that a force
70 majeure event has occurred, and further alleges that this event effectively
71 relieves them of certain obligations under the Agreement, including the
72 obligation to provide PacifiCorp with Default Security and the requested
73 additional adequate assurances. The Company vehemently disagrees that
74 a force majeure event has occurred. Nonetheless, in an effort to resolve
75 the dispute and get past the issue of a force majeure, PacifiCorp and
76 Desert Power agreed to negotiate a term sheet, which would serve as a

¹ The Agreement (Section 8.2), states that PacifiCorp has the right to require Desert Power to post a letter of credit for the benefit of PacifiCorp in the amount of \$4 million on or before the Scheduled Commercial Operation Date in the event of a material adverse change. A material adverse change is any change, which in the reasonable opinion of PacifiCorp adversely impacts Desert Power's ability to fulfill its obligations under the Agreement.

77 precursor and basis for developing an amendment that could be signed
78 by both parties, modifying the terms of the Agreement. The most
79 significant term of the proposed term sheet was PacifiCorp's willingness
80 to permit Desert Power to establish a new commercial operation date of
81 June 1, 2007 for the facility, as opposed to the June 1, 2006 date in the
82 original Agreement. However, the term sheet was never finalized, and
83 during the pendency of negotiations and discussions between the parties
84 regarding the term sheet, intervening circumstances and events caused
85 PacifiCorp to assert its contractual rights and require Desert Power to
86 post Default Security and request additional adequate assurances
87 pursuant to the terms of the Agreement.

88 Desert Power asserts that it can be on-line by a revised on-line
89 date of June 1, 2007; however, based on recent discussions with Desert
90 Power, Questar and the Utah Division of Public Utilities, PacifiCorp has
91 reason to doubt Desert Power's assertion that the facility will be
92 commercially operational by June 1, 2007.

93 **Q: Please discuss the events and circumstances surrounding the parties'**
94 **efforts to negotiate a term sheet as a precursor to a definitive**
95 **amendment to the Agreement.**

96 A: PacifiCorp and Desert Power discussed, over the course of several
97 months, a mechanism to allow Desert Power to proceed to completion
98 and still protect the Company and our customers from any adverse
99 impact caused by Desert Power's delay in reaching commercial
100 operations. In April and May 2006, the parties were negotiating a term
101 sheet that sought to preserve the value of the Agreement for our
102 customers and still allow Desert Power to construct the facility and meet
103 its obligations by agreeing to a June 1, 2007 commercial operation date.
104 However, contrary to Mr. Darling's testimony, the term sheet was never
105 finalized, nor was it executed. This was primarily because PacifiCorp
106 learned of (i) the work stoppage on the facility, (ii) the additional liens
107 imposed on the facility and (iii) Desert Power's inability to secure firm
108 gas transportation service from Questar to serve the facility. PacifiCorp
109 believes that a combination of all these events, plus the questions
110 surrounding Desert Power's financial situation, constitute a material
111 adverse change as contemplated by the terms of the Agreement. Further,
112 the combined effect of all these events calls into question Desert's ability
113 to meet even the proposed extended date of June 1, 2007. Thus, given
114 the level of uncertainty regarding the viability of the facility, PacifiCorp
115 turned to its remedies under the Agreement and requested that Desert

116 Power post the Default Security and provide additional adequate
117 assurances, to protect the interest of the Company and its customers.

118 **Q: Can you provide additional detail about the facts that led PacifiCorp**
119 **to cease the term sheet discussions and request assurances?**

120 A: During the negotiation of the term sheet a number of facts and
121 circumstances were brought to PacifiCorp's attention, which give
122 PacifiCorp significant concern about Desert Power's ability to have the
123 facility commercially operational by June 1, 2007. Specifically, these
124 facts include: (i) all work on the facility had been suspended; (ii) a June
125 19, 2006 lien was placed on the entire facility, encumbering it in the
126 amount of \$4.6 million, and indeed, a total of \$7.5 million in liens
127 currently encumber the facility; (iii) the inability to secure firm gas
128 transportation service from Questar, which is the primary fuel source for
129 the generation plant, in a timely manner to ensure commercial operation
130 on or before June 1, 2007; and (iv) uncertainty surrounding Desert
131 Power's bank financing and ability to obtain additional equity in order to
132 have the necessary funds to complete the facility. All these facts taken
133 as a whole gave PacifiCorp grounds under the terms of the Agreement to
134 demand the Default Security and additional adequate assurances under
135 the Agreement.

136 **Q. Is there a disagreement between the parties over the power pricing**
137 **applicable if a June 1, 2007 date is agreed?**

138 A. Yes. Mr. Darling states that PacifiCorp is attempting to add a “new”
139 condition to the term sheet, and presumably any definitive amendment to
140 the Agreement, which the Commission would have to approve. Based
141 on Mr. Darling’s testimony, it appears Desert Power does not agree that
142 they would be subject to new avoided cost pricing if they are not on-line
143 by June 1, 2007. PacifiCorp does not agree with Mr. Darling’s
144 characterization that such a condition is a “new” term, given that the
145 term sheet and a definitive amendment were never finalized. PacifiCorp
146 maintains that it always contemplated requiring that Desert Power would
147 have had to agree to the long term avoid cost methodology established
148 by this Commission in Docket No. 03-035-14 in the event that the
149 facility was not commercially operational by June 1, 2007.

150 **Q. What authority leads PacifiCorp to believe that avoided cost pricing**
151 **should apply in the case where Desert Power does not achieve**
152 **commercial operation by June 1, 2007?**

153 A. PacifiCorp believes the Commission’s order approving the May 20, 2004
154 Stipulation makes it clear that the avoided cost methodology as
155 contained therein was only valid for qualifying facilities that were on-

156 line an operational on or before June 1, 2007. PacifiCorp believes that
157 requiring such a term in any definitive amendment to the Agreement is
158 warranted and necessary because resetting the avoided cost pricing,
159 which was the basis for the pricing in the Agreement, would be
160 consistent with the terms of the Stipulation approved by the Commission
161 and signed by Desert Power. Qualifying facilities that do not meet that
162 firm date of June 1, 2007 would have to effectively agree to the avoided
163 cost pricing then in effect for the utility. PacifiCorp does not believe this
164 is a “new” term, but it is an acknowledgment of the terms of the
165 Stipulation as approved by the Commission.

166 **Q. Why did PacifiCorp specify this as a term of the initial Agreement as**
167 **approved by the Commission?**

168 A. The Agreement as approved by the Commission contemplated that the
169 facility would achieve a Commercial Operation Date of June 1, 2006.
170 The Agreement also contemplated significant liquidated damages
171 provisions for failure to achieve a Commercial Operation Date of June 1,
172 2006. At the time the parties negotiated and finalized the Agreement, it
173 was never contemplated that the facility would not be on-line and
174 operational within the time frame described by the Stipulation. Within
175 the context of negotiating an amendment to the Agreement, PacifiCorp

176 believes it is necessary and prudent to protect the interests of its
177 customers by requiring an express term that describes the effect of Desert
178 Power's failure to achieve a June 1, 2007 commercial operation date for
179 the facility.

180 **Q. Mr. Darling emphasizes that a provision in an amendment to the**
181 **Agreement requiring refreshed avoided costs if the facility is not**
182 **commercially operational before June 1, 2007 is unfair because such**
183 **alternative price is unknown, and would in effect preclude Desert**
184 **Power from obtaining any financing on the facility. Do you agree**
185 **with his characterization?**

186 A. No. In discussions of a possible amendment to the Agreement,
187 PacifiCorp has offered to incorporate the post June 1, 2007 avoided cost
188 pricing into the body of the amendment. Including the alternative
189 pricing in the amendment would eliminate any uncertainty as to the post
190 June 1, 2007 pricing.

191 **Q. Is PacifiCorp prepared to specify what the post June 1, 2007 avoided**
192 **cost pricing would be under a Commission-approved amendment to**
193 **the Agreement if Desert Power fails to achieve Commercial**
194 **Operation before June 1, 2007?**

195 A. Yes. Attached to my testimony as RMP Exhibit BWG-3 are the results
196 of an avoided cost pricing run that would apply for Desert Power if its
197 facility has not achieved Commercial Operation before June 1, 2007.
198 This avoided cost pricing run was conducted in response to a data
199 request from the Division of Public Utilities.

200 **Use of Force Majeure**

201 **Q. Under the terms of the Agreement, does an event of force majeure**
202 **relieve Desert Power of its obligation to post Default Security and**
203 **provide additional adequate assurances?**

204 A. Although I am not an attorney, after discussing these issues extensively
205 with counsel, I can state that PacifiCorp's position is that an event of
206 force majeure has not occurred, and that even if it had, an event of force
207 majeure would not relieve Desert Power from these contractual
208 obligations. The Agreement is specific on these issues. For example,
209 Section 8.2 of the Agreement states as follows:

210 "Seller shall provide default security ("Default Security") for its
211 performance hereunder. For such purposes, the Default Security shall be
212 composed of a (1) Letter of Credit for the benefit of PacifiCorp on or
213 before the Scheduled Commercial Operation Date in the amount of
214 \$4,000,000 . . ." (*Emphasis added*).

215

216 Based on the plain language of Section 8.2, PacifiCorp believes that the
217 requirement to post Default Security has always been contemplated prior
218 to the Scheduled Commercial On-line Date of the facility.

219 Further, Section 13.1 of the Agreement provides in part:

220 “As used in this Agreement, “Force Majeure” or “an event of Force
221 Majeure” means any cause beyond the reasonable control of the Seller or
222 of PacifiCorp that, despite the exercise of due diligence, . . . such party
223 shall be unable to overcome, except that nothing contained herein shall
224 effect [sic] the obligation to pay.” (*Emphasis added*).

225 PacifiCorp believes the plain language of the Agreement makes it clear
226 an event of force majeure does not suspend a party’s obligation to make
227 payments pursuant to the terms of the Agreement, including Desert
228 Power’s obligation to post a Default Security payment.

229 Finally, Section 11.1.5 of the Agreement provides as follows:

230 “A Material Adverse Change has occurred with respect to Seller and
231 Seller fails to provide such performance assurances as are reasonably
232 requested by PacifiCorp, including without limitation the posting of
233 additional Default Security or the maintenance or renewal of Default
234 Security pursuant to Section 8.2 . . .” (*Emphasis added*).

235 PacifiCorp believes Section 11.1.5 makes it clear that if PacifiCorp has a
236 reasonable basis for believing Desert Power has experienced a material
237 adverse change in its situation and circumstance, it has the contractual
238 right to request Desert Power post Default Security and provide

239 additional reasonable adequate assurances demonstrating its ability to
240 perform its obligations under the Agreement.

241 **Q. Mr. Swenson’s testimony contends that the Agreement does not**
242 **require firm gas transportation service. Do you agree?**

243 A. No. Scheduled Deliveries as defined in the Agreement are a firm
244 obligation with liquidated damages for non-delivery under the terms of
245 the Agreement. Section 6.1 of the Agreement requires that the Seller
246 “...operate and maintain the Facility in a safe manner in accordance
247 with . . . Prudent Electrical Practices . . .”. Prudent Electrical Practices,
248 as defined by Section 1.25, dictate that the qualifying facility engage in

249 “...the practices, methods and acts engaged in or approved by a
250 significant portion of the electrical utility industry or any of the
251 practices, methods or acts, which, in the exercise of reasonable judgment
252 in the light of the facts known at the time a decision is made, could have
253 been expected to accomplish the desired result at the lowest reasonable
254 cost consistent with reliability, safety and expedition...” (*Emphasis*
255 *added*).

256 PacifiCorp believes it is prudent utility practice that facilities such
257 as the one proposed by Desert Power be required to have firm gas
258 transportation service to operate safely and reliably in a manner
259 consistent with its contractual obligations. As such, Desert Power must
260 obtain and maintain the firm gas supply transportation and firm gas
261 supply agreements to meet its obligation to perform Scheduled

262 Deliveries. Desert Power has failed to demonstrate that it can obtain fuel
263 sufficient to run its facility if PacifiCorp dispatches the plant 24 hours a
264 day, seven days a week, as PacifiCorp has the right to do under the
265 Agreement. Not having a firm gas transportation service agreement and
266 firm gas supply agreement in place or some alternative means of firm
267 fuel supply is not consistent with prudent utility practice. PacifiCorp
268 believes this would not be a practice that the Commission or our
269 customers would accept as a commercially reasonable business practice.

270 **Q. What about Mr. Swenson’s position that PacifiCorp only required**
271 **commercially reasonable efforts to obtain firm gas service and**
272 **supply for Desert Power to meet Scheduled Deliveries?**

273 A. PacifiCorp and Desert Power negotiated the term “commercially
274 reasonable efforts” because the Agreement contained liquidated damages
275 for not meeting scheduled and dispatched power deliveries. The
276 liquidated damages provision is an extraordinary provision to provide a
277 means to compensate the utility and its customers for non-performance.
278 Desert Power cannot simply rely on a liquidated damage payments as a
279 substitute for commercially reasonable business practices. Liquidated
280 damages mitigate the Company’s and our customers’ risk for Desert
281 Power’s non-performance in the event Desert Power’s gas supply is

282 interrupted and it is unable to deliver power to PacifiCorp. Under the
283 Agreement, when PacifiCorp dispatches the facility (i.e., requests Desert
284 Power to run the facility to provide energy for our customers), Desert
285 Power may fail to deliver electrical power to PacifiCorp only for defined
286 National Electrical Reliability Council (“NERC”) events as listed in the
287 Agreement under Section 6.4 and Exhibit D. Specifically, Desert Power
288 is not allowed to interrupt its delivery for a Noncurtailing Event, which
289 is an event that exists whenever equipment or major components are
290 removed for maintenance, testing or other purposes that does not result
291 in a unit outage or derating. Not having gas supply to the plant when
292 dispatched would be a Noncurtailing Event because the plant is fully
293 available but unable to operate with no fuel.

294 **Q. What is PacifiCorp asking the Commission to do in response to the**
295 **parties’ dispute?**

296 A. PacifiCorp is specifically requesting that the Commission make a
297 determination that, given the facts and circumstances, no force majeure
298 has in fact occurred, and that accordingly the terms of the Agreement
299 stand, including the requirement that Desert Power post Default Security
300 and provide PacifiCorp the additional requested adequate assurances.

301 Alternatively, if the Commission finds that a force majeure event

302 has occurred, PacifiCorp requests that the Commission make a ruling on
303 the scope and duration of the event of force majeure pursuant to Section
304 13.2 of the Agreement. Further, PacifiCorp requests the Commission
305 make a determination as to whether the scope and duration of that force
306 majeure excused Desert Power's performance with regard to Default
307 Security and the requirement to provide PacifiCorp additional adequate
308 assurances, and if not, that Desert Power be required to meet such terms
309 immediately. Finally, PacifiCorp requests that the Commission find that
310 if the parties execute an amendment to the Agreement, any such
311 amendment must have a provision calling for refreshed avoided cost
312 pricing that would be effective if the facility has not achieved
313 Commercial Operation on or before June 1, 2007.

314 **Q: Does this conclude your testimony?**

315 A. Yes it does.