

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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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  
) REPORT AND ORDER RESOLVING  
) DESERT POWER CONTRACT  
) DISPUTE  
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ISSUED: September 20, 2006

By Order issued October 7, 2004, the Commission approved a purchase power agreement (PPA) for the sale of electric capacity and energy to PacifiCorp from Desert Power L.P.'s qualifying facility ("QF"). Through the PPA, the parties intended that the QF would provide electric power to PacifiCorp and Desert Power would receive compensation for the electric power delivered, consistent with the general parameters resolved by the Commission in Docket No. 03-035-14. In Docket No. 03-035-14, the Commission approved a multiparty-stipulation which provided an interim resolution for capacity and energy indicative prices (sometimes referred to as avoided costs) for purchases from qualifying facility projects exceeding Schedule 37 capacity limits, under contracts with terms up to 20 years that PacifiCorp would enter into under specified conditions. This interim resolution was intended to be available for a specified quantity of electric power that qualifying facilities would begin delivering on or before June of 2007. Desert Power's QF PPA was negotiated and approved as one of the qualifying facility power contracts to which Docket No. 03-035-14's resolution would apply.

However, Pacificorp and Desert Power have experienced a number of difficulties in accomplishing the tasks and meeting milestones anticipated to bring the QF online. As a result, almost from the contract's initiation, the parties have been in frequent discussions and

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negotiations and have undertaken a number of actions in an attempt to bring the QF online, by the PPA's Commercial Operation date of May 6, 2006, and subsequently by at least on or before June 1, 2007. By the summer of 2006, the parties' mutual efforts began to fall apart. Ultimately, PacifiCorp demanded that Desert Power agree to amend the PPA to include avoided cost rates that would be applicable on June 2, 2007, if the QF is not online by June 1, 2007. Desert Power opposed such an amendment, believing identification of post June 1, 2007, avoided costs need be addressed only if the QF fails to come online by June 1, 2007. Driven by the parties' impasse on a PPA amendment regarding future avoided cost rates, the interpretation and application of other PPA terms, and the resulting breakdown of negotiations and activities to bring the QF online, Desert Power filed with the Commission, on August 10, 2006, an Emergency Petition seeking Commission aid in resolving some of the disputes. In the Petition, Desert Power asked the Commission to resolve whether the PPA's avoided cost terms must be amended as demanded by Pacificorp. Desert Power further requested that the Commission approve an amendment to the PPA extending the commercial operation date to June 1, 2007, and the contract term one additional year.

In response to the Emergency Petition, PacifiCorp answered that, in addition to the avoided cost rate dispute, there were other disputes between the parties, e.g., whether other contractual obligations have been suspended due to a force majeure occurrence, and that PacifiCorp could not comply with the procedural/hearing schedule proposed in the Petition. At an August 14, 2006, Scheduling Conference, a procedural schedule was set with an evidentiary

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hearing scheduled for September 8, 2006. At the evidentiary hearing, PacifiCorp was represented by counsel Dean Brockbank and David Elmont, Desert Power was represented by counsel Stephen Mecham, the Division of Public Utilities (Division) appeared through Assistant Attorney General Michael Ginsberg, and the Committee of Consumer Services (Committee) appeared through Assistant Attorney General Paul Proctor. Desert Power, PacifiCorp and the Division presented evidence through various witnesses at the evidentiary hearing.

We are urged to complete our deliberation and issue our order quickly, in furtherance of the intent to pursue efforts to have additional generating facilities available, on or before June 1, 2007. We address the issues in the order that are raised by the pleadings, not necessarily in an order of their importance, either perceived by the parties or the Commission.

### **Necessity of Amendment to Identify Post June 1, 2007, Avoided Costs**

We agree with Desert Power that the existing PPA need not be amended to specify what avoided costs, or energy and capacity prices, will be applicable if the QF is not online by June 1, 2007. We accept Desert Power's position that it does not need that information in order to proceed with its efforts to go forward with the project. Our concurrence with Desert Power's position does place whatever risks associated with such an unknown, and consequences, squarely on Desert Power's knowing and willing acceptance of them.

While information is available, from which an indication of what avoided costs for energy and capacity may be, for projects that come online after June 1, 2007, a sufficient record of evidence admitted in this docket does not exist for a Commission determination of

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what those prices precisely are. And, given Desert Power's willingness to proceed, even with this post June 1, 2007, pricing lacuna in its PPA, we need not derive the specific price terms that PacifiCorp's requested amendment would require. We need, however, to reiterate that our intent, in approving the Docket No. 03-035-14 stipulated pricing and our subsequent proceedings establishing an indicative pricing methodology, is to limit the applicability of Docket No. 03-035-14 pricing terms to projects that are contracted for under the stipulation and order terms and which are online on or before June 1, 2007, only.

**Extension of the QF Online Date to June 1, 2007,  
and One Year Extension of the Contract**

Desert Power requests that the Commercial Operation Date be extended to on or before June 1, 2007. In the absence of evidence to the contrary, we must assume the parties to the PPA intended for the resource to be in commercial operations by May of 2006. However, because of miscalculations and difficulties in meeting timelines by both parties, this Commercial Operation Date was not achieved. A Pacificorp witness indicated in oral testimony that Pacificorp was willing to extend the Commercial Operation Date to on or before June 1, 2007, the date sought by Desert Power in this proceeding. Up to this point, the QF has been included in Pacificorp's resource plans and an extension is consistent with the positions these parties have already exhibited that there is potential benefit to have this additional resource available, if it can be on or before June 1, 2007. Accordingly, we find that extension of the Commercial Operation Date to on or before June 1, 2007, is a reasonable modification of the PPA, providing

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opportunity for the original intentions of the parties to be fulfilled in bringing this generation resource into operations. Pricing for this resource, if it is in commercial operation on or before June 1, 2007, shall be consistent with our order issued in Docket No. 04-035-14.

We do not, however, agree that the contract is to be extended one year. Desert Power has failed to present a sufficient basis, evidentiary and logical, for us to conclude that extension of the PPA for an additional year is reasonable or appropriate. Desert Power does not explain what purpose the requested one year extension has. We have no idea what activity, milestone, or term of the PPA would be extended under Desert Power's request. The PPA's

existing terms already provide that purchases from the QF will be made for twenty years from the Commercial Operation Date. We 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.

### **Whether a Force Majeure Event Has Occurred**

Desert Power asks that the Commission find that a force majeure event or events have occurred. Implicit in Desert Power's argument is that if a force majeure event has occurred, other activities or requirements of the PPA are affected. We are not asked to address what effect or consequences arise from a force majeure determination. Desert Power refers to difficulties and delays in specifying and exchanging information to be used for the Generation Interconnection System Impact and Facilities Study, in completing that study, and in engineering and procurement efforts. PacifiCorp and the Division argue that whatever difficulties have occurred in efforts to bring the QF online, they are not force majeure events as that term is used

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in the PPA. These parties argue that the delays and difficulties that have been experienced result from the decisions and actions PacifiCorp and Desert Power themselves made in the course of their efforts to develop the QF, not from an outside source beyond the control of Desert Power or PacifiCorp. PacifiCorp argues that Desert Power's position is essentially attempting to vet what could be viewed as a breach of contract as a force majeure. PacifiCorp further argues that Desert Power's position is far too broad, elevating any difficulty a party may have to be a force majeure event. Relative to PacifiCorp's conduct and actions, Desert Power's witnesses concede that they

are in no violation of any contractual, statutory or tariff term or standard. We agree with the positions of PacifiCorp and the Division that none of the matters Desert Power complains of are force majeure events.

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. Because of the desire that our decision be speedily issued, we will not delay our order to pursue additional legal briefing and entry of additional evidence on this last issue.

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## **ORDER**

Based upon the evidence and argument presented to us, we conclude that the PPA need not be amended to specify the avoided costs that apply beginning June 2, 2007, if the QF is not online on or before June 1, 2007. We conclude that it is reasonable, consistent with the parties' intent, and the intent underlying our resolution of Docket No. 03-035-14, to extend the Commercial Operation Date for the QF to on or before June 1, 2007. We 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. We also find that no force majeure event has occurred.

Wherefore, we enter this Report and Order, in which we ORDER:

1. The Purchase Power Agreement between PacifiCorp and Desert Power may be amended to place the qualifying facility's Commercial Operation Date to be on or before June 1, 2007.
2. All further relief requested by Desert Power or PacifiCorp is denied.

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DATED at Salt Lake City, Utah, this 20<sup>th</sup> day of September 2006.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard

Commission Secretary

G#50466