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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

**ROCKY MOUNTAIN POWER'S
OPPOSITION TO PROPOSED
SCHEDULE FOR EMERGENCY
PETITION**

Rocky Mountain Power (or the “Company”) hereby responds in opposition to the scheduling request contained in the Emergency Petition for Resolution of Dispute Pursuant to Section 21 of Power Purchase Agreement (“Petition”) filed by Desert Power, L.P. (“Desert Power”) on August 9, 2006. For the reasons set forth below, the Petition should not receive the expedited treatment requested by Desert Power. If the Commission is to adopt an expedited schedule it should adopt the one proposed by the Company below—or a longer schedule that

similarly preserves the parties' right to be heard and to develop a complete administrative record of all issues surrounding this dispute.

ARGUMENT

A. THE SCHEDULE SOUGHT BY DESERT POWER DOES NOT COMPORT WITH DUE PROCESS OR COMMISSION PROCEDURE.

The Petition seeks an order directing the Company to file a response to the Petition within five days, to be prepared for a technical conference within two days after that, to submit a position statement within five days after that (limited to 10 pages, with no opportunity for submitting testimony or conducting discovery), and to be prepared for a hearing within four days after that. *See* Petition at 2. In sum, the Petition seeks to resolve a substantive contract dispute in its entirety (at least as to the parties' opportunity to participate) within just over two weeks, approximately the same amount of time a party would have to submit its initial response to a typical motion (*see* Utah Administrative Code R746-100-4.D) and about half the time a party would have to submit its initial response to a request for agency action. *See id.*

While the Petition describes the dispute as involving "a demand that Desert Power agree to accept avoided costs rates in effect June 2, 2007 if the Desert Power plant is not on line by June 1, 2007," in reality the issues are much broader. There are fact-intensive disputed issues regarding Desert Power's current and future performance under the terms of the Commission approved power purchase agreement that require an opportunity for discovery and pre-filed testimony. For example, one of the issues in dispute involves Desert Power's refusal to provide adequate assurance of performance, as required under the agreement, based on its assertion that its obligation has been suspended as a result of a force majeure event. Because of significant concerns regarding Desert Power's continuing ability to perform under the terms of the agreement, that issue is of major concern to the Company.

The timing and process contemplated by the Petition would not provide an adequate opportunity to address these important issues, nor would it comport with constitutional due process or established Commission procedure. Fundamental to due process under both the United States and Utah Constitutions are concepts of adequate notice and a meaningful opportunity to be heard.¹ These requirements are built into the Utah Administrative Procedures Act (“UAPA”), which requires that the agency “afford all the parties reasonable opportunity to present their positions . . . [and] opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.”² The concepts of due process are also reflected in the Commission’s rules, which require, for example, an opportunity to conduct discovery, adequate notice of any hearing, and the “full opportunity to cross-examine” witnesses.³

While UAPA allows for a deviation from its timeframes “for good cause shown,”⁴ there can never be good cause to deny due process, and statutory provisions must always yield to constitutional mandates. Given the seriousness and fact-intensive nature of the issues raised by the Petition, the timeframes requested by Desert Power and the lack of opportunity to conduct necessary discovery and submit testimony are inconsistent with due process. Moreover, an agency action that is “contrary to a rule of the agency” or “contrary to the agency’s prior practice, unless the agency justifies the inconsistency” is reversible error if it would substantially

¹ See, e.g., *V-1 Oil Co. v. Dep’t of Env’tl Quality*, 939 P.2d 1192, 1197 (Utah 1997) (“[S]tricter due process requirements apply to adversarial, adjudicative decision making than to legislative-type decision making. The most fundamental requirement in this context is ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’ As a necessary corollary to this opportunity, affected parties must receive adequate notice . . .”) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); additional citations omitted).

² See Utah Code Ann. §§ 63-46b-8(1)(a), (1)(d).

³ See, e.g., Utah Admin. Code R746-100-8; R746-100.10.A, F, G.

⁴ See Utah Code Ann. § 63-46b-1(9).

prejudice a party.⁵ To be consistent with Commission rules and practice, any rule deviation must come only after “notice, opportunity to be heard and a showing that the rule imposes an undue hardship which outweighs the benefits of the rule.”⁶ Here, the rule deviation effectively sought in the Petition is inconsistent with these notice and right-to-be-heard requirements.

B. ROCKY MOUNTAIN POWER IS WILLING TO AGREE TO AN APPROPRIATELY EXPEDITED SCHEDULE THAT PRESERVES ITS RIGHT TO BE HEARD.

The Company does not seek to unnecessarily delay the resolution of the parties’ dispute, and is indeed willing to waive any insistence on following the timeframes set forth in the Commission’s rules in order to accommodate an appropriately expedited schedule. However, that schedule and the accompanying process must preserve the Company’s (and, by extension, its customers) right to be heard, including adequate notice, an opportunity to conduct discovery, an opportunity to submit fact and/or expert testimony and an opportunity to cross-examine Desert Power’s witnesses. To accommodate these needs, the Company proposes the following expedited schedule, which would only result in a modest delay in Desert Power’s proposed schedule but would more appropriately comport with due process:

August 14, 2006	Scheduling Conference
August 17, 2006	Direct Testimony by Desert Power
August 22, 2006	Technical Conference
August 31, 2006	Response Testimony by Rocky Mountain Power
September 7, 2006	Response Testimony by Division and Committee
September 12-13, 2006	Hearing

⁵ See *id.* at § 63-46b-16(h).

⁶ See Utah Admin. Code R746-100-15.

The Company also proposes a 5 calendar-day turn-around on any discovery requests (calculated in accordance with Utah Admin. Code R746-100-4.E).

CONCLUSION

For the reasons set forth above, the schedule set forth in the Petition should be denied, and if the Commission is to grant an expedited schedule it should adopt the Company's proposed schedule set forth above.

RESPECTFULLY SUBMITTED: August 10, 2006.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **ROCKY MOUNTAIN**

POWER'S OPPOSITION TO EXPEDITED SCHEDULE FOR EMERGENCY

PETITION was sent by electronic mail to the following on August 10, 2006:

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