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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

<p>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</p>	<p>Docket No. 04-035-04</p> <p>RESPONSE TO EMERGENCY PETITION FOR EXPEDITED CLARIFICATION</p>
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Rocky Mountain Power (the “Company” or “PacifiCorp”) hereby respectfully responds to the Emergency Petition for Expedited Clarification of Report and Order Resolving Desert Power Dispute Issued September 20, 2006 (“Petition”) filed in this matter by Desert Power, L.P. (“Desert Power”) on September 25, 2006.

The Company believes the Commission’s Report and Order Resolving Desert Power Contract Dispute (“Order”), issued September 20, 2006, is complete and succinct in its meaning and that there is no need for further clarification or elaboration. The Order is clear in its holding

that all terms in the parties' power purchase agreement remain unchanged, except for the Commercial Operation Date as defined therein. (*See* Order at 5). Nonetheless, the Company does not object to the Commission providing additional clarification. However, the Company submits its response in order to correct Desert Power's assertions that the Company is attempting "obstruction" and seeking to "nullify the Commission's extension" (*See* Petition at 3) in demanding Default Security and performance assurances. Further, the Company provides a response to Desert Power's three specific requests for clarification so that there is no question about the parties' interpretation on these issues.

The terms of the contract are clear. When, in the reasonable opinion of PacifiCorp, Desert Power has "experienced a material adverse change in ability to fulfill its obligations" under the contract, the Company is explicitly permitted to seek performance assurances, including without limitation the posting of additional Default Security, or the maintenance or renewal of Default Security. (*See* PPA §§ 1.18, 11.1.5). Since July 14, 2006, and continuing through today, PacifiCorp has been of the reasonable opinion that continuing material adverse changes have occurred with respect to the project, and accordingly PacifiCorp sought to protect itself and its customers by requesting the assurances explicitly permitted in the contract. The Commission was very clear in its determination that no event of force majeure occurred and that all terms of the contract remain unchanged, with the exception of the Commercial Operation Date. All other contractual requirements remain in place.

It is undisputed (i) that there are material liens and encumbrances on the project; (ii) that Desert Power's firm gas supply is uncertain; (iii) that construction has been at a halt for an extended period of time; (iv) that the primary lender has suspended further financing and demanded additional equity investment; (v) that Desert Power has no steam contract; and (vi)

that the potential transaction with MMC Energy, Inc., which Desert Power brought before the Commission to demonstrate the viability of the project, has been terminated. It is not only the “reasonable opinion” of the Company that such facts constitute a Material Adverse Change under the contract, it would be unreasonable to think otherwise. Desert Power’s “astonishment” (*See* Petition at 3) at the Company’s continued request for contractually-required Default Security and performance assurances is therefore misplaced, and the Petition appears to be an attempt to obtain the benefits of a force majeure finding when the Commission has already rejected such a finding.

The Company has no desire to deprive Desert Power of whatever benefits the Commission’s Order provided, nor does it desire to delay the project. Indeed, the Company has not sought to enforce every milestone and right under the contract; but the Commission’s Order did not constitute a broad contract extension or a free pass from Desert Power’s contractual obligations, and the Company retains the obligation to prudently and reasonably protect itself and its customers. Desert Power’s ability to perform remains seriously in question—a fact attested to by the very filing of the Petition. Regardless of what clarification the Commission chooses to provide, Desert Power should not be relieved of its obligations under the contract.

As to Desert Power’s specific requests:

1. Scheduled Commercial Operation Date: The only term extended by the Order was the Commercial Operation Date, not the Scheduled Commercial Operation Date. Further, even if the Scheduled Commercial Operation Date were extended (potentially impacting the schedule for posting Default Security under section 8.2), the material adverse change impacting Desert Power’s ability to perform entitles the Company to reasonably request performance assurances “including without limitation the posting of additional Default Security” (*See*

PPA § 11.1.5). A change in the Scheduled Commercial Operation Date would not alleviate the Company's serious concerns about Desert Power's ability to perform. The Commission's Order was very clear. It sets forth what should be revised in the contract—the Commercial Operation Date—and no other terms. The Company's insistence on the enforcement of other, still-applicable terms in the contract in no way makes the Commission's finding a nullity.

2. Global Dispute Settlement: Desert Power appears to be seeking the benefits of a force majeure finding, suspending all of its contractual obligations, despite the fact that the Commission expressly found that no such event had occurred. (*See* Petition at 4) (“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.”). Desert Power reads its desired result into the Commission's Order, when the language is simply not there. Rather, the Commission clearly rejected such a result, and was correct in its findings. (*See* Order at 6) (“Irrespective of what our conclusion may be regarding the force majeure issue, some parties have argued that we have the ability to alter or amend the PPA to provide alternative, but effectively the same, relief as Desert Power ostensibly believes it would have through a finding of the existence of a force majeure. We do not address that contention as the record has limited analytical information upon which we could base a decision. In addition, the record is totally devoid of evidence upon which we could craft the various amendments that would be needed, should we have concluded that we do have the authority.”).

3. Contract Term: Desert Power again appears to be reading its desired result into the language of the Order, seeking an extension of time for its ability to sell power under the contract notwithstanding the Commission's clear statement that “[w]e have concluded that the Commercial Operation Date may be extended to on or before June 1, 2007, but have an

insufficient basis to extend any other term.” (*See* Order at 5; *see also id.* at 7) (where the Commission, in finding that the Commercial Operation Date is extended, found “[w]e do not reach the same conclusion for Desert Power’s request to extend the contract for one year; without a sufficient evidentiary basis, its terms cannot be extended.”). Pursuant to section 2.2, the contract will terminate on December 31, 2025. The Commission did not order revision of section 2.2 and there is no basis to extend that date.

In summary, the Company is not seeking to “obstruct,” it is trying to protect its interests and those of its customers. In the present circumstances, it is more than reasonable to conclude that a material adverse change has occurred. In response, the Company has merely sought the posting of Default Security and additional performance assurances described in the contract. The Commission’s Order did not affect the Company right to take this prudent step, nor would there be any reason for the Commission to issue an order prohibiting the Company from doing so.

RESPECTFULLY SUBMITTED: September 26, 2006.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **RESPONSE TO EMERGENCY PETITION FOR EXPEDITED CLARIFICATION** was sent by electronic mail to the following on September 26, 2006:

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