

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

DPU Exhibit 1.0

Direct Testimony of Andrea Coon
Division of Public Utilities

September 6, 2006

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

3 A. My name is Andrea Coon. My business address is 160 E. 300 S. SLC, UT. I
4 work as a Technical Consultant for the Utah Division of Public Utilities
5 (Division).

6

7 **Q. Please summarize your educational and pertinent professional**
8 **background for the record.**

9 A. I have a Bachelor's degree in Economics, a Master's degree in
10 Communications, and have completed all coursework toward a Ph.D. in
11 Economics. I have been working in utility regulation since 2001. I have
12 participated in a number of areas including IRP, power costs, special
13 contracts, and QF agreements.

14

15 **Q. Were you involved in the prior proceeding for Docket 04-035-04?**

16 A. Yes. Although I did not file Division testimony in the prior proceeding, I was
17 involved in this and other QF proceedings at the time on behalf of the
18 Division. I have since become the Division's expert on QF contracts and have
19 filed testimony or memoranda before the Commission in six QF dockets so far
20 this year on behalf of the Division.

21

22 **Q. What is the purpose of this testimony?**

23 A. The purpose of this testimony is to provide the Commission with the
24 Division's observations of the events surrounding Desert Power's claim of
25 Force Majeure as well as the Division's position on under what circumstances
26 the Power Purchase Agreement (PPA) in question could or should be
27 extended according to the language of the existing PPA. I will not be
28 addressing points made on an individual basis presented by each of the
29 witnesses of the various parties, but rather will be addressing the overarching
30 issues of whether the delay in contract performance appears to have been
31 related to an event of Force Majeure and whether this event would allow for a
32 possible extension of the PPA originally approved by the Commission on
33 October 7, 2004.

34

35 **Q. Desert Power proposed that the PPA should be extended to June 1, 2007,**
36 **regardless of the existence of a Force Majeure event. Does the Division**
37 **agree with this proposal?**

38 A. No. The parties to the PPA have not reached an agreement to alter the PPA. In
39 the absence of a Force Majeure event and without an agreement between the
40 parties, the Division believes that the Commission should apply the contract
41 as written and approved and not rewrite it. Avoided costs are significantly
42 different at present than they were at the time the PPA was approved and the
43 PPA should be extended only under the terms of the contract. Extending the
44 PPA outside of the terms of the contract would require a new finding that such

45 an action is just, reasonable, and in the public interest which the Division
46 would be unable to support given the evidence presented thus far.

47 If the Commission finds that a Force Majeure event did occur, the
48 Division believes that the PPA contains provisions to guide future actions.
49 These specific provisions do not seem to contain any mention of an extension
50 of contract end date. The Division would need more time to analyze the
51 particular implications of the contract provisions.

52

53 **Q. What are the conditions contained within the PPA under which it can be**
54 **extended as is?**

55 A. The Division team has found no specific condition within the contract that
56 would allow for an extension. A Force Majeure would allow for suspension of
57 obligations, but does not specifically allow for an extension of the end date. A
58 Force Majeure event, however, could allow for a later online date. Therefore,
59 the Division attempted to ascertain a possible root cause of the Desert Power's
60 failure to come online as scheduled.

61

62 **Q. Why is it important to identify a possible root cause of Desert Power's**
63 **failure to perform under the PPA?**

64 A. It is because the events upon which Desert Power is basing its claims are not
65 those that would normally come to mind when referring to a Force Majeure.
66 The events that would normally come to mind when referring to a Force
67 Majeure are those specifically called out in the PPA in Section 13.1, such as

68 acts of God, fire, flood, storms, wars, etc, that are beyond the reasonable
69 control of a party and not caused by one party or the other. The event upon
70 which the Desert Power claim seems to be primarily based is a redesign of a
71 transmission interconnection.¹ According to the strict wording of the PPA, any
72 use of this event as a Force Majeure would seem to fall into the category of “is
73 not limited to” contemplated under Section 13.1. Therefore, a root cause helps
74 determine whether the event was applicable as a Force Majeure under the
75 terms of the contract.

76

77 **Q. Please explain your understanding of what constitutes a Force Majeure**
78 **event.**

79 A. Although I am not an attorney, I have reviewed Section 13 of the PPA
80 between Desert Power and PacifiCorp as part of my analysis of the facts
81 presented by the parties. The examples of Force Majeure events presented in
82 this section are fairly straightforward. The events largely consist of either
83 naturally occurring events, such as fire or flood, or are due to actions taken by
84 third parties that are outside of the reasonable control of the parties, such as
85 strike or sabotage. One of the points that I found to be important was the fact
86 that events that could otherwise qualify as a Force Majeure can apparently be
87 disqualified as such if reasonable foresight could have enabled the affected
88 party to avoid the event. (See Section 13.1 (ii)) Another important manner in
89 which a possible Force Majeure event could be disqualified as such is if the

¹ Testimony of Roger Swenson dated August 18, 2006, lines 29-32

90 exercise of due diligence could enable the affected party to overcome the
91 event. (See Section 13.1 (iii))

92

93 **Q. How has the Division gone about analyzing the issues in this docket?**

94 A. We have examined the evidence presented, both in the form of testimony as
95 well as in the form of data responses, and have tried to determine a root cause
96 for the failure of Desert Power to come online according to its contract
97 provisions. At the Technical Conference held on the record on August 31,
98 2006, we handed out a time line that placed the important events in
99 chronological order. This time line was sent to both parties for comment.
100 PacifiCorp provided comments on August 30, 2006, which were incorporated
101 into the document. Desert Power provided comments after the close of
102 business on September 5, 2006, which were also incorporated into the
103 document. The updated time line is attached as DPU Exhibit 1.1.

104

105 **Q. Desert Power has pointed to a redesign during the System Impact study**
106 **phase of the Generation Interconnection System Impact and Facilities**
107 **Study as the circumstance which caused the overall project delay. Has the**
108 **Division examined the events surrounding this redesign and formed an**
109 **opinion of whether this event fits into the category of a Force Majeure?**

110 A. We have. As mentioned above, there are specific items within the contract that
111 seem to point toward qualification of a possible Force Majeure event. The
112 PPA contains three such qualifications in Section 13.1 which are: the event

113 must be beyond the reasonable control of the affected party, the event could
114 not reasonably be avoided by the party using reasonable foresight, and the
115 exercise of due diligence is insufficient to allow the affected party to
116 overcome the event. These are the qualifications that the I will attempt to
117 apply to the event in question.

118 First: Was the redesign and subsequent delay outside of the reasonable
119 control of Desert Power? It is clear that the redesign itself was outside of the
120 control of Desert Power. It is specifically the realm of PacifiCorp
121 Transmission and its team. The time line attached to this testimony seems to
122 show that the delay following the redesign could not necessarily be attributed
123 to either party, as both parties were participating in the process. Therefore, it
124 is possible that the event could fit into the first qualification.

125 Second: Could the event have been avoided using reasonable foresight?
126 While it is not clear that Desert Power could have foreseen the need for the
127 redesign, it could have foreseen the possibility of some delay in the study
128 process itself and prepared for such. As anyone who has ever been involved
129 with a home remodeling project or construction project knows, delays are so
130 common as to be ordinary. It is reasonable to assume that everything will not
131 go as planned and some delay will occur.

132 In the Division's opinion, the delay became a problem primarily because
133 Desert Power had not allowed sufficient time within its self-imposed time line
134 to allow for any delay. For example, although Mr. Houston of PacifiCorp
135 Transmission stated in the Technical Conference held on August 31, 2006,

136 that the average length of time required for the interconnection process from
137 start to finish is roughly 20 months, Desert Power filed for interconnection a
138 mere 10 months before its desired online date and only 15 months before its
139 Scheduled Commercial Operation Date under the terms of its contract. The
140 timing of interconnection request was well within the reasonable control of
141 Desert Power as was the Scheduled Commercial Operation Date under the
142 terms of the PPA. Although the Division is well aware of the reasons given by
143 Desert Power for the delay in the interconnection request, the circumstances
144 attributed could have been avoided with a reasonable amount of due diligence
145 by Desert Power prior to signing the PPA. Therefore, the event does not
146 appear to fulfill the second qualification.

147 Third: Could the exercise of due diligence have allowed Desert Power to
148 overcome the event? The Division has been unable to ascertain whether or not
149 the event meets this qualification due to the reasons outlined below.

150

151 **Q. Is it clear to the Division that once the reconfiguration was required, it**
152 **was unlikely that Desert Power would meet the online date?**

153 A. Yes. In the Technical Conference held on August 31, 2006, Mr. Darling, from
154 Desert Power, stated that a vital piece of equipment needed for the substation
155 had a lead-time, which is time between order and delivery, of 16 weeks. In
156 addition, Kevin Freestone, Director of Substation Operations for the
157 Distribution Group of PacifiCorp, informed me that the average build time
158 required for a substation is between two and three months. Allowing for the

159 shortest build time of two months and the 16-week lead-time for the
160 substation equipment means that the time between equipment order and
161 substation completion is roughly 24 weeks. Using the Scheduled Commercial
162 Operation date of May 9, 2006, a lead time of 24 weeks would mean that the
163 equipment would need to have been ordered by approximately November 22,
164 2005 in order to reasonably allow for completion of the substation by the
165 Scheduled Commercial Operation date. According to the events occurring
166 near November 22, 2005, as listed in the DPU time line, Desert Power's
167 ability to order its equipment by that date seems unlikely, given the status of
168 the engineering and related items at that time. It is possible that a later order
169 date could still have allowed Desert Power to complete its substation
170 construction prior to its Scheduled Commercial Operation date, but
171 extraordinary measures could have been required, such as more than one shift
172 of workers, overtime, etc. The Division has insufficient knowledge to guess at
173 what latest possible order date would have, given extraordinary effort, allowed
174 for a successful and timely completion. If, however, the interconnection
175 request had been made and data provided in a timely manner, it is unclear that
176 the redesign would have prohibited the interconnection from being completed
177 by the Scheduled Commercial Operation date.

178

179 **Q. Since neither Desert Power, as represented by Roger Swenson during the**
180 **Technical Conference held on August 31, 2006, nor PacifiCorp**
181 **Transmission believe that PacifiCorp Transmission violated either law or**

182 **FERC tariff, the only obligation that it appeared to have was to act in a**
183 **reasonable fashion to meet the customer timeline. Did the Division**
184 **examine the actions taken by PacifiCorp Transmission during the course**
185 **of the interconnection process for reasonableness?**

186 A. Yes we did. The Division team examined thousands of pages of
187 documentation to ascertain whether or not PacifiCorp Transmission took
188 actions that we found reasonable. The team was unable to find any significant
189 action that we could definitively call unreasonable. There were, of course,
190 errors made, such as when PacifiCorp Transmission appears to have lost
191 Desert Power's edits to the proposed Engineering and Procurement agreement
192 and had to request a new copy roughly three weeks after the first submission
193 as shown on the time line. These errors, however, do not necessarily amount
194 to unreasonable behavior, just human fallibility. There was also evidence that
195 response times for certain items were delayed, although the Division does not
196 have enough evidence to pronounce the delayed response times unreasonable.
197 Although it is possible that such errors and delayed response times could have
198 contributed to the overall project delay, it is also not clear to the Division that
199 the errors and apparent delays that we found necessarily led to any more of the
200 overall project delay than similar actions or inactions on the part of Desert
201 Power as shown in the Division's Exhibit 1.1. The one item that the Division
202 feels is worthy of note, is that unless PacifiCorp Transmission was relatively
203 certain that it could meet the proposed schedule of 120 days for both the
204 Impact and Facilities studies, it would not have been reasonable to agree to

205 such a schedule. The Division does not, however, have evidence that
206 PacifiCorp Transmission believed otherwise at the time of the agreement.

207

208 **Q. Did the Division also examine the actions of Desert Power as they relate**
209 **to possible overall project delays?**

210 A. Yes we did. We again examined pages upon pages of documents, mostly
211 consisting of data responses to specific questions and general correspondence.

212

213 **Q. Did the Division find any circumstances where actions or inactions on the**
214 **part of Desert Power may not have been reasonable and could have**
215 **contributed to a delay in the ability to perform under the contract?**

216 A. Yes we did. The actions that raised questions of reasonableness to the
217 Division in our current investigation started with events apparently occurring
218 when Desert Power originally signed its contract. It appears that Desert Power
219 signed a contract with an aggressive online date proposing to use equipment
220 that it did not possess. In addition, statements made by Mr. Darling and Mr.
221 Swenson in the August 31, 2006, Technical Conference imply that Desert
222 Power had not even surveyed the market to ascertain equipment availability
223 and the ease of procurement. Also, Desert Power did not make an
224 interconnection request until some five months after the PPA was signed, even
225 though Schedule 38, which outlines the rules for large QFs, suggests that such
226 a request should be made concurrent with PPA negotiations. A copy of the
227 Schedule in effect in the spring of 2004 is attached as DPU Exhibit 1.2. And

228 finally, Desert Power did not provide data with the interconnection request
229 and took several months to provide the completed data. In concert, these
230 actions led to a delay in the interconnection study commencement. It is likely
231 that an earlier start to the study process would have led to an earlier draft
232 report and, perhaps, an earlier redesign. The delays caused by Desert Power's
233 actions and inactions, therefore, may have contributed to Desert Power's
234 inability to perform under the contract.

235

236 **Q. Given the above statements, does the Division believe that a Force**
237 **Majeure event can be declared, along with its allowable changes to**
238 **required performance?**

239 A. Based on the evidence that we have seen and heard thus far the Division
240 believes that there is insufficient evidence to support the finding of Force
241 Majeure under the "not limited to" clause contained within the PPA.

242

243 **Q. If it is determined by the Commission that the contract should be**
244 **extended to June 1, 2007, should the Commission immediately address**
245 **the price if Desert Power should again fail to meet the online date?**

246 A. Yes. If there is a contract extension ordered, the Division believes that this
247 question would need to be answered now in order to allay confusion and
248 further delays. The Division would draw the Commission's attention to
249 Docket No. 04-035-20, which was a pricing dispute arising from an expired
250 contract without any clear provisions for what came next. This particular

251 docket took months for resolution. The Division believes that a clear
252 Commission order stating what pricing is applicable would preempt the need
253 for another such proceeding. The need for such an order, however, is
254 contingent upon the Commission finding that a contract extension is just,
255 reasonable, and in the public interest. The Division would support the use of
256 current Avoided Cost pricing for an online date of later than June 1, 2007 to
257 ensure the mandates, including ratepayer indifference, are met.

258

259 **Q. Does this conclude your testimony at this time?**

260 A. Yes it does.