
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
**PREFILED DIRECT TESTIMONY OF
CHARLES DARLING FOR DESERT
POWER, L.P.**

DESERT POWER EXHIBIT 1

August 18, 2006

ATTACHMENTS TO EXHIBIT 1.10 ARE SUBJECT TO THE PROTECTIVE ORDER

ISSUED IN DOCKET NO. 04-035-04

1 **Q. Please state your name, business address, and position for the record.**

2 A. My name is Charles Darling. My business address is 2306 Augusta Suite 880,
3 Houston Texas and I am President and General Manager of Desert Power, L.P.

4 **Q. Please state who Desert Power, L.P. is.**

5 A. Desert Power owns and operates a natural gas fired power plant located in Tooele
6 County, Utah adjacent to the US Magnesium refining facility.

7 **Q. What is the present status of the facility?**

8 A. We are in the middle of an expansion of our facility that will take it from a simple
9 cycle facility into a combined cycle facility qualifying as a Qualifying Facility
10 under federal and state law. However, at the present time, by virtue of the
11 uncertainty being addressed in this proceeding, work on the site has stopped.

12 **Q. Were you involved in the negotiation and execution of the Power Purchase**
13 **Agreement between Desert Power, L.P. and PacifiCorp dated September 24,**
14 **2004?**

15 A. Yes, I was. As you can see, I executed the agreement on behalf of Desert Power.

16 **Q. Please provide the basis upon which you have come before the Commission.**

17 A. Under Section 21 of the PPA, in the event the parties are unable to resolve a
18 dispute between them, they can submit the matter to the Commission for
19 resolution. The parties have a dispute between them; they have met in an attempt
20 to mediate that dispute between them and have been unsuccessful in doing so;
21 and, accordingly, Desert Power has sought resolution of the dispute by the
22 Commission.

23 **Q. What gives the Commission jurisdiction over this dispute?**

24 A. Section 21 of the PPA was in the agreement submitted to the Commission for
25 approval, which approval was granted by the Commission in its Order of October
26 7, 2004. By approving the contract, the Commission asserted jurisdiction over the
27 PPA, and thus, Desert Power believes the Commission continues to have
28 jurisdiction in the matter.

29 **Q. Please describe the dispute.**

30 A. On February 10, 2006, Desert Power invoked the *force majeure* provisions in
31 Article 13 of the PPA. The *force majeure* related to the inability of PacifiCorp to
32 meet the projected in-service date for the Desert Power expansion in its design,
33 engineering and construction of the interconnection facilities required by Desert
34 Power to bring the power plant on line under the terms of the PPA. This letter
35 was followed by a further invocation of the *force majeure* provisions by letters
36 dated March 30, 2006 and May 19, 2006. These letters, and the related
37 correspondence from PacifiCorp, are attached to my testimony as Exhibits 1.1
38 through 1.7. The underlying facts relating to the invocation of the *force majeure*
39 provisions of the agreement are set out in the testimony of Mr. Roger Swenson on
40 behalf of Desert Power.

41 **Q. Please state Desert Power's position in this proceeding.**

42 A. Desert Power believes it has been rendered unable to complete this project in a
43 timely manner because of PacifiCorp's wrongful rejection of Desert Power's
44 invocation of *force majeure* pursuant to the operative provisions of the PPA. That
45 invocation remains outstanding, is uncured, and has tolled Desert Power's
46 performance obligations on a day-to-day basis until cured. In the meantime,

47 PacifiCorp's refusal to abide by the terms of the contract has rendered its
48 subsequent request for assurances, additional security and accession to additional
49 burdens not contemplated by the contract invalid.

50 Indeed, Desert Power believes that in the circumstances, PacifiCorp's
51 actions render it in contractual breach. Nevertheless, what Desert Power seeks is
52 a Commission declaration that the force majeure remains in effect and that the
53 public convenience and necessity is served by a contract extension along those
54 lines reflected in the Term Sheet orally agreed to by the parties in June of 2006.

55 **Q. Does Desert Power still think it can achieve the June 1, 2007 Commercial**
56 **Operations Date?**

57 A. Yes, we do. But every day that goes by makes it more and more difficult to
58 attain. We are losing days for which there is presently no compensating
59 extension. We had been hopeful that we could, through mediation, get the matter
60 resolved by the beginning of August, in which case we believed we could have
61 commenced site mobilization by September 1, giving us 9 full months to achieve
62 the Commercial Operation Date, a very realistic schedule. However, PacifiCorp's
63 insistence on imposing extra-contractual conditions to resolve the outstanding
64 issues has only further delayed our ability to recommence construction operations.
65 As it stands today, we will be lucky to have people on site and ready to go by
66 October 15, assuming the Commission were to promptly resolve this matter. That
67 cuts our time down to only seven and one-half months, and we have lost good
68 construction days in September and had our construction moved further into the

69 winter months. That is a challenging schedule, but one we are prepared to set out
70 on.

71 **Q. What happens if you don't make it?**

72 A. We will have to come back before the Commission, but at this point, that is still a
73 hypothetical issue. However, we cannot bear any additional delay, having already
74 tried to work through this matter cooperatively with PacifiCorp for several
75 months.

76 **Q. Why did Desert Power invoke the *force majeure* provisions?**

77 A. The invocation of the *force majeure* related to the length of time that it was going
78 to take to get the transmission interconnection installed. PacifiCorp's delay was
79 beyond Desert Power's control and, therefore, an event of *force majeure*. By
80 invoking the *force majeure* provisions, Desert Power believed it gave the parties
81 an opportunity to work out a realistic schedule when all facilities required of both
82 parties could be in place and operational. Our goal was not to create a problem
83 or a confrontation; it was to find a business solution that was mutually
84 accommodative.

85 **Q. Why was the timing of the interconnection so important?**

86 A. Prior to the plant expansion, Desert Power already had an Interconnection
87 Agreement with PacifiCorp and was classified as a network resource when it was
88 selling power to PacifiCorp. Under that agreement, we already had provision for
89 80 MW's of power on the interconnection. This interconnection was effected
90 through the Rowley substation, where Desert Power had its own busbar,
91 transformer, breakers, switches, and meters for purposes of delivering power into

92 the PacifiCorp transmission system. All that we sought to do was to amend that
93 agreement to include the additional power we would be capable of delivering as a
94 result of the plant expansion.

95 However, expanding the interconnection was important to being able to
96 commence the shake-out and start-up process. This is because the new
97 interconnection would be the one that would allow us to begin the “backfeeding”
98 of power to commence the start-up operations on the newly constructed portions
99 of the plant.

100 **Q. Were you also affected by the design of the interconnection?**

101 A. Yes, we were.

102 **Q. Please explain.**

103 A. The design of the interconnection directly impacted the electrical engineering
104 design work being done by our engineers for our plant. It also affects the
105 placement of orders for the electrical equipment to effect the interconnection,
106 much of which have long lead times.

107 **Q. What happened here?**

108 A. As Mr. Swenson explains in his testimony, all of us – both Desert Power and
109 PacifiCorp – were focused on an expansion of the interconnection that would use
110 the existing lines. We proceeded along those lines for several months. It was
111 only in late October of 2005, when we had essentially finalized a design working
112 off the existing interconnection that PacifiCorp advised us that operational
113 personnel had reviewed the design and wanted to fundamentally modify it,
114 effectively starting over.

115 These modifications were substantial and required virtually a complete
116 rework of the existing tie-in for both us and US Magnesium. The result was that
117 by February 10, 2006, it was clear that we were not going to have a final impact
118 study from PacifiCorp until sometime in March at the earliest. With that type of
119 timeline, it was very clear that we would not have the interconnection for the new
120 facility in place for some time, well beyond May 9, 2006.

121 However, the impact of this delay in the study was not limited to the
122 interconnection itself. It stopped much of the electrical design work by our
123 engineers as they awaited inputs from PacifiCorp. With the changes, they could
124 not proceed. This, in turn, affected our construction progress and our schedule for
125 completion.

126 Given these circumstances, we sent our *force majeure* letter of February
127 10, 2006.

128 **Q. What was PacifiCorp’s response?**

129 A. It rejected our *force majeure* claim.

130 **Q. What was the basis for its rejection?**

131 A. PacifiCorp claimed that *force majeure* events were limited to “Acts of God” and
132 similar type events.

133 **Q. Did you agree?**

134 A. No, I did not.

135 **Q. Why not?**

136 A. The *force majeure* language in Article 13 of the PPA states that an event of force
137 majeure is “any cause beyond the reasonable control of the Seller or of PacifiCorp

138 that despite the exercise of due diligence, such party is unable to prevent or
139 overcome.” Clearly, the actions of PacifiCorp’s operational personnel at the
140 previous point of finalization of the prior study, which totally changed the
141 interconnection design and required entirely new engineering and design, were
142 actions beyond the control of Desert Power.

143 **Q. PacifiCorp has previously stated that these events were not beyond the**
144 **control of Desert Power because it waited 5 months after the signing of the**
145 **PPA to ask for an Interconnection Agreement. Do you agree?**

146 A. No, I do not.

147 **Q. Please explain.**

148 A. The 5-month period occurred because we were looking for a steam turbine and
149 generator that was available that would allow us to meet our three primary
150 objectives as to this piece of equipment: (1) meet our on-line timing requirements;
151 (2) meet our size requirements; and (3) allow us to attempt to achieve our heat
152 rate objectives under the PPA.

153 As to the first point, because of our scheduling constraints, we could not
154 go with a new unit because of the lead times for a new unit. As to the second
155 point, we needed a unit in the 30 to 40 MW size range. And on the third point, we
156 needed it to be a high-pressure turbine to do that. However, most high pressure
157 turbines are not that small.

158 It turned out to be a little like looking for a needle in the haystack:
159 although there were many available steam turbines in the secondary market, there
160 was only one steam turbine and generator set available that met our requirements.

161 However, that turbine was not the first turbine we found; before we found that
162 particular turbine, we had to consider and inspect many turbines as we tried to
163 find the right match, which took some time.

164 **Q. How did the search for the right steam turbine delay your request?**

165 A. The interconnection request form requires very specific information about the
166 equipment proposed to be added to the transmission system so that PacifiCorp can
167 assess system impacts. Until we had that information, we really could not
168 meaningfully fill out the required form, and PacifiCorp could not undertake a
169 meaningful evaluation of impacts. Thus, we could not make our request until we
170 had identified the equipment that we intended to install.

171 As soon as we had identified the equipment, and long before we had it
172 purchased, we used the information from that equipment to make our request for
173 the expansion of our existing Interconnection Agreement. Thus, we took the risk
174 at that point that we would be unsuccessful in our acquisition effort and would
175 have paid for a study that had no use. However, as it turns out, we successfully
176 acquired the equipment. I might add that we used this same approach to expedite
177 our engineering – telling our engineers to design to the proposed equipment at our
178 risk of not acquiring it.

179 **Q. Do you believe that the delay in filing the interconnection request was**
180 **responsible for the events that lead to your *force majeure* claim?**

181 A. No, I do not. As Mr. Swenson set out, we were had essentially finalized a
182 interconnection design with PacifiCorp by the end of September of 2005. Rather,

183 it was the total redesign of the existing interconnection in late October of 2005
184 that resulted in the delay.

185 **Q. How did those delays affect Desert Power?**

186 A. They fundamentally affected our scheduling on the completion of the plant.

187 **Q. Please explain.**

188 A. We had set out in our planning to try to bring the plant on-line and be ready for
189 commercial operation by January 1, 2006. However, delays in certain equipment
190 acquisition made that goal unattainable. Nevertheless, we always kept focused on
191 the requirement under the PPA to get the plant on-line by May 9, 2006.

192 However, with the redesign of the interconnection, and the attendant
193 delays that PacifiCorp told us we would be incurring, we had to confront how we
194 would manage our construction efforts in order to assure an on-time delivery
195 consistent with PacifiCorp's ability to provide us a "backfeed" from the new
196 facilities. Based on the schedules provided us, that "backfeed" would not occur
197 until mid- to late September, 2006. Indeed, in mid-May, 2006, PacifiCorp
198 advised us that that date had slipped to November 15, 2006.

199 With those kind of delays evident by early 2006, we had to examine and
200 begin adjusting our construction schedules. The further into the matter we got,
201 the longer the interconnection delays became. This led to our subsequent *force*
202 *majeure* letters of March 30, 2006 and May 19, 2006. But at the same time, it
203 made no sense to staff up to as many as 300 laborers on extended hours to meet a
204 May 9, 2006 date if we were then not even going to be able to begin start-up
205 operations until fall of 2006.

206 **Q. What was PacifiCorp’s response to your subsequent *force majeure* letters?**

207 A. The same as before: rejection of the claim.

208 **Q. With these rejections, why didn’t Desert Power just complete the plant**
209 **anyway and just leave it there until everything was ready?**

210 A. It would have been very costly to do so, and it would have been wholly
211 impractical. As a plant begins to be completed, the “backfeed” from the
212 interconnection is utilized to begin testing pumps, running systems, and doing the
213 necessary completion work and adjustments. In effect, without that backfeed, we
214 would not know what had to be done as we went along in the final processes,
215 requiring tearing out installed items and reinstalling them once we had the
216 backfeed. As well, we would have to demobilize and remobilize without being
217 fully certain of the crafts required to complete the facility.

218 Equally importantly, PacifiCorp’s straight-out rejection of our claim
219 directly impacted our financing. We had secured permanent financing to take out
220 our bridge construction loan. But with the rejection of the *force majeure* claim,
221 the permanent financing became concerned about the viability of the PPA.
222 Ultimately, they terminated the commitment at the end of February. Our bridge
223 lender, although originally supportive, became increasingly concerned about our
224 inability to reach any resolution with PacifiCorp and ultimately terminated further
225 financing at the end of April until we could get the matter with PacifiCorp
226 resolved.

227 Thus, with the dispute with PacifiCorp, we were unable to meet the
228 conditions of retaining our financing to complete the plant. So with PacifiCorp's
229 refusal to recognize our claim, we lost our ability to move forward.

230 **Q. Did Desert Power make PacifiCorp aware of these problems with the**
231 **financing?**

232 A. Yes, we did. We repeatedly informed them over this course of time that we had
233 to get this cleared up to keep our financing. But PacifiCorp kept rejecting the
234 claims anyway, making no effort to engage in meaningful discussions.

235 **Q. Did that change at all anytime subsequently?**

236 A. Yes, at least temporarily, but after we had already lost our permanent financing at
237 the end of February, had our bridge financing shut down at the end of April, and
238 had been forced to shut down construction at our site in early May..

239 **Q. Please explain.**

240 A. There were two efforts. The first was by Rocky Mountain Power division of
241 PacifiCorp in mid-May offering to work with us to get the transmission facilities
242 in place earlier. However, because of actions we had already taken given the
243 timelines PacTrans was providing us, those efforts could not have solved the
244 delay problems. In any event, after we began to chase down the elements needed
245 to solve the problems, it became clear that we could not get the needed
246 transmission elements any earlier in any event.

247 The second effort was by what is now the PacifiCorp Energy division of
248 PacifiCorp. In late May, it agreed to try to resolve the matter with us. As I
249 previously set out, we had repeatedly urged on PacifiCorp our belief that the best

250 manner by which to resolve this matter was by agreement between the parties, a
251 belief that dictated the approach we took of invoking the *force majeure* clause.
252 After ensuing discussions, by Term Sheets dated June 14 and 21, 2006, we
253 achieved a resolution of the matter, agreeing to extend the Commercial Operation
254 Date under the PPA to June 1, 2007 and agreeing to an attendant one-year
255 extension of the PPA. The only point of discussion was the specific inclusion of
256 PacifiCorp Transmission within the scope of the release provisions between the
257 parties since we had not concluded our negotiations with PacTrans over the
258 Interconnection Agreement.

259 **Q. What happened to the Term Sheet?**

260 A. As I mentioned, we provided some comments to PacifiCorp, the last of which
261 were made on June 22, 2006, on the terms of the release. After that, I have heard
262 nothing further on the Term Sheet.

263 **Q. What was your next substantive communication concerning the PPA?**

264 A. My next substantive communication regarding the PPA was a request to
265 participate in a discussion with PacifiCorp and DPU Staff. I was informed it went
266 to a question arising out of PacifiCorp's rate case.

267 **Q. What was the substance of that discussion?**

268 A. The discussion concerned our gas supply situation at the plant. As well, questions
269 that were posed regarding the installation of upstream compression on the Questar
270 Gas distribution system serving the plant.

271 **Q. What is that situation?**

272 A. Mr. Swenson discusses the matter in his testimony. However, the short answer is
273 that we believe we have taken all measures required under the contract – and
274 more – to assure our gas supply for the commencement of service under the
275 contract and are taking additional measures to assure eliminate any potential for
276 future uncertainty.

277 **Q. Was there follow-up to that call?**

278 A. Yes, there was.

279 **Q. Please tell me what that was and the subsequent events surrounding that**
280 **follow-up.**

281 A. On July 14, 2006, Desert Power’s attorney received a letter from Mr. Mark Klein,
282 Vice President of PacifiCorp; I have attached the letter as Exhibit 1.8. Desert
283 Power responded to that letter on July 19, 2006, which letter is attached as Exhibit
284 1.9. Because it appeared that a dispute had developed that required mediation,
285 Desert Power requested mediation pursuant to Article 21 of the PPA. PacifiCorp
286 requested various assurances and undertakings in that letter, most of which we
287 considered not founded in the PPA and constituting an attempt to impose extra-
288 contractual conditions on us.

289 **Q. Did that mediation occur?**

290 A. Yes, it did.

291 **Q. When was that?**

292 A. It occurred on Tuesday, August 1, 2006.

293 **Q. What were the results of that mediation?**

294 A. At the conclusion of the mediation, once again, no agreement was forthcoming
295 from PacifiCorp. Rather, PacifiCorp requested that we put into writing a point-
296 by-point response to Mr. Klein’s July 14, 2006 letter. In addition, PacifiCorp
297 requested that Desert Power agree to an automatic reset of the avoided cost price
298 under the PPA if we did not meet the June 1, 2007 on-line date; however,
299 PacifiCorp did not provide any estimate of what they projected that price would
300 be.

301 **Q. Did Desert Power provide PacifiCorp the requested response?**

302 A. Yes, we did, by letter dated August 4, 2006, a copy of which is attached as
303 Exhibit 1.10.

304 **Q. Did Desert Power agree to the automatic price reset proposed by PacifiCorp?**

305 A. No, it did not.

306 **Q. Why did Desert Power not agree?**

307 A. The automatic price reset condition PacifiCorp requested Desert Power to accept
308 not only has no basis in the PPA but would essentially render the project
309 unfinanceable. The additional security PacifiCorp has requested is not
310 contemplated under the PPA. The assurances PacifiCorp sought on gas supply
311 are not contemplated under the PPA, and Desert Power has satisfied all the
312 contractual provisions on fuel under the PPA, as Mr. Swenson sets out in his
313 testimony. Finally, the financial assurances that PacifiCorp requests cannot be
314 given until it has removed what effectively constitutes a “blocking action” to
315 Desert Power’s ability to obtain those assurances.

316 **Q. Why is that?**

317 A. As to the first condition, PacifiCorp has requested that Desert Power agree
318 unconditionally to an unknown rate for the duration of the contract if it is not
319 online by June 1, 2007. No financing source will accept such a provision because
320 it cannot know what the revenues will be to support repayment of any financing
321 that it may make.

322 As to the second condition, the \$4 million letter of credit sought by
323 PacifiCorp is required under Section 8.2 of the PPA in support of Desert Power
324 achieving a Commercial Operation Date. Prior to that, the provisions of Section
325 8.1 apply, with its own internal damage calculation and refreshment provisions.
326 PacifiCorp is attempting to invoke the provisions of Section 8.2 with no
327 Commercial Operation Date. That is not contemplated. What it does is simply to
328 further burden Desert Power's ability to obtain financing.

329 As to the third, the fuel provision, Mr. Swenson has discussed at length the
330 measures we have taken to ensure our fuel supply, and how those actions fully
331 satisfy Desert Power's obligations under the PPA.

332 As to the fourth condition, with PacifiCorp unwilling to ratify the PPA,
333 Desert Power cannot obtain further financing. This was set out in our August 4,
334 2006 letter to PacifiCorp which then generated two additional letters dated August
335 7, 2006 marked as Exhibits 1.11 and 1.12.

336 **Q. Was there any further correspondence between the parties?**

337 A. Yes. After the schedule in this matter was set, PacifiCorp sent us a notice of
338 default dated August 16, 2006 which is attached as Exhibit 1.13.

339 **Q. What is the current situation?**

340 A. We have a financing source willing to come into the project and provide the
341 assurances on financing sought by PacifiCorp. However, it will not agree to the
342 first and second conditions.

343 **Q. Do you have an amended Interconnection Agreement now?**

344 A. No, we do not.

345 **Q. What is the status of the amendment?**

346 A. We have completed all of the elements of the new agreement; most, if not all, of
347 the required equipment has been ordered; and basically all elements are ready to
348 move forward. There is one consent from US Magnesium that we are awaiting,
349 but that should be it. We have already funded over \$400,000 of PacifiCorp's
350 costs. Essentially, everyone has moved forward on the basis of the agreed-to
351 design and taken all necessary elements to implement the new interconnect. For
352 example, the specialized poles required for the new interconnection – which are a
353 long lead-time item – are already ordered. On the current time frame, we believe
354 the new interconnection would be ready early next year.

355 **Q. Does that conclude your testimony?**

356 A. Yes, it does.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was emailed and/or mailed, postage prepaid, this 18th day of August, 2006, to the following:

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