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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 ENERGY FROM ITS
PROPOSED QF FACILITIES

DOCKET NO. 04-035-04

**EMERGENCY PETITION FOR
EXPEDITED CLARIFICATION OF
REPORT AND ORDER RESOLVING
DESERT POWER DISPUTE ISSUED
SEPTEMBER 20, 2006**

Desert Power, L.P. (“Desert Power”), by and through counsel, hereby petitions the Public Service Commission of Utah (“Commission”) for expedited clarification of the Commission’s Report and Order Resolving Desert Power Dispute issued September 20, 2006. Desert Power petitioned this Commission August 9, 2006 for emergency mediation pursuant to Section 21 of the Power Purchase Agreement (“PPA”) between Desert Power and PacifiCorp. PacifiCorp had made demands of Desert Power that Desert Power believed were either premature or extra-contractual and forced Desert Power to petition the Commission for resolution.

On September 8, 2006, the Commission heard this matter and received evidence, including correspondence between the parties outlining PacifiCorp’s demands and addressing the parties’ other contentions. Desert Power argued that PacifiCorp’s change in design of a substation at the plant site constituted a force majeure event under the terms of the PPA because

the change was beyond the control of Desert Power, crippled Desert Power's ability to complete the project on the original 2006 schedule, and adversely impacted Desert Power's ability to fund the project to completion because of the question mark overhanging the validity of the PPA. Desert Power also sought an extension of the Commercial Operation Date to June 1, 2007. Without a finding of force majeure, Desert Power was concerned that PacifiCorp could act with impunity by further delaying the project and making successful completion by June 1, 2007 impossible in the event that the Commission granted Desert Power's petition and extended the date.

On September 20, 2006 the Commission issued its order resolving the disputes between the parties by ruling that the delays caused by PacifiCorp's change in design did not amount to an event of force majeure and extending the Commercial Operation Date of the Desert Power plant to June 1, 2007. Desert Power respectfully disagrees with the Commission's interpretation of force majeure because it nullifies unambiguous language of Section 13 of the PPA. Notwithstanding that disagreement, Desert Power immediately distributed the Commission's order to parties with whom Desert Power had been negotiating to solidify additional financing for the project.

On Friday, September 22, 2006, just two days following the issuance of the Commission's order that was supposed to have resolved all the disputes between PacifiCorp and Desert Power, PacifiCorp sent a letter renewing its demand for assurances from its July 14, 2006 letter, making an additional demand, and threatening to find Desert Power in breach if Desert Power does not provide the assurances by October 9, 2006.¹ The new cure period pursuant to the demand letter issued after the Commission's order is seven days shorter than the cure period

¹ A copy of PacifiCorp's September 22, 2006 letter is attached as an exhibit for the Commission's review.

under PacifiCorp's previous letter of August 16, 2006.² It is this series of new and renewed demands that precipitated this Emergency Petition for Expedited Clarification.

Needless to say, Desert Power was astonished, but the September 22nd letter illustrates the difficulties Desert Power has had with PacifiCorp. Desert Power was concerned that PacifiCorp would continue to try to delay the construction of the Desert Power project if the Commission found no event of force majeure, but Desert Power did not expect PacifiCorp's attempted obstruction to come so swiftly or blatantly. The new letter has interfered with Desert Power's negotiations for financing and has already caused additional delay. PacifiCorp bases its renewed and additional demands on the Commission's determination not to extend any other term of the contract except for the June 1, 2007 Commercial Operation Date.³ Below, Desert Power seeks clarification of that conclusion, but based on PacifiCorp's twisted interpretation, that means that the Scheduled Commercial Operation Date of the PPA continues to be 18 months after the effective date of the PPA, May 9, 2006. PacifiCorp believes that interpretation permits it to demand the assurances itemized in the attached letter and arguably to assess damages, if any, all during the construction period, an interpretation and outcome with which Desert Power strenuously disagrees. The effect of PacifiCorp's interpretation is to nullify the Commission's extension of the Commercial Operation Date and renders the project nonfinancible. Investors interested in the project will not invest in it if it is immediately subject to PacifiCorp's demands.

The Commission had PacifiCorp's July 14, 2006 letter before them as an exhibit to the pre-filed testimony of Charles Darling, as well as the subsequent correspondence between

² Desert Power responded to PacifiCorp in letters dated August 4, August 7, and August 25, 2006, all of which are in evidence as exhibits to Mr. Darling's testimony. In PacifiCorp's new letter, it gives as evidence of a material adverse change the withdrawal of MMC Energy's "offer of financial support." The fact is that Desert Power, not MMC Energy withdrew from the negotiations.

³ September 20, 2006 Commission Order, p. 5.

PacifiCorp and Desert Power. The Commission also examined evidence during the hearing on the proper construction of Sections 8.1 and 8.2 of the PPA to determine whether project development security or default security should be available to PacifiCorp. The Commission could have made findings on both issues but instead remained silent.

Desert Power believes the Commission intended that the extension of the Commercial Operation Date settle globally all disputes between the parties. There was no reason to address each issue once the Commission extended the Commercial Operation Date; default and demands for assurances based on a 2006 contract schedule should no longer be at issue.

Based on the foregoing and the continuing disputes with PacifiCorp, Desert Power petitions the Commission to clarify the September 20, 2006 order by answering the following questions:

- 1. Did the Commission intend that the Scheduled Commercial Operation date remain May 9, 2006 so that PacifiCorp could demand the same assurances it demanded before the Commission resolved the disputes between the parties?**

Desert Power submits that the Commission's extension of the Commercial Operation Date necessarily extended the Scheduled Commercial Operation Date; otherwise, the Commission's action was a nullity.

- 2. Did the Commission intend that the September 20, 2006 order settle globally all disputes between the parties by extending the Commercial Operation Date?**

Desert Power submits that the Commission did settle the disputes globally and by so doing did not have to address each issue separately raised at hearing.

3. **On Page 5 of the September 20, 2006 order, the Commission indicated that “the PPA’s existing terms already provide that purchases from the QF will be made for twenty years from the Commercial Operation Date.” Does that mean that the Commission intends that the PPA term be twenty years?**

Desert Power submits that through this acknowledgement in the order, the Commission assumes that the PPA is a twenty-year contract.

Desert Power requests that the Commission clarify these issues by answering these questions and resolving this matter by the end of the day tomorrow, Tuesday, September 25, 2006. Desert Power acknowledges this is an extraordinary request, but Desert Power is facing extraordinary circumstances. In addition to the delays Desert Power asserted against PacifiCorp at hearing September 8, 2006, this dispute has been ongoing since February 10, 2006. It should have settled by no later than June 21, 2006, but PacifiCorp changed its strategy and now Desert Power has missed the entire summer construction season to complete the plant. If Desert Power has any chance of completing the Desert Power project by June 1, 2007, these issues must be resolved now.

Respectfully submitted this 25th day of September, 2006.

Callister Nebeker & McCullough

Stephen F. Mecham

Certificate of Service

I certify that on September 25, 2006 I emailed a true and correct copy of the foregoing **EMERGENCY PETITION FOR EXPEDITED CLARIFICATION OF REPORT AND ORDER RESOLVING DESERT POWER DISPUTE ISSUED SEPTEMBER 20, 2006** to the following:

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