

- 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)
ORDER ON REQUEST)
FOR CLARIFICATION)

ISSUED: October 2, 2006

Through petition filed September 25, 2006, Desert Power seeks clarification of our Report and Order issued September 20, 2006. Desert Power requests clarification through Commission response to three questions posed in the petition. These three questions are: 1. Did the Commission intend that the Scheduled Commercial Operation date remain May 9, 2006 so that PacifiCorp could demand the same assurances it demanded before the Commission resolved the disputes between the parties;? 2. Did the Commission intend that the September 20, 2006 order settle globally all disputes between the parties by extending the Commercial Operation Date;? and, 3. On Page 5 of the September 20, 2006 order, the Commission indicated that “the PPA’s existing terms already provide that purchases from the QF will be made for twenty years from the Commercial Operation Date.” Does that mean that the Commission intends that the PPA term be twenty years? Responses to Desert Power’s petition were filed September 27, 2006, by Pacificorp and the Division of Public Utilities.

Based upon our review of the petition, the responses and our September 20, 2006, Report and Order, we conclude that some clarification can be granted. Before responding to the questions proposed by Desert Power, we note that our decisions are to be supported by substantial evidence. See, Utah Code 63-46b-16(4). We must again reiterate that the record

developed for us at the September 8, 2006, hearing, upon which our September 20, 2006, Report and Order is based, and necessarily upon which our consideration for clarification is based, is limited. This order of clarification is based on that which we believe is supportable from the available record.

We can clarify Desert Power's first question only to the extent that we conclude that the Scheduled Commercial Operation date may also be modified to be on or before June 1, 2007. For the purposes expressed in our original order, extension of the Scheduled Commercial Operation date follows the same intent and goal as the modification of the Commercial Operation date. We feel compelled, however, to state that our extension of the Scheduled Commercial Operation date will not permit Desert Power to have any expectation of receiving Docket No. 03-035-14 Stipulation based pricing for electrical output if the plant is not meeting production requirements on or before June 1, 2007. Our intent should not be misconstrued, if Desert Power's QF does not meet the June 1, 2007, date, it will not be eligible for Docket No. 03-035-14 Stipulation based pricing for electrical generation provided to PacifiCorp. As to the other aspects of Desert Power's first question, vis whether PacifiCorp may demand further assurances, we can make no resolution. The basis upon which PacifiCorp seeks performance assurances appears to go beyond the failure to meet the Scheduled Commercial Operation or the Commercial Operation dates specifically. Performance assurance demands are based upon the terms of the parties' contract. Beyond the change to the Scheduled Commercial Operation date and the Commercial Operation date, we do not venture to make any other change to the contract.

We do not resolve any dispute(s) about demanded assurances because we conclude the record does not provide sufficient evidentiary support for such resolution.

Our conclusion regarding Question 1 presages our response to Questions 2 and 3. We cannot “settle globally all disputes between the parties” because we do not know what all the disputes may be. The parties mutually negotiated the terms of the Purchase Power Agreement (their contract), they have set the terms of their bargain and mutually agreed to the terms that will be applied to them through the contract. We have concluded that of the disputes that were presented for resolution in the parties’ pleadings, the record supports a change to the Scheduled Commercial Operation date and the Commercial Operation date only. As noted in our September 20, 2006, Report and Order, Desert Power’s August 10, 2006, Emergency Petition raised only three issues and, while Pacificorp’s response referred in general terms to other disputes between the parties, Pacificorp specifically identified only the force majeure dispute. At the hearing, the parties’ focus was on the force majeure issue. To specifically respond to Desert Power’s Question 2, the Commission did not intend, by the September 20, 2006, Report and Order, to settle globally all disputes between the parties.

Nor can we give further clarification in response to Question 3. The reference made in our September 20, 2006, Report and Order, and to which Desert Power’s Petition makes reference, was used as an example of the difficulty we had in understanding and applying Desert Power’s Emergency Petition’s request to extend the contract by a year. We were then, and continue to be, unable to find a sufficient evidentiary basis to extend any contract term provision,

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beyond the Scheduled Commercial Operation and Commercial Operation dates. The term (length or duration) of the contract is determined by the contract's terms. The Commission did and does not intend to disturb or alter the contract's duration beyond what the parties had already provided for in the negotiated terms of their contract and the operation of such terms.

DATED at Salt Lake City, Utah, this 2nd day of October 2006.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

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