

1 BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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3 In the Matter of: The) Docket No. 04-035-04

4 Petition of Desert)

5 Power, LP for Approval) TRANSCRIPT OF

6 of a Contract for the) PROCEEDINGS

7 Sale of Capacity and)

8 Energy from its)

9 Proposed QF Facilities)

10)

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13

14 September 8, 2006 * 8:30 a.m.

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16 Location: Public Service Commission

17 160 East 300 South, Hearing Room

18 Salt Lake City, Utah

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23 Commissioner Richard Campbell, Chairman

24 Commissioner Theodore Boyer

25 Commissioner Ron Allen

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A P P E A R A N C E S

FOR DESERT POWER:

Stephen F. Mecham, Esq.
CALLISTER, NEBEKER & MCCULLOUGH
Attorneys at Law
10 East South Temple, #900
Salt Lake City, Utah 84133
Tel: 801.530.7300

FOR ROCKY MOUNTAIN POWER:

Dean S. Brockbank, Esq.
ROCKY MOUNTAIN POWER
201 South Main Street, Suite 2200
Salt Lake City, Utah 84111
Tel: 801.220.4568

David L. Elmont, Esq.
STOEL RIVES, LLP
Attorneys at Law
201 South Main, #1100
Salt Lake City, Utah 84111
Tel: 801.328.3131

FOR UTAH DIVISION OF PUBLIC UTILITIES:

Michael L. Ginsberg, Esq.
Assistant Attorney General
500 Heber Wells Building
160 East 300 South
Salt Lake City, Utah 84114
Tel: 801.366.0353

FOR COMMITTEE OF CONSUMER SERVICES:

Paul Proctor, Esq.
ATTORNEY GENERAL'S OFFICE
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114
Tel: 801.366.0353

1 FOR QUESTAR GAS COMPANY:
 2 Colleen Larkin Bell Esq.
 Jenniffer Byde, Esq.
 3 Questar Gas Company
 180 East 100 South
 4 Salt Lake City, Utah 84145-0360
 Tel: 801.324.5556

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1 P R O C E E D I N G S

2 COMMISSIONER CAMPBELL: Let's go on the
3 record in Docket Number 04-035-04 In the Matter of
4 the Petition of Desert Power, LP for Approval of the
5 Contract for the Sale of Capacity and Energy from its
6 QF Facility.

7 Let's take appearances for the record,
8 please.

9 MR. MECHAM: Steve Mecham from the law
10 firm of Callister, Nebeker & McCullough appearing for
11 Desert Power, LP.

12 MR. BROCKBANK: Dean Brockbank on behalf
13 of PacifiCorp and David Elmont on behalf of
14 PacifiCorp from Stoel Rives.

15 MR. GINSBERG: Michael Ginsberg for the
16 Division of Public Utilities.

17 MR. PROCTOR: Cheryl Murray and Paul
18 Proctor for the Utah Committee of Consumer Services.

19 MS. LARKIN BELL: Colleen Larkin Bell on
20 behalf of Questar Gas Company for purposes of
21 responding to a Subpoena request.

22 COMMISSIONER CAMPBELL: All right. Thank
23 you.

24 Insofar as we intend to get through this
25 hearing in a day, what we've decided is to allow an
26

1 hour for each witness. We would hope that we -- we
2 have read the testimony so we do expect any summaries
3 to be very brief and allow the maximum amount for
4 cross-examination.

5 With that, Mr. Mecham, let me turn to you.

6 MR. MECHAM: Thank you, Mr. Chairman. Our
7 first witness is Mr. Charles Darling.

8 MR. ELMONT: Mr. Chairman, if I could
9 interrupt, were we going to swear all witnesses at
10 the same time?

11 COMMISSIONER CAMPBELL: No.

12 CHARLES DARLING,
13 called as a witness, being first duly sworn, was
14 examined and testified as follows:

15 COMMISSIONER CAMPBELL: Thank you. Please
16 be seated. Mr. Mecham?

17 DIRECT EXAMINATION

18 BY MR. MECHAM:

19 Q. Mr. Darling, could you state your name and
20 business address for the record, please.

21 A. Yes. My name is Charles Darling. I am
22 President and General Manager of Desert Power, LP,
23 2603 Augusta Drive, Suite 880, Houston, Texas.

24 Q. Thank you.

25 You may want to pull that microphone just
26

1 a little closer.

2 A. Is that better?

3 Q. Yes. And did you prepare Direct Testimony
4 for this proceeding that consists of 16 pages with 14
5 exhibits attached, all of that has been premarked,
6 the testimony itself as Desert Power 1 with Desert
7 Power 1.1 through 1.14 attached?

8 A. Yes, I did.

9 Q. Are there any corrections to that
10 testimony?

11 A. No, sir.

12 Q. So if I were to ask you the questions that
13 are in the testimony your responses would be the same
14 today?

15 A. Yes, they would.

16 Q. Thank you.

17 Do you have a brief summary of your
18 testimony?

19 A. Yes, I do.

20 Q. Why don't you give it.

21 A. On behalf of Desert Power, my testimony
22 today seeks the extension of the contract, the
23 currently existing contract, and the milestone dates
24 therein through June 1, 2007 pursuant to an event of
25 force majeure which we contend occurred with regard

26

1 to this contract.

2 We have today some \$70 million invested in
3 a plant with \$10 million more committed that we are
4 endeavoring to complete to facilitate our performance
5 under that contract. As a part of doing that, we
6 have had to take our existing Interconnection
7 Agreement which allows us to produce 78 megawatts
8 into the PacifiCorp transmission system and pursuant
9 to which we operated as a network resource in the
10 past and amend it for another 30 megawatts.

11 During the course of that amendment,
12 fundamental changes were made in the design of the
13 substation after a considerable period of time which
14 made the achievement of the commercial operation date
15 impracticable and, indeed, impossible.

16 Pursuant to that, we filed a notice of
17 force majeure because due to events beyond our
18 control we were not able to meet the commercial
19 operation date. That is the essence of what we are
20 here about today.

21 We met in an attempt to achieve a
22 resolution. We were unable to do so. We have
23 negotiated with PacifiCorp and thereafter we sought
24 arbitration or mediation and we were unable to reach
25 an agreement, during the course of which we believe

26

1 that extra contractual requirements were imposed upon
2 us that it was impossible in the circumstances for us
3 to fulfill. We offered to mitigate those
4 circumstances, but that was not accepted. And so we
5 present ourselves to the Commission today to have
6 them review the merits of our force majeure claim, to
7 hold, hopefully, that it was valid and to extend the
8 contract.

9 I would say that today, as we said during
10 the Technical Conference, we have a Letter of Intent
11 to sell this plant and we're in the final stages of a
12 Purchase and Sale Agreement. However, moving forward
13 on that is dependent upon the outcome of this
14 proceeding because the contract is fundamental to the
15 completion of that sale.

16 Q. Does that complete your summary, Mr.
17 Darling?

18 A. That does.

19 MR. MECHAM: Mr. Chairman, all three
20 PacifiCorp witnesses rebutted Mr. Darling and Mr.
21 Swenson and I would ask that he be given a chance to
22 offer some surrebuttal.

23 COMMISSIONER CAMPBELL: That is our
24 practice. Would you like to at this time offer his
25 Direct Testimony?

26

1 MR. MECHAM: Yes, I would. We would offer
2 Desert Power 1 with Exhibits 1.1 through 1.14
3 attached.

4 COMMISSIONER CAMPBELL: Are there any
5 objections?

6 MR. ELMONT: No objections.

7 MR. PROCTOR: No objections.

8 COMMISSIONER CAMPBELL: All right. It's
9 admitted.

10 MR. MECHAM: Thank you.

11 Q. (BY MR. MECHAM) Mr. Darling, do you have
12 any surrebuttal of the three PacifiCorp witnesses and
13 perhaps Ms. Coon?

14 A. Yes, I do. The major rebuttal to our
15 force majeure claim has been that we delayed the
16 proceedings and thus were responsible for the delays
17 ourselves. Those come through particularly in the
18 testimony of Ms. Coon and in the testimony of Mr. --

19 Q. Houston?

20 A. -- Houston. Excuse me. I would just like
21 to go through that for a minute and explain why we do
22 not believe that was the case.

23 First, we started the process, in fact,
24 with a letter and a conversation with Dave Cory on
25 June -- in June of 2004. In that conversation, I

26

1 apprised Mr. Cory, and in the subsequent letter, that
2 we were intending to amend our existing agreement to
3 add approximately -- to bring on a 35-megawatt steam
4 turbine generator, to add that amount of capacity.

5 At the time he said he appreciated the
6 heads up, that for a request of this nature he was
7 appreciative because often we had more than a year.
8 Because we told him our expected completion date, we
9 were going to try, if we got there, would be in early
10 2006, and so we would have time to work on it. And
11 generally they did not have that kind of time to
12 respond to this kind of request.

13 After the execution of the agreement, in
14 September of 2004, we began to look for a turbine.
15 And as set out in my Direct Testimony, that turbine,
16 as it turns out, had to be very specific. It had to
17 be of a size that was fairly unique and we did not --
18 were not able to go to the original equipment
19 manufacturers because when we had polled them in the
20 summer of 2004 they could not meet our time schedule
21 for delivering to us a new turbine. Accordingly, we
22 had to go into the aftermarket.

23 These turbines all had different
24 generators on them with different specifications.
25 And indeed, as Mr. Houston says in his own testimony

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1 on page 20, the need to provide specific data caused
2 the delays in our submission to February of 2005.
3 Indeed, long before we had acquired the generator,
4 but once we had identified it, we provided, started
5 providing information to PacifiCorp with our request
6 and thereafter.

7 As Mr. Houston also says, if we would have
8 changed the specifications, once we had submitted the
9 first set of specifications, it would have required
10 us to start all over again. So they needed the
11 specific specifications which we started providing.

12 There is further criticism of a delay from
13 February to June. However, if you look at the record
14 and the timeline, we were providing data throughout
15 March and had a scoping meeting in April, and there
16 was additional data that we were required to prepare
17 and present. However, that data was not just Desert
18 Power's data. We found ourselves required to produce
19 data from US Magnesium for purposes of this study, a
20 customer that was already interconnected with
21 PacifiCorp, but apparently as to which PacifiCorp
22 Transmission did not have much of the same data that
23 they were requesting from us, such as governor
24 settings, such as settings on generators and other
25 assorted things.

26

1 The US Magnesium generators are 1968
2 vintage. They are what are called 5LA's and they
3 have been modified to M's. They are very old
4 machines and they've been modified. Getting the
5 information from industry sources and from
6 PacifiCorp, and from US Magnesium itself, because
7 they had no stake in this situation, created time
8 delays as we attempted to accumulate that information
9 from a third party and from third parties. So we did
10 everything we could to keep this matter on track,
11 continually attempting to provide data and responsive
12 information to the request of PacifiCorp
13 Transmission.

14 Our people worked together with the PAC
15 Trans people and we had basically a final design
16 within the construct of our existing interconnection
17 by September of 2005 which contemplated very little
18 modification of the existing interconnect, the
19 attachment end of our steam turbine generator set and
20 going on. But once we were at that place there was a
21 change, and it was a radical change, a fundamental
22 modification of the way the interconnection was to be
23 made including restringing, reconnecting US
24 Magnesium, how they were to be accounted for,
25 multiple switches, multiple poles, none of which were
26

1 involved previously, and all of which were long lead
2 time items.

3 In addition, because it required extensive
4 engineering, even after the preparation of a Final
5 Impact Study, which we were advised would not be
6 ready until January 31st, and which they could not
7 begin to begin the engineering on until after the
8 Final Impact Study, we immediately tried to start
9 taking measures to expedite the engineering, because
10 as we looked at it, it was going to become extremely
11 difficult to get everything in place for a March 6
12 date.

13 Pursuant to that, under the Engineering
14 and Procurement Agreement, we agreed to take over
15 certain engineering at our risk and cost where we
16 would start it even before the final design was in
17 place and the Final Impact Study was made because the
18 initial analysis, from our point of view, with the
19 timeline that we were confronting was much later, was
20 late 2006 and possibly even early 2007 unless we
21 could figure out some way to speed this process up.

22 So we took over engineering and hired a
23 PacifiCorp-approved engineering company to start the
24 engineering as soon as they approved it. We advanced
25 funds so that they could begin their processes too.

26

1 But when on February 3rd we got a letter that looked
2 to a further delay in getting to the final study, we
3 knew that it became impossible anymore to have any
4 hope of meeting May of 2006. With that we submitted
5 the force majeure letter and attempted to work out
6 what was being done.

7 Now, we also talked about delays, that we
8 had an executable QFLGIA in February. We were
9 presented and we have provided in discovery the draft
10 LGIA that we were provided, and the first one we were
11 provided was on April 11, 2006. We timely responded
12 to it. There were comments made. We had a further
13 draft in May.

14 And one of the items that was in that
15 involved certain hardware at US Magnesium that
16 PacifiCorp thought needed to be replaced. But part
17 of that was based upon a faulty analysis that PAC
18 Trans had run, that once our engineers examined, they
19 agreed we were right. And we worked that out during
20 late May, that in fact that was not the case subject
21 to validating the equipment. I mean, we found the
22 faults were not there and we had to validate the
23 equipment. We had to go back to the manufacturers,
24 we had to get US Mag to sign off, and we finally
25 managed to do that. We have never gotten the

26

1 sign-off from US Mag, but we've gotten it from the
2 manufacturers, so far in late June the fact that the
3 switches would work. So we have consistently
4 attempted to take measures to move this process
5 along.

6 Now, so we do not believe we accounted for
7 the delays in this process. We think we have
8 provided information, responsiveness and cooperation
9 throughout this proceeding, not that PAC Trans
10 hasn't, in an attempt to get this matter online, but
11 it was simply beyond our control.

12 There is talk in Mr. Bennion's testimony
13 about the attempt to see if we could get things
14 together for the end of May. But there were three
15 problems with it: (1) In fact, PacifiCorp did not
16 have the long lead time equipment they required, that
17 was required to get it online. Number two, it was
18 conditional on US Mag having an available line on its
19 microwave. We contacted the Vice President of
20 Operations of US Mag and he advised all circuits were
21 completely committed on their microwave system and
22 they had none available.

23 And number three, the matter of the
24 MagCorp/US Mag hardware was still open at the time
25 and, thus, there was an issue as to the adequacy of
26

1 that hardware to even handle what we were going to
2 bring online, an issue that had been raised as a
3 safety issue by PAC Trans and only got resolved in
4 mid July actually.

5 As to the force majeure in Ms. Coon's
6 testimony, I read it with interest because during the
7 1980s I was a lawyer that was involved in a lot of
8 force majeure cases that were afflicting the gas
9 industry at the time. And the claims that she made
10 were pressed before courts throughout this country
11 and the courts consistently found that if it was
12 identified as -- with examples, "but not limited to,"
13 then you read the express terms of the contract
14 matters beyond the control of the party claiming the
15 force majeure. And although those examples clearly
16 fit within it, it was not limiting and you had to
17 look at the actual merits of the individual claim.

18 Finally, I would say to this Commission
19 that this sale is important to create an asset that
20 is capable of being brought online for next summer if
21 we can move quickly. We have a purchaser who is
22 willing to commit the funds and we today say to you
23 that by allowing this contract to be extended we will
24 bring another asset to the system that will assist
25 the system.

26

1 Thank you.

2 Q. Does that conclude your Surrebuttal?

3 A. It does.

4 MR. MECHAM: Mr. Darling is available for
5 cross-examination.

6 COMMISSIONER CAMPBELL: Thank you.

7 Mr. Elmont?

8 MR. ELMONT: Thank you, Mr. Chairman.

9 CROSS-EXAMINATION

10 BY MR. ELMONT:

11 Q. Good morning, Mr. Darling.

12 A. Good morning, Mr. Elmont.

13 Q. Mr. Darling, when did Desert Power first
14 determine that it was going to become a qualifying
15 facility?

16 A. It filed a proceeding -- I think we filed
17 with the FERC in late 2003, as I recall.

18 Q. And that would have been a self-
19 certification; is that what you're referring to?

20 A. That would have been a self-certification.

21 Q. And how long prior to that internally had
22 Desert Power determined it was going to become a QF?

23 A. We had examined options as to what we were
24 -- what we needed to do probably in September and
25 October of 2003.

26

1 Q. And when you talk about examining options
2 of what you need to do, are you referring there to
3 what you need to do in order to qualify as a QF?

4 A. Whether we were going to sell the plant,
5 whether to apply for a QF, whether to abandon the
6 project. Many options were examined during that
7 period.

8 Q. Understood. So in that process, as you
9 were examining options and at the point that you
10 determined to become a QF prior to your FERC filing
11 in late '03, did you look into the specific legal
12 requirements of becoming a QF?

13 A. I'm sure our attorneys did.

14 Q. And that would include things such as
15 PURPA, that would include things such as the tariff
16 requirements under PacifiCorp's Schedule 38, is that
17 correct, things of that nature?

18 A. We looked at, in terms with our
19 self-certification, we worked with our Federal
20 attorneys in Washington, D.C. looking at the PURPA
21 requirements.

22 Q. Okay. I actually want to call your
23 attention --

24 Mr. Chairman, I wasn't planning on
25 introducing this as a marked exhibit. It's actually

26

1 the Petition filed by Desert Power in this docket, so
2 I believe it should be on the Commission's file. I
3 do have a few copies. I can give one to Mr. Mecham
4 and one to the Commission. Or if you need us to make
5 additional copies, we can.

6 COMMISSIONER CAMPBELL: Could you identify
7 it more precisely to see if we have it?

8 MR. ELMONT: Yes. It's the Petition filed
9 opening Docket 04-035-04, filed on January 23rd of
10 '04 opening the proceeding that we're now in.

11 COMMISSIONER CAMPBELL: All right. We
12 don't have that with us so if you could provide us a
13 copy to look at, that would be great.

14 MR. MECHAM: I don't have one either,
15 Dave.

16 MR. ELMONT: Right now we have one for the
17 Commission to share, is that okay, and one for the
18 witness?

19 COMMISSIONER CAMPBELL: Let's go ahead and
20 have some copies made.

21 MR. ELMONT: Artie has volunteered.

22 COMMISSIONER CAMPBELL: I'll hand this to
23 the witness too.

24 MR. DARLING: Thank you, Mr. Chairman.

25 MR. ELMONT: Thank you. I apologize for
26

1 that.

2 COMMISSIONER CAMPBELL: Go ahead.

3 Q. (BY MR. ELMONT) Do you recognize this
4 document, Mr. Darling?

5 A. (Witness reviewed document.) It's not
6 signed, but it looks -- I mean, it sounds like
7 something we would have filed.

8 Q. I appreciate you mentioning that. And I
9 will make a representation to you that, subject to
10 check --

11 A. Okay.

12 Q. -- this is the version as it exists on the
13 Commission's website.

14 A. Okay.

15 Q. Which electronic filing doesn't have
16 signed copies. But I'll make that representation and
17 you can confirm that later if you choose to.

18 I want to call your attention to just a
19 couple of provisions very briefly. The first is the
20 introductory paragraph where Utah Code Annotated,
21 Section 54-12-2 and Section 10 of the Public Utility
22 Regulatory Policies Act of 1978 are mentioned. Do
23 you see those references?

24 A. I do.

25 Q. So at this point, whether counsel or
26

1 otherwise, someone on behalf of Desert Power had
2 examined those legal requirements?

3 A. Yes. Mr. Mecham.

4 Q. Yes. And then I want to call your
5 attention down to paragraph 9. And in paragraph 9,
6 the second sentence reads: "Based on input from
7 interested parties, the Commission adopted a
8 procedure for a larger QF to obtain avoided cost
9 pricing, file the Schedule 8 within the approved
10 tariff. In accordance with proposed guidelines for
11 Schedule 38, which were adopted by this Commission,
12 Desert Power, working with US Magnesium, LLC, made a
13 request in November 2002 for indicative pricing."

14 A. Yes.

15 Q. Do you see that language?

16 A. Yes.

17 Q. And I take it my question as to
18 familiarity with PacifiCorp's Schedule 8 at that
19 point, by Mr. Mecham or otherwise, that Desert Power
20 had familiarity with the requirements of Schedule 38
21 at this point?

22 A. We had reviewed Schedule 38.

23 Q. Okay. Thank you.

24 In the course of reviewing legal
25 requirements for becoming a QF, and I guess practical
26

1 requirements for becoming a QF, do you know if Desert
2 Power reviewed PacifiCorp's FERC Open Access
3 Transport Tariff Timelines or other requirements of
4 the OATT?

5 A. I know that we had a copy of it.

6 COMMISSIONER CAMPBELL: Mr. Darling, can
7 you pull that microphone closer?

8 MR. DARLING: I know we had a copy of it,
9 of the FERC tariff.

10 Q. (BY MR. ELMONT) Thank you.

11 I want to call your attention back to the
12 Petition, and specifically to paragraph 6 where the
13 Petition states: "The Desert Power facility is
14 already in place. With an approved contract by the
15 end of April 2004, its expansion will be fully ready
16 to generate power by the summer peak of 2005. The
17 power will be fully dispatchable."

18 Did Desert Power rely on the OATT
19 timelines in determining this January '04 filing,
20 that if the Commission approved the contract by April
21 of '04 the power would be available by the summer
22 peak of '05?

23 A. We relied upon our previous experience
24 with PacifiCorp in getting an Interconnection
25 Agreement in making that representation.

26

1 Q. And that experience was as an independent
2 power producer when the plant was first built? Is
3 that what you're referring to?

4 A. That is correct.

5 MR. ELMONT: I apologize for just one
6 moment here, Mr. Chairman.

7 I want to introduce something that
8 actually I think we will mark as an exhibit, Mr.
9 Chairman.

10 COMMISSIONER CAMPBELL: All right. We'll
11 mark it --

12 MR. DARLING: Are we done with this for
13 right now?

14 MR. ELMONT: For right now, yes. Thank
15 you.

16 What we'll mark, I suppose, as PacifiCorp
17 Cross 1.

18 COMMISSIONER CAMPBELL: Let's just mark it
19 Cross Exhibit 1 and we'll just go in sequential
20 order.

21 Q. (BY MR. ELMONT) I won't ask you if you
22 recognize the document since it's not one of yours,
23 Mr. Darling, but could you read the title for us?

24 A. "Utah Power & Light Company, Electric
25 Service Schedule Number 38, State of Utah, Qualifying
26

1 Facility Procedures filed July 23rd, 2005."

2 Effective the same date.

3 Q. Thank you.

4 And I'm going to ask you to for the time
5 being, and subject to check, rely on my
6 representation that the language that we're going to
7 review briefly would have been language that was in
8 effect as of the time that Desert Power was
9 considering becoming a QF.

10 So based on that assumption, would you
11 turn to -- I'm trying to see if we've got an actual
12 page number here, I don't believe we do -- but within
13 the sections identified it's Roman Numeral II. So
14 Section II of the tariff.

15 A. On original sheet 385?

16 Q. Yeah, you're right. And that is the page
17 number. So page 5 in Schedule 38. Thank you.

18 Could you read for us the two paragraphs
19 underneath the heading of Section II, Process for
20 Negotiating Interconnection Agreements?

21 A. "In addition to negotiating a Power
22 Purchase Agreement, QFs intending to make sales to
23 the Company are also required to enter into an
24 Interconnection Agreement that governs the physical
25 interconnection of the project to the Company's

26

1 transmission or distribution system. The Company's
2 obligation to make purchases from a QF is conditioned
3 upon all necessary interconnection arrangements being
4 consummated. It is recommended that the owner
5 initiate its request for interconnection as early in
6 the planning process as possible to ensure that
7 necessary interconnection arrangements proceed in a
8 timely manner on a parallel tract with negotiation of
9 the Power Purchase Agreement."

10 Q. And again, someone on behalf of Desert
11 Power would have reviewed Schedule 38 prior to the
12 time that Desert Power determined to become a QF or
13 at least prior to the time it filed its application
14 inside its Schedule 38?

15 A. I'm sure it did.

16 Q. Okay. Now, you mentioned in your live
17 rebuttal this morning that you had a June of '04
18 conversation with a Mr. Cory. Do you recall what his
19 title was, Mr. Cory from PacifiCorp?

20 A. It's on the letter that we provided in
21 discovery.

22 Q. Okay. In which you talked about amending
23 the existing Interconnection Agreement?

24 A. Yes.

25 Q. Did you have any basis, as you understood
26

1 the legal requirements for becoming a QF, for
2 believing that an amendment to the existing
3 Interconnection Agreement was acceptable?

4 A. My Federal counsel.

5 Q. So on advice of counsel an amendment was
6 suggested?

7 A. Yes. To preserve my place in the queue,
8 that QFs throughout the country had amended. And in
9 fact, that utilities change you over to a QF to deny
10 you your place in the queue and so, therefore, an
11 amendment was the preferred approach.

12 Q. Did you discuss that issue with Mr. Cory
13 at the time?

14 A. No. Nothing was raised on that.

15 Q. Thank you.

16 I think you can put aside Schedule 38.

17 A. Thank you.

18 COMMISSIONER CAMPBELL: Do you want to
19 move the admission?

20 MR. ELMONT: Thank you, Mr. Chairman, yes.
21 I move for the admission of Cross-Examination Exhibit
22 Number 1, Utah Power & Light Company Electric Service
23 Schedule 38.

24 COMMISSIONER CAMPBELL: Any objections?

25 MR. MECHAM: No.

26

1 MR. PROCTOR: No objection.

2 COMMISSIONER CAMPBELL: All right. We'll
3 admit it.

4 MR. ELMONT: Thank you.

5 Q. (BY MR. ELMONT) When did Desert Power
6 begin to negotiate a PPA with PacifiCorp?

7 A. Sometime after the Stipulation approved by
8 this Commission in June of 2004 was entered into or
9 approved. Summer of 2004.

10 Q. That's close enough. Thank you very much.

11 At the time that Desert Power began to
12 negotiate the PPA, did it seek to initiate a request
13 for interconnection -- and actually, you probably
14 would want to refer back to Schedule 38 as I'm going
15 to quote from it, that same Section II -- "on a
16 parallel tract with negotiation of the Power Purchase
17 Agreement"?

18 A. No. We notified Mr. Cory, but we did not
19 put the formal request in.

20 Q. Thank you.

21 And that request would have been in
22 February of 2005; is that correct?

23 A. That's the request we put in.

24 Q. Thank you.

25 Now, Desert Power did attach a proposed
26

1 PPA to its application in this matter; is that
2 correct?

3 A. If you represent that I did, then I did.

4 Q. Okay. But you don't recall any
5 negotiations taking place based on a contract if it
6 was attached to the application?

7 A. No. It was -- I think, as I recall -- the
8 more you talk about it, Mr. Elmont, I think there's
9 some requirement that you tender a contract or
10 something else of the sort in the rate schedule and
11 so we tendered one.

12 Q. Thank you.

13 And negotiations began sometime in the
14 summer?

15 A. About six months. I think around six
16 months after we tendered it.

17 Q. Thank you.

18 At the time that Desert Power was in the
19 process in this docket of seeking approval for
20 becoming a qualifying facility, could you describe
21 for us what, if any, plans it had in place for
22 actually obtaining the online date by summer peak of
23 2005 as was stated in the application?

24 A. At that point in time we had identified
25 surplus equipment that would allow us to do that.

26

1 Because with the passage of time certain of the
2 assets actually were scrapped and another of the
3 assets was sold.

4 Q. And are you referring specifically to
5 steam turbine in that context?

6 A. Steam turbine and HRSG.

7 Q. Okay. So what steps had you taken to
8 secure the steam turbine or to look into, I don't
9 want to put words into your mouth, before you found
10 out it was scrapped?

11 A. This was a time when there was a lot of
12 excess inventory on the market. The people who had
13 the HRSGs had them in storage and they were
14 requesting that we go ahead and purchase them without
15 a contract. We didn't have the money to buy them.
16 Without the money to buy them they did not -- they
17 got tired of waiting and decided that they would --
18 wanted to get them out of storage and they scrapped
19 them. As to the steam turbine, they then sold it to
20 an alternative person.

21 Q. Thank you.

22 But you did identify, it sounds like
23 fairly early in the process, and maybe you can tell
24 us when, the need for that equipment if you were to
25 become a QF?

26

1 A. As soon as we looked, I mean, we knew that
2 -- my background is I'm an attorney. I've dealt with
3 QFs a long time.

4 Q. So you knew you had to co-generate?

5 A. I knew I had to co-generate.

6 Q. So is it fair to say that would have been
7 early in the process back in '03 as you were mulling
8 this decision?

9 A. Yes. We were talking at -- we were
10 talking with US Magnesium or the predecessor or the
11 people who were there at the time.

12 Q. Understood. Thank you.

13 What about potential other long lead time
14 items aside from the steam turbine, had you
15 identified any of those as of the time that you were
16 submitting the application and hoping for a summer
17 peak online date of '05?

18 A. We had -- our operations and maintenance
19 people were very involved in the market, and we went
20 to them to attempt to identify what we would need.
21 At that point in time, in 2003, early 2004, the
22 market was fairly flooded, I might say, with
23 available equipment. That condition has since
24 changed, but at the time it was fairly fluid.

25 Q. So the expectation the Company had based
26

1 on that variety of items was that they would be
2 available when needed; is that a correct statement?

3 A. We had ascertained availability of
4 significant items that today are long lead time
5 items.

6 Q. Thank you.

7 And ascertaining their availability meant
8 seeing they were on the market as opposed to ordering
9 or anything like that?

10 A. We did not have the money to order.

11 Q. Thank you.

12 Could you remind us, Mr. Darling, when in
13 the process or rather at what point in time you
14 started the process of identifying the specific steam
15 turbine? Was that late '04? Am I recalling your
16 testimony correctly?

17 A. Once we had -- once we had the contract
18 secured, we gave -- we had people looking, but not
19 inspecting. We were looking at availability. We
20 were not sending people out to actually inspect, kick
21 the tires. It's not the local car lot, you have to
22 fly people all over the country to look at various
23 pieces of equipment and then evaluate what they've
24 seen, often taking second and third trips.

25 Q. So is it accurate to characterize that as
26

1 being the looking in earnest for the specs in the
2 steam turbine that were necessary came after the
3 entry of the signature to the PPA? Is that what
4 you're testifying?

5 A. Once -- once we knew the -- once the
6 Stipulation was approved, then our O&M contractor
7 began to look for units and we began the preliminary
8 analysis to try and figure out how we were going to
9 do it. The process of actually sending people out
10 was after we entered into the contract.

11 Q. Thank you.

12 And the downside of sending people out to
13 kick the tires, as you put it, prior to that time
14 would have been a cost issue; that's your testimony?

15 A. Yes.

16 Q. And you signed the --

17 COMMISSIONER CAMPBELL: Mr. Elmont, as far
18 as kicking, it did occur to me that the Commission is
19 going to have questions of each witness as well so
20 we're going to reserve ten minutes for our questions.
21 So I guess you're looking at another ten minutes.

22 MR. ELMONT: That's fine, Mr. Chairman.
23 I'll do my best. I would note that much of our hour
24 was spent on the rebuttal testimony rather than on
25 cross-examination, but I will certainly --

26

1 COMMISSIONER CAMPBELL: I understand.

2 MR. ELMONT: Thank you.

3 Q. (BY MR. ELMONT) You signed a Stipulation
4 agreeing to the Commission's Interim Pricing Method
5 in Docket Number 03-035-14 in May of '04; is that
6 right?

7 A. That's correct.

8 Q. You've testified that you began the
9 process of requesting interconnection in February of
10 '05. When did the parties enter the Study Agreement
11 to begin the process of study following the request
12 for interconnection?

13 A. I'm sorry, I really didn't understand the
14 question.

15 Q. Let me help you out. And we'll introduce
16 here Cross Exhibit 2. Do you recognize that
17 document, Mr. Darling?

18 A. Yes.

19 Q. And when I refer to it as the Study
20 Agreement, does that make sense?

21 A. That's perfectly good.

22 Q. Okay. So this is dated February 24th of
23 2005, correct?

24 A. That's correct.

25 Q. And accepted by Desert Power on the second
26

1 page on it looks like March 5th; is that right?

2 A. Either 3rd or 5th, one of the two.

3 Q. I'm glad I'm not the only one who can't
4 read my own writing.

5 And do you recall when PacifiCorp first
6 informed Desert Power of the need for technical data
7 before the actual studies could begin?

8 A. Personally I really don't. Our project
9 manager at the time and others were the ones, and our
10 engineering group, were the ones who were really
11 coordinating that. So I really can't tell you.

12 Q. Okay. Thank you.

13 In the interest of time I'm going to make
14 a representation to you subject to check and, that
15 is, that by letter of March 1st of '05, PacifiCorp
16 informed Desert Power of the need for technical data
17 before studies could begin. Does that sound, subject
18 to check, sort of a reasonable time frame?

19 A. Probably. That would probably make
20 sense.

21 Q. And you've talked in your Rebuttal
22 Testimony this morning about the fact that some of
23 the data that was necessary was actually US
24 Magnesium's data; is that correct?

25 A. That is correct.

26

1 Q. Thank you.

2 I would like to -- I forgot to move for
3 Exhibit 2, didn't I, admission, Mr. Chairman?

4 COMMISSIONER CAMPBELL: Any objections?

5 MR. MECHAM: No.

6 COMMISSIONER CAMPBELL: All right, we'll
7 admit it.

8 MR. ELMONT: Thank you.

9 Q. (BY MR. ELMONT) I would like to introduce
10 Cross Exhibit 3. Do you recognize any of the senders
11 or recipients from the e-mail string here?

12 A. Well, I see that Ed Oleksy, I don't
13 actually recognize -- I think I've heard his name. I
14 wouldn't have been able to place him but for the
15 e-mail address, but he's with Sega, who was our
16 engineering firm. Rob Shephard was our project
17 manager at the time.

18 Q. So to cut things short, and I'm sorry to
19 cut you off but in the interest of time, this is an
20 e-mail from Larry Soderquist who is PacifiCorp,
21 correct?

22 A. That's exactly right.

23 Q. So it's addressed to at least, among
24 others, representatives of Desert Power?

25 A. Right.

26

1 Q. I want to call your attention to the last
2 full paragraph, which is actually the second e-mail
3 on this page, but the last full paragraph on page 1
4 where it identifies data that PacifiCorp is seeking
5 at that point. And I guess paragraph is not the
6 right term, but the last block beginning "Steam
7 Turbine Governor System Block Model Diagram Data."
8 Do you see where I'm referring to?

9 A. Yes, I do.

10 Q. In the list within that paragraph, so to
11 speak, do you see the bottom one is a US Magnesium
12 Electrical System, Turbine Generator and -- I don't
13 even know how to say that. Can you help me?
14 Intershe?

15 A. Intertie.

16 Q. Intertie. The preceding four items above
17 the US Magnesium items, are those Desert Power items?

18 A. They are.

19 Q. And can you identify the date we're
20 talking about here this would have been sent?

21 A. May 4th.

22 Q. Thank you.

23 And the data was actually provided in June
24 of '05, correct? Is that your understanding of the
25 completion of the data as PacifiCorp required it to
26

1 begin the studies?

2 A. That may well be.

3 Q. So as of May of '05 there was still
4 information required, not only from US Magnesium but
5 also from Desert Power; is that correct?

6 A. That's what this says.

7 Q. Thank you.

8 I'm going to expedite things, Mr.
9 Chairman.

10 You've testified this morning, and it's
11 also, I believe, something that you referenced in
12 Technical Conference previously about the complete
13 reworking that was effectuated by the October
14 redesign. Is that correct, that the need for
15 engineering, for example, and throwing things off in
16 terms of the dates?

17 A. Yes.

18 Q. Were there no long lead items or other
19 items that could have been identified as being within
20 Desert Power's scope even at that time, even prior to
21 the redesign, if that question makes sense? Let me
22 put it differently.

23 A. There were long lead time items, but none
24 based on what we had located that I think exceeded 18
25 weeks. So at that time.

26

1 Q. But in terms of the need for the
2 engineering to be done and to be approved by
3 PacifiCorp, were there items that you knew were going
4 to be necessary regardless of what the engineering
5 had to say, for example, transformers?

6 A. We already had it.

7 Q. What about, for example, control room
8 materials?

9 A. We had things going on with the control
10 room and we had paid a premium so that our control
11 room systems would be available. And by then the
12 January 1 date had slipped, but so that they would be
13 in place by March 15, 2006.

14 Q. What about metering?

15 A. Metering? Part of the metering was the
16 responsibility of PacifiCorp under the contract. And
17 it was only when the delay with the redesign came in
18 that we even talked about seeing if we could assume
19 control for metering. But when we went to the market
20 we found out that we couldn't improve on PacifiCorp's
21 lead times.

22 Q. Thank you.

23 And I guess finally, although, Mr.
24 Chairman, if we have time later on I do have more if
25 we are able to cover the ground.

26

1 We had within the Study Agreement that
2 I've already introduced to you language that stated,
3 if I can call your attention back to it --

4 A. I'm sorry, which one?

5 Q. Cross Exhibit Number 2.

6 A. Is that the tariff?

7 Q. The February 24, 2005 Study Agreement.

8 A. Okay.

9 Q. We had language in the bottom paragraph on
10 the first page stating, "PacifiCorp will make
11 commercially reasonable efforts to complete the Study
12 within 120 days from the date PacifiCorp receives the
13 executed Study Agreement, payment and required
14 technical data from Desert. Time to complete the
15 Study is dependent on the availability of PacifiCorp
16 resources at the time the required items are received
17 by PacifiCorp."

18 Is it your impression or can you state for
19 us your opinion on whether PacifiCorp violated the
20 promise or the commitment that it made in that
21 paragraph in this case?

22 MR. MECHAM: Is this his legal opinion?

23 Q. (BY MR. ELMONT) Either.

24 A. My personal opinion is that we were on
25 track through September and fully consistent with
26

1 this. It was the redesign that just knocked the
2 schedule into a tailspin.

3 Q. I understand. Let me rephrase it.

4 A. But --

5 Q. Did PacifiCorp fail to make commercially
6 reasonable efforts to complete the study within 120
7 days?

8 MR. MECHAM: If you have an opinion. I
9 don't know how you can --

10 MR. DARLING: I will say we worked
11 together to complete the required study within 120
12 days. And as we were coming in for the final
13 approach there was a change which fundamentally
14 modified everything. At that point in time it just
15 started everything all over again. And so that's --
16 that would be my answer.

17 Q. (BY MR. ELMONT) Understood. One final
18 question. Does Desert Power allege that PacifiCorp
19 has violated any tariff requirement, any contract
20 requirement in terms of the timing in completing the
21 processes, or any other legal principle in terms of
22 the timing in this case?

23 A. We have put a notice of force majeure,
24 that a force majeure does not allege a breach of a
25 contract, it alleges that there were items beyond our
26

1 control which delayed our performance.

2 MR. ELMONT: Thank you. Thank you, Mr.
3 Chairman.

4 COMMISSIONER CAMPBELL: Thank you, Mr.
5 Elmont. Oh, just a minute. Do you move the
6 admission of Cross Exhibit 3?

7 MR. ELMONT: Thank you. Yes, we would
8 move that.

9 COMMISSIONER CAMPBELL: Any objection?

10 MR. PROCTOR: No objection.

11 MR. MECHAM: None.

12 COMMISSIONER CAMPBELL: All right. It's
13 admitted.

14 COMMISSIONER ALLEN: Thank you, Mr. Chair.

15 Mr. Darling, early in your testimony today
16 you indicated that in the spring of '04 you had a
17 data confusion between the parties. Could you give
18 me a little more information what you mean by that?

19 MR. DARLING: Early '04? I'm sorry,
20 Commissioner, I'm --

21 COMMISSIONER ALLEN: You said that there
22 was data confusion between US Mag, PacifiCorp, Desert
23 Power and the parties that created time delays in the
24 spring of '04.

25 MR. DARLING: It wouldn't have been '04,
26

1 it would have been '05, I believe. Or if I said '04,
2 I misspoke.

3 COMMISSIONER ALLEN: Okay, great. That
4 was part of my question. And just to follow up real
5 quickly, could you just tell me what the nature of
6 that confusion was? Did it deal with the equipment
7 specifically?

8 MR. DARLING: It dealt with the equipment.
9 And actually, it was in the spring of '06, I
10 apologize, because what it dealt with -- I'm trying
11 to avoid the technical. There's something called
12 circuit switches and there was confusion at
13 PacifiCorp as to what circuit switches US Magnesium
14 had or didn't have which took until June to
15 ultimately resolve once errors in a Fault Study were
16 remade. That was in '06 of this year.

17 COMMISSIONER ALLEN: Thank you.

18 COMMISSIONER BOYER: Just one question,
19 Mr. Darling. And I don't want to put words in your
20 mouth, but I believe your testimony is that
21 everything was more or less on track, give or take a
22 few days here and there, on the anticipated
23 scheduling until the design change.

24 Could you give us more detail on the
25 design change, what caused it, who insisted upon the
26

1 design change, and what was the scope of the design
2 change?

3 MR. DARLING: I guess that's --

4 COMMISSIONER BOYER: Three questions.

5 MR. DARLING: The -- just to step back for
6 a minute. Our original design was to leave the wires
7 going into the existing Rowley Substation as they
8 existed at the time, put in a new bus bar and the
9 interconnect into the high wires further maybe from
10 150, 200 feet beyond where they were connected
11 currently to tie into the third generator. That
12 would have required a new switch and pole, one pole
13 and a new switch on the PacifiCorp side. And other
14 than that, things remained basically the same. There
15 were some -- below that we had to build everything
16 even as we had before.

17 When we got -- when we were in, as I said,
18 the final stages, we were notified on October 19th
19 that PacifiCorp operations had reexamined the design
20 and determined a change was required. Pursuant to
21 that change what would happen is, instead of what we
22 had before, we would move out perhaps another 50, 100
23 feet, install a three-way switch. And what this
24 would do is there would be a switch to PacifiCorp, a
25 switch to us, and a switch to US Magnesium. And then
26

1 we would have to string new poles and wires over
2 to a new interconnection point across our property to
3 US Magnesium and put the metering then on those poles
4 and switches. We would then take what had been the
5 PacifiCorp transmission line, take over ownership of
6 it, and come into our other bus bar. So
7 fundamentally redesigning how this interconnection
8 worked.

9 And indeed, because it was part of the
10 transmission line, and what still hasn't been applied
11 for is it's going to require an abandonment of that
12 piece of line that we're going to take over, an
13 abandonment approval from the FERC because that's
14 currently an interstate commerce, it's an interstate
15 facility.

16 So all of these things which was not going
17 to be required before, all of these things now had to
18 be engineered and designed and then the impacts on
19 the fault loading, the circuit breakers, all of that
20 within our system had to be reexamined from an
21 engineering point of view to ascertain exactly what
22 modifications we needed to make for equipment. So in
23 January, even then our engineers are still waiting.
24 Our engineers, not the ones we hired to do the other
25 stuff, but our engineers were still waiting for

26

1 PacifiCorp data so that they could go through and
2 complete their engineering design of our internal
3 electrical design vis-a-vis the switch station and
4 things like that.

5 So that's where we get to this wasn't just
6 a one-month delay. We were moving down with
7 engineering design going on one set of assumptions as
8 to how this whole interconnection would work that
9 fundamentally changed once we understood it.

10 Now, yes, we acceded to the demand that we
11 agree to it because basically PacifiCorp said, "This
12 is how we're going to do it, guys." We really didn't
13 have a choice in the matter. So of course we went
14 along with it because that was the condition on which
15 we could get the additional interconnection.

16 COMMISSIONER BOYER: Thank you.

17 COMMISSIONER CAMPBELL: Mr. Elmont, I'll
18 give you five more minutes.

19 MR. ELMONT: Mr. Chairman, I think I would
20 be counterproductive to go back into some of the more
21 minutiae I was going to do at the time. So for now
22 I'll withhold those.

23 Thank you.

24 COMMISSIONER CAMPBELL: Thank you. And I
25 think that's a great observation if we can just get

26

1 to the point.

2 MR. GINSBERG: Chairman Campbell, could I
3 ask one or two?

4 COMMISSIONER CAMPBELL: I'm sorry. Yes,
5 Mr. Ginsberg, go ahead.

6 CROSS-EXAMINATION

7 BY MR. GINSBERG:

8 Q. I had just a couple of areas I wanted to
9 ask you about. When I look at the time schedule and
10 the events and the delays that were occurring, it
11 appears that the project could have been, with the
12 delays you've talked about, been online sometime this
13 fall or this winter?

14 A. Our original, with everything that was
15 going along, Mr. Ginsberg, our timeline that we were
16 working on with PacifiCorp in March was backfeed in
17 early October, I think October 3rd. And so probably
18 fully online about November 15th.

19 Q. How did the November 15th date then turn
20 into the June 1, '07 date?

21 A. Once, as I set out in my testimony, once
22 we had the concern about the contract, we encountered
23 financing problems which ultimately led in May, on
24 May 1 to our bridge lender refusing to advance any
25 more funds until we had resolved the issue. And so

26

1 it required us to shutdown the project.

2 Q. So because of the financing falling apart
3 in basically that last spring that November date
4 wasn't plausible any longer?

5 A. That's right. At that point in time, once
6 the shutdown occurred, we lost the summer that we
7 would have been going full steam to bring this
8 online.

9 Q. The second thing I wanted to ask you
10 about, do you have the contract up there with you?

11 A. I have a contract over there. I can just
12 reach over for it. Is it all right?

13 Q. Sure.

14 COMMISSIONER CAMPBELL: Go ahead.

15 Q. (BY MR. GINSBERG) This goes somewhat, I
16 guess, to really what you're asking here for the
17 Commission to do. If you can go to paragraph 13.

18 And you made reference in your summary to
19 the "but not limited to" language and referred to Ms.
20 Coon's testimony that that meant that you should
21 evaluate the event, other events that are possible
22 force majeure events besides the so-called acts of
23 God type of events?

24 A. That's correct.

25 Q. Is that what you did?

26

1 A. I'm sorry.

2 Q. Is that what you think Ms. Coon did?

3 A. My impression in reading her testimony was
4 that she focused on the "by way of example" language
5 and not the first sentence of the provision when it
6 says on the "by way of example" which "but is not
7 limited to" language.

8 Q. So is it your view that the delay that
9 occurred that you discussed with Mr. Elmont and was
10 talked about in a variety of the testimonies dealing
11 with not having the generator available to you at the
12 time of the contract and the five-month delay
13 requesting the interconnection is irrelevant?

14 A. I would say that until we had the actual
15 data so that they could undertake a meaningful study,
16 since we were not getting an OEM generator, per se,
17 that we could spec out, that yes, we would have to
18 start all over again if the information we originally
19 gave them was wrong.

20 Q. But you are the ones who were able to pick
21 the online date of June '06 and then have something
22 completed within your discretion, and it was within
23 your discretion not to have the generator available
24 to you at the time you signed the contract.

25 How are those not relevant factors in

26

1 determining whether it's reasonable to have delayed
2 five months in applying for an Interconnection
3 Agreement?

4 A. It is reasonable because we began the
5 process. We had identified earlier equipment that
6 became unavailable and so, therefore, we began the
7 measures then with the stipulation to identify the
8 equipment that would meet our requirements, and it
9 took us some time to do that.

10 Q. One final area then. A force majeure
11 event seems to relieve you of performance of certain
12 obligations that the force majeure affects, one of
13 which could be the in-service date.

14 Is it your view that the force majeure
15 date also would extend the termination date of the
16 contract or is it still a 20-year contract but that
17 the commercial operation date may still get extended?
18 The contract would expire 20 years from, as the
19 contract defined, 18 months from the effective date
20 of the agreement, which would be, I guess, sometime
21 in 2026.

22 A. I think it tolls the operation of the
23 specified dates. How that works on contract
24 expiration, I have not really analyzed, Mr. Ginsberg.

25 COMMISSIONER CAMPBELL: Thank you, Mr.

26

1 Ginsberg.

2 Mr. Mecham, any redirect?

3 MR. MECHAM: Just very quickly with
4 respect to what Mr. Ginsberg was asking.

5 COMMISSIONER CAMPBELL: Just a minute.
6 Mr. Proctor do you have a question?

7 MR. PROCTOR: Yeah, just one question.

8 CROSS-EXAMINATION

9 BY MR. PROCTOR:

10 Q. And my purpose is to try to understand
11 your force majeure claim.

12 A. Sure.

13 Q. In paragraph 13 of the force majeure
14 section of the contract, it refers to any cause
15 beyond the reasonable control of the seller or of
16 PacifiCorp that, despite due diligence," and so on.

17 Do you believe that the delay that you're
18 complaining of was within the control of PacifiCorp?

19 A. Yes, I do.

20 Q. Now, there is no comma separating "seller
21 or of PacifiCorp," is there?

22 A. There is not.

23 Q. And would that not be read as the beyond
24 reasonable control must be beyond the control of the
25 seller as well as PacifiCorp?

26

1 A. It has to be beyond the control of the
2 party claiming force majeure.

3 Q. Does that first sentence of paragraph 13.1
4 say that it must be beyond the control only of the
5 party declaring a force majeure?

6 A. It says that "Despite the exercise of due
7 diligence such party." There's an "or" between
8 PacifiCorp and seller and it's singular and not
9 plural, in such party.

10 Q. That would be Desert Power's position?

11 A. That would be Desert Power's position.

12 Q. Thank you, Mr. Darling.

13 MR. PROCTOR: Thank you, Mr. Chairman.

14 COMMISSIONER CAMPBELL: Thank you.

15 Mr. Mecham?

16 REDIRECT EXAMINATION

17 BY MR. MECHAM:

18 Q. Very quickly, Mr. Darling. Your
19 experience in getting your first Interconnection
20 Agreement again took how long?

21 A. About four months, actually.

22 Q. Thank you.

23 And then with respect to Mr. Ginsberg's
24 question concerning Ms. Coon's testimony, she says on
25 line 69 of that testimony that the delay or the issue

26

1 that's beyond the reasonable control of the party is
2 not caused by one party or the other.

3 Did that leave you with a certain
4 impression?

5 A. I mean --

6 Q. If it didn't, it didn't,

7 A. It didn't.

8 MR. MECHAM: Okay. Thank you.

9 COMMISSIONER CAMPBELL: All right. Thank
10 you, Mr. Darling.

11 MR. DARLING: Thank you, Mr. Chairman,
12 Commissioners.

13 MR. MECHAM: Mr. Chairman, are you ready
14 for Mr. Swenson?

15 COMMISSIONER CAMPBELL: Yes.

16 MR. MECHAM: Desert Power calls Mr.
17 Swenson.

18 COMMISSIONER CAMPBELL: Mr. Swenson, let's
19 swear you in.

20 ROGER SWENSON,
21 called as a witness, being first duly sworn, was
22 examined and testified as follows:

23 COMMISSIONER CAMPBELL: Thank you.

24 Mr. Mecham?

25 MR. MECHAM: Mr. Chairman, one quick
26

1 procedural. You probably were timing Mr. Darling, I
2 was too. He took about 15 or 16 minutes to do his
3 summary and surrebuttal.

4 COMMISSIONER CAMPBELL: We still have an
5 hour per witness. So I'll have to make a judgment
6 how that goes.

7 MR. MECHAM: Just looking at these
8 documents and this easel, I start getting a little
9 nervous about my ability to cross in my time.

10 COMMISSIONER CAMPBELL: I think perhaps
11 Mr. Darling set somewhat of a standard. And if
12 people fall within five minutes of that we'll be
13 okay.

14 MR. MECHAM: Thank you very much.

15 DIRECT EXAMINATION

16 BY MR. MECHAM:

17 Q. Mr. Swenson, would you state your name and
18 business address for the record?

19 A. My name is Roger Swenson. I'm an energy
20 consultant that has worked for Desert Power. My
21 address is 1592 East 3350 South, Salt Lake City,
22 Utah.

23 Q. Thank you very much.

24 And did you prepare Direct Testimony in
25 this proceeding consisting of 13 pages with 8

26

1 attachments, all of which were premarked, the
2 testimony being Desert Power Exhibit 2, the attached
3 exhibits being Desert Power 2.1 through 2.8?

4 A. Yes, I did.

5 Q. And if I were to ask you those questions
6 today, would your answers be the same?

7 A. All but I do have one correction to make.

8 Q. All right. Let's make the correction.

9 A. On page 4, line 71. The testimony as
10 filed in that sentence says, "adding roughly 30
11 megawatts of additional load." That should be
12 changed to "additional generation" in that sentence.

13 Q. And with that correction, if I were to ask
14 you the questions, would your answers be the same?

15 A. Yes, they would.

16 Q. Thank you.

17 MR. MECHAM: I would move the admission of
18 Desert Power 2 with 2.1 through 2.8 attached.

19 COMMISSIONER CAMPBELL: Any objections?

20 MR. ELMONT: No objections.

21 COMMISSIONER CAMPBELL: All right. It's
22 admitted.

23 MR. MECHAM: Thank you.

24 Q. (BY MR. MECHAM) Mr. Swenson, do you have
25 a brief summary, and what's going to be a brief
26

1 summary of your testimony?

2 A. Yes, I do.

3 Desert Power requests that this Commission
4 order an extension of the commercial operation date
5 under its contract with PacifiCorp to June 1, 2007.
6 The basis for this request is that it became
7 impossible to perform under this approved contract
8 with the circumstances that developed from the
9 interconnection, such circumstances or events that
10 could not have been reasonably within the ability of
11 Desert Power to control.

12 The interconnection process took much
13 longer than the initial process that Desert Power had
14 with its initial experience of its interconnection.
15 The basis for this longer period was the redesign of
16 the Rowley Substation that Mr. Darling explained.

17 Once the decision was made that there was
18 no alternative that Desert Power could be online
19 quickly enough to meet the contract operational
20 dates, Desert Power made every attempt it could to
21 push the process along. It asked for and received
22 approval to use outside engineering rather than
23 in-house PacifiCorp engineering to do the required
24 work.

25 However, as a result of the time it took
26

1 to get the necessary work done and all final
2 approvals, and procure long lead time equipment,
3 there was nothing that would move the project
4 backfeed date up further than October of 2006.

5 This occurred even with PacifiCorp
6 searching for all possible surplus equipment that
7 could be used from other projects. The process was
8 frustrating in that there was no clear determination
9 of when equipment that would be needed to be ordered
10 that had long lead times should be procured to meet
11 online dates.

12 Metering and communication equipment, for
13 instance, items that PacifiCorp knew would have to be
14 included in any kind of redesign, were not
15 specifically called out in meetings set for scoping
16 when those types of items were discussed on October
17 6th of 2005. If such items would have been
18 identified, Desert Power would have provided the
19 funds to acquire equipment. It never shied away from
20 doing everything it could to meet as quickly an
21 online date as it possibly could.

22 In any event, the delays passed the
23 critical contract dates and the failure to find a
24 reasonable solution between the parties to extend the
25 agreement led to a stoppage of all work once funds
26

1 were frozen.

2 Gas issues have also come up in
3 discussions in recent months. Desert Power has been
4 in discussions with Questar concerning alternatives
5 for firming up gas transportation to the plant for
6 some time. We have been in discussions with Questar
7 concerning the use of gas-fired reciprocating engines
8 or various speed electric-driven compressors. We
9 believe that electric-driven compressors offer better
10 flexibility and will be easier and quicker to
11 install.

12 The history of the gas situation that
13 Desert Power has been involved with with Questar
14 began in 2001. There were discussions with Questar
15 for installation of compressors back to that date.
16 Desert Power decided at that time to install
17 compressors at its site, which it had the right to
18 do, to help boost pressures at that point in time.

19 Once Desert Power entered into a 20-year
20 agreement, it felt like it was necessary to look into
21 locking down delivery quantities since the Tooele
22 Valley population is growing at a fairly substantial
23 rate. To assure that it could move forward
24 eventually, it locked a site for a compressor station
25 down and purchased that land. Desert Power is

26

1 looking at doing this upgrade because it would be
2 exposed to nonperformance penalties if it did not
3 perform when called on.

4 The contract itself does not call out for
5 more than commercially reasonable efforts under the
6 fuel section of the contract. Desert Power does,
7 however, understand the potential for penalties and
8 those penalties will keep ratepayers and the Company
9 whole if there are performance issues. But there
10 will be economic consequences to Desert Power so we
11 continued to look at those alternatives.

12 Questar has indicated to Desert Power that
13 it will use commercially reasonable efforts to
14 provide gas deliveries to the compressor if it's not
15 online. Therefore, Desert Power is meeting their
16 requirements under the fuel provisions of the
17 contract.

18 In summary, the Commission should approve
19 the extension of Desert Power's contract with
20 PacifiCorp to June 1, 2007 so that the construction
21 can begin in earnest again.

22 Q. Does that conclude your summary?

23 A. Yes, it does.

24 Q. Do you have Surrebuttal of the PacifiCorp
25 witnesses?

26

1 A. Yes, I do have some Surrebuttal.

2 MR. MECHAM: May I distribute this, Mr.
3 Chairman?

4 COMMISSIONER CAMPBELL: Go ahead.

5 MR. SWENSON: I believe that the picture
6 that the PacifiCorp witnesses is painting concerning
7 delays that the project incurred are somewhat
8 distorted. PacifiCorp suggests that it should file
9 typical data to get studies going early, but then
10 again says those data need to be almost perfect
11 before the study is worth any meaningful result.

12 They state that we've delayed the process
13 by holding Engineering and Procurement Agreements
14 from being executed when in actuality we've turned
15 documents around in a week and stated we were ready
16 to send money. They say we have no urgency in
17 executing Interconnection Agreements, but the last
18 interaction between PacifiCorp and Desert Power
19 concerning Interconnection Agreements occurred July
20 12th discussing Desert Power's concerns, written
21 concerns, and we have not heard anything back.

22 Concerning Mr. Houston's testimony,
23 directly on line 265 of Mr. Houston's testimony, he
24 states that it took six weeks to review and sign the
25 Engineering Agreement. This is just wrong. Desert

26

1 Power was sent an Engineering and Procurement
2 Agreement on November 29th of 2005. Desert Power
3 sent the agreement back on December 12th with a
4 couple of comments stating that it was ready to send
5 the money at any time. Desert Power heard nothing
6 until January 5th when PacifiCorp requested another
7 copy of the Engineering and Procurement Agreement
8 since they could not find the draft that we had sent
9 back.

10 Mr. Houston on line 282 says that the
11 change to the design created a one-month delay. I
12 can't even come close to that time calculation. I
13 believe that the redesign provided a substantially
14 longer delay. In order to see the difference, I have
15 completed a projected timeline based on where we
16 stood on October 6, 2005, starting from October 6,
17 2005, which was a meeting to begin the process of
18 scoping out which parties were going to do which
19 efforts.

20 Q. (BY MR. MECHAM) And that's Exhibit
21 2.1SR?

22 A. Which is Exhibit 2.1, SR2.1 with the
23 original design. And I provided a timeline based on
24 what actually happened with the redesign of Desert
25 Power.

26

1 Also attached I have provided meeting
2 notes that Desert Power's project manager took based
3 on the October 6th meeting. That's listed as SR2.3.
4 In that, in those meeting notes, you can see that
5 we've talked about many of the issues we've been
6 discussing today. The communication issues are
7 discussed, the interconnection issues are discussed,
8 communication issues are discussed, and even some of
9 the long lead time items were discussed. And the
10 only long lead time item that was discussed from
11 PacifiCorp's point of view was a switch that was said
12 was going to take 14 weeks.

13 In those meeting notes it was -- the
14 scoping meeting suggests that Desert Power would be
15 allowed to design the new pole and the
16 interconnection subject to PacifiCorp's approval. If
17 that would have taken place, if they would have just
18 let us go to work on the designs that the engineers
19 that were being used by Desert Power had been
20 contemplating and working on, we would have just got
21 going. We would have known what kind of equipment we
22 needed to order by November. I believe we could have
23 been backfeeding in April if we would have just moved
24 forward with that design.

25 What I've also supplied along with that,
26

1 those meeting notes, are other e-mails and documents
2 that support the timeline that occurred. I won't
3 take up the time of the Commission or PacifiCorp's
4 cross time to go into those details because everyone
5 can just read through those memos as they're just
6 factual.

7 Concerning Mr. Bennion's testimony, again,
8 Mr. Bennion suggests that we delayed the process by
9 not sending money for the engineering and procurement
10 work. And I believe it has issue with the same delay
11 that Mr. Houston talked about, although I'm not
12 positive. Mr. Bennion also says that we put the
13 metering back in their scope based on the meeting of
14 March 9th. And as Mr. Darling suggested, when we
15 tried to take on as much as we could to speed the
16 process up it was one of those items that we knew we
17 couldn't do any faster than PacifiCorp, and
18 PacifiCorp by its means did move faster and did find
19 current transformers that would have been acceptable.

20 In terms of Mr. Griswold's testimony, he
21 states that he doubts that the project could be
22 online by June 1st, 2007 and that's the basis for
23 finding -- for stopping all efforts to find a way to
24 bring this project into the mix of resources for next
25 summer. Desert Power has clearly been trying to use

26

1 every conceivable effort to start this project as
2 soon as possible given the circumstances.

3 As Mr. Miller provided information in the
4 Technical Conference, he believes that with a rapid
5 decision there is a likelihood that we can be
6 operational by June 1st and be a resource for next
7 summer.

8 Mr. Griswold asserts that we must have
9 firm gas supplies, even though the fuel supply
10 section of the agreement only calls out requirements
11 of commercially reasonable efforts to obtain all
12 natural gas supplies necessary to make scheduled
13 deliveries from the general gas market and maintain
14 transportation agreements to effect delivery of such
15 gas supplies.

16 By the plain language of the agreement it
17 is clear that commercially reasonable efforts is the
18 basis for fuel deliveries. We have a letter,
19 correspondence between Questar and Desert Power that
20 says that without a progressive station that's what
21 we have. Mr. Griswold himself states that there are
22 mechanisms within the performance provisions of the
23 contract to mitigate the Company's and the customers'
24 risk in case Desert Power's fuel supply is
25 interrupted. Mr. Griswold goes a long way in his

26

1 argument to say that there's more implied in the
2 contract than there is, but the plain language speaks
3 for itself, as it should in any agreement. There
4 shouldn't be uncertainties from various sections that
5 can lead to misunderstandings. Clearly the fuel
6 supply section is where the elements of the terms and
7 conditions are brought forward based on fuel
8 considerations.

9 I think I'll end my summary there.

10 Q. Thank you, Mr. Swenson.

11 We would move the admission of Desert
12 Power 2.1SR through 2.12SR.

13 COMMISSIONER CAMPBELL: Are there any
14 objections?

15 MR. BROKBANK: No objections.

16 COMMISSIONER CAMPBELL: Thank you, we'll
17 admit them.

18 Let's go ahead -- first of all, are you
19 making him available for cross?

20 MR. MECHAM: Yes, he's available for
21 cross. I apologize.

22 COMMISSIONER CAMPBELL: All right. We
23 will now take a break, take about a 15-minute break.
24 Let's reconvene at 10:20.

25 (Recess taken.)

26

1 COMMISSIONER CAMPBELL: Let's go back on
2 the record. Mr. Brockbank?

3 MR. BROCKBANK: Thank you, Mr. Chairman.

4 CROSS-EXAMINATION

5 BY MR. BROCKBANK:

6 Q. Mr. Swenson, good morning.

7 A. Good morning, Mr. Brockbank.

8 Q. I much prefer being across the table from
9 you in negotiations than at the table with you on the
10 witness stand.

11 A. I'm not sure which I prefer.

12 Q. I know I can be a bulldog in both places.

13 Mr. Swenson, besides Desert Power, can you
14 briefly tell us what other qualifying facilities
15 you've represented?

16 A. I have worked with US Magnesium and its
17 predecessor MagCorp. I have worked with Mountain
18 Wind, LLC, that is a qualifying wind facility in
19 Wyoming; Pioneer Ridge, LLC, a qualifying facility
20 here in Utah. And, you know, there have been
21 assorted various others in different stages that have
22 probably not progressed as far as those projects
23 have.

24 Q. Okay. Is it fair to say that you are one
25 of the more familiar faces over here at the

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1 Commission as far as expert witnesses representing
2 qualifying facilities?

3 A. I guess I'll say yes.

4 Q. Thank you.

5 That certainly is my observation. I'm not
6 a witness, though.

7 Mr. Swenson, I would like to turn to the
8 transcript from the Technical Conference on August
9 31st and just walk you through a few lines of that.

10 We did not bring copies of the transcript
11 for everybody, Mr. Chairman. We have a copy for the
12 witness and we have a copy for -- one copy for the
13 Bench. And I'm not sure about the court reporter, if
14 the court reporter needs a copy of the transcript.
15 We would like to just look through a few lines of
16 that.

17 COMMISSIONER CAMPBELL: Go ahead.

18 Q. (BY MR. BROCKBANK) Mr. Swenson, while Mr.
19 Elmont is passing that out --

20 MR. ELMONT: Do you want this introduced?

21 MR. BROCKBANK: No, we're not going to
22 introduce that.

23 Q. (BY MR. BROCKBANK) Do you recall -- while
24 you're finding this, Mr. Swenson, and the pages that
25 we're going to look at briefly are beginning on page
26

1 43 of the transcript.

2 Do you recall Ms. Coon asking you at the
3 Technical Conference something along the lines of
4 whether PacifiCorp Transmission failed to follow
5 their tariff timelines?

6 A. Yes, I recall that.

7 Q. Let's look briefly at page 43, lines 16
8 and 17. Could you please read that sentence?
9 Actually, for the sake of expedition and timeliness
10 I'm just going to read it. And if you can't see
11 where I am, will you please flag me? I want to make
12 sure you're following me.

13 On lines 16 and 17 you say, "The tariff
14 timelines say that they're doing -- they're going to
15 make reasonable efforts to do this."

16 Lines 21 and 22, "There's nothing in the
17 tariff that says that they're going to have to do
18 anything by a certain time."

19 Lines 24 and 25 -- or line 24, that is,
20 "And maybe we were naive or maybe I was naive looking
21 at it in that context."

22 Page 44, lines 4 through 6, "I couldn't
23 tell you that they had specifically violated a term
24 of their tariff. It's very flexible."

25 And lastly, page 46 and 47, lines 24 and
26

1 25 over onto the next page, "I have no way to be able
2 to say that they had any obligation to do besides
3 what's in their tariff."

4 Do you still stand by these statements,
5 Mr. Swenson?

6 A. Yes, I do. It hasn't been part of our
7 argument that they have breached their tariff in any
8 way. Our argument has just been that there was a
9 circumstance that Desert Power had no control over
10 and in that context we needed to extend the contract.

11 Q. Thank you.

12 I would also like to refer you to Cross
13 Exhibit 2 that Mr. Elmont used briefly with Mr.
14 Darling. And Mr. Elmont will provide you a copy so
15 that you will have that. The other folks should have
16 a copy of that.

17 And on some of these matters I'm going to
18 try to skip through quickly just because Mr. Elmont
19 covered them with Mr. Darling and I don't want to be
20 too repetitive, but because you are a separate
21 witness.

22 Cross Exhibit 2 is what we call the Study
23 Agreement; is that correct?

24 A. I'll take your word for it.

25 Q. Dated February 24, 2005. I would like to
26

1 just again refer you to the last paragraph on the
2 front page of that Study Agreement where it says that
3 "PacifiCorp will make commercially reasonable efforts
4 to complete the study within 180 days from the date
5 PacifiCorp received the executed Study Agreement."

6 The next line reads --

7 COMMISSIONER CAMPBELL: Mr. Brockbank, I
8 believe it reads 120 days.

9 MR. BROCKBANK: What did I say, Mr.
10 Chairman?

11 COMMISSIONER CAMPBELL: I heard 180.

12 MR. BROCKBANK: 180? I was not trying to
13 sneak that in, I can assure you.

14 Q. (BY MR. BROCKBANK) "120 days from the
15 date PacifiCorp receives the executed Study
16 Agreement." And the next sentence says, "Time to
17 complete the study is dependent on the availability
18 of PacifiCorp resources at the time the required
19 items are received by PacifiCorp."

20 Mr. Swenson, as a regulated utility,
21 PacifiCorp is required to follow its tariff, correct?

22 A. Yes.

23 Q. Commission orders, correct?

24 A. Yes.

25 Q. Agreements that it enters into?

26

1 A. Yes.

2 Q. And so far there's no Commission order
3 dictating contrary to what PacifiCorp Transmission
4 has done in the process here. According to your
5 testimony today and your comments in the Technical
6 Conference it has not violated its tariff, so that
7 only would leave this agreement that you believe
8 PacifiCorp has violated or breached?

9 A. I don't particularly say that there's been
10 any breach here. I think all that's occurred, and
11 the only thing we attest has occurred, is that there
12 was an unforeseeable event that caused such a delay
13 as we couldn't meet a contractual commitment entered
14 into with your company and we asked that the contract
15 be extended so that we can continue on with that
16 contract. That's all we're saying.

17 Q. As long as PacifiCorp complies with its
18 obligations in this agreement, then, it is doing
19 everything that it needs to do assuming it's
20 complying with its tariff; is that correct?

21 A. I'm not sure if you're asking me a legal
22 question there.

23 MR. MECHAM: It sounds to me as though he
24 is.

25 MR. SWENSON: I get nervous when I start
26

1 to sound like an attorney because I am not one.

2 MR. MECHAM: And I'll object on that
3 basis.

4 MR. BROCKBANK: I will ask it a different
5 way.

6 Q. (BY MR. BROCKBANK) You did state, Mr.
7 Swenson, that PacifiCorp is required to follow its
8 agreements?

9 A. Yes.

10 Q. Do you believe that PacifiCorp used its
11 commercially reasonable efforts in complying with the
12 terms of this agreement?

13 A. I believe it used its reasonable efforts.
14 I'm not sure what commercially reasonable efforts.
15 The funny thing is your tariff says "reasonable
16 efforts." I'm not sure what the difference is
17 between commercially reasonable efforts and
18 reasonable efforts. You took efforts. And I have
19 testified that the tariff is very flexible and I'll
20 admit to that.

21 Q. You seem to be very comfortable with the
22 terms "commercially reasonable" when discussing a gas
23 supply. So I want to make sure that -- you appear to
24 have given certain kinds of perhaps legal opinions.
25 I don't know if they're considered legal opinions

26

1 there or not, but in this context your testimony is
2 that PacifiCorp has used reasonable efforts then?

3 A. Well, and you've got me thinking about the
4 other concept of using the language in another
5 agreement. What I made sure of was that the gas
6 agreement and the gas suppliers said that they would
7 use commercially reasonable efforts. You required
8 commercially reasonable efforts. I don't know that I
9 would explicitly know what the definition of that is.
10 But what I did know is I had a supplier who said
11 that's what was going to happen, I had a contract who
12 said that's what I needed to have happen and there I
13 have a match.

14 Here I'm just saying, I will agree that
15 you used reasonable efforts and your tariff says
16 you've got to use reasonable efforts. I wouldn't say
17 you did anything unreasonable in the whole process.

18 Q. Thank you, Mr. Swenson.

19 Are you in a position to know the
20 availability of PacifiCorp resources at the time that
21 was required for items from Desert Power to pursue
22 studies?

23 A. No.

24 Q. That was the other carve-out, if you will,
25 in this Study Agreement, wasn't it?

26

1 A. I have to take your word for it. If you
2 want me to read that, I'll read it.

3 Q. I read it earlier. It's on the last three
4 lines of page 1. "Time to complete the study is
5 dependent on the availability of PacifiCorp
6 resources." Is that the time required?

7 A. Certainly.

8 Q. Okay, thank you.

9 Do you believe that Desert Power bears any
10 of the blame for its project's failure to be online
11 on a timely basis by the scheduled operation date of
12 May 9, 2006?

13 A. Any of the blame. I don't know that I'm
14 in a position to make that determination
15 specifically. What I do know is what I believe could
16 have happened if the redesign didn't occur. And I
17 believe we were online and on timeline to make the
18 commercial operation date until we had the redesign.

19 Q. So your testimony is that PacifiCorp up
20 until the redesign everything was going smoothly,
21 Desert Power had done everything correct, had managed
22 their facility, the construction, the contracting
23 completely consistent with getting a project online
24 by June 1 of 2006, and PacifiCorp is the sole cause
25 for these problems, these delays?

26

1 A. I believe up until October 6 everything
2 was moving along swimmingly, everything was going
3 along as though we could make this date, and in
4 October things changed in the schedule.

5 Q. Swimmingly, I like that term.

6 Let's refer to Cross-Examination Exhibit
7 1, Schedule 38. You're familiar with Schedule 38?

8 A. Yes. I have read Schedule 38 a few times.

9 Q. Mr. Elmont will provide you a copy that's
10 already been admitted into evidence and the other
11 parties should have a copy of that.

12 Again, I would just turn you, Mr. Swenson,
13 to the last -- to original sheet number 38.5. And
14 I'm not going to take time to read this because we've
15 already read it. But I'm referring to the language
16 where the tariff recommends on original sheet 38.5,
17 the last block on that page at the bottom where the
18 tariff recommends that the owner of a qualifying
19 facility initiate its interconnection request as
20 early in the planning process as possible.

21 Did Desert Power initiate its
22 interconnection request as early in the planning
23 process as possible, in your view?

24 A. It did it as early as possible with
25 information that was applicable to what it was

26

1 actually going to install. To have provided
2 information prior to that would have given us
3 meaningless results that would have wasted your
4 Company's resources and time. And I could tell how
5 busy your Company's resources are and I would rather
6 not waste their time.

7 Q. Do you believe that Desert Power and
8 PacifiCorp began negotiating the Power Purchase
9 Agreement in earnest in June of 2004?

10 A. Yes, I believe that's correct.

11 Q. Thank you.

12 All things being equal, if Desert Power
13 would have made its request for transmission service
14 back when it began negotiating with PacifiCorp on the
15 Power Purchase Agreement, isn't it true that right
16 now instead of being in September 2006, under these
17 same sets of circumstances we would be facing these
18 same circumstances in January of 2006?

19 A. I'm not sure I get your timelines exactly.

20 Q. Approximately?

21 A. Well, I suspect that if we would have
22 given the interconnection request and made up
23 information, that I would have had Mr. Houston
24 telling me that I didn't give him good information
25 until June 21st of 2005 anyway, which started the
26

1 process. And until we had good information you
2 didn't want to start the process anyway.

3 Q. Okay. Was it within Desert Power's
4 reasonable control to wait until February 22, 2005 to
5 make its interconnection request?

6 A. Yes.

7 Q. Having made the February 22nd request, was
8 it within Desert Power's reasonable control to wait
9 until June 10th to submit the necessary technical
10 data to make its study application complete?

11 A. Again, I'm not sure what "reasonable
12 control" is. I assume that the project engineer and
13 the electrical engineers that were working on getting
14 information had a basis for digging that data up and
15 it took them that long.

16 Q. Thank you.

17 When did Desert Power finally take
18 possession of its steam turbine?

19 A. That I don't know.

20 Q. Subject to check, would you agree that
21 Mr. Darling stated in the Technical Conference that
22 possession was achieved by Desert Power in September
23 or October of 2005?

24 A. Subject to check. But it's not something
25 I have direct knowledge of.

26

1 Q. Okay. It's page 65 of the transcript,
2 lines 7 through 12, just for the record, so Mr.
3 Mecham could review that if he would like.

4 Was it within Desert Power's control to
5 wait clear until August of 2005 to purchase and
6 October 2005 to take possession of the steam turbine?

7 A. I think Mr. Darling has testified to all
8 of those matters and I don't know what more you want
9 me to say about it.

10 Q. I just would like to know whether you
11 think it was within Desert Power's control?

12 A. I think he testified that's when they
13 obtained the equipment so it was in his control.

14 MR. MECHAM: If you would like him to
15 elaborate he can do that under the rules of the game.

16 MR. BROCKBANK: Thank you. I appreciate
17 that. I think we're okay.

18 Q. (BY MR. BROCKBANK) Are you aware of
19 whether the turbine is available for use right now?
20 Is the refurbishment done and complete?

21 A. I'm not aware of what you mean by "the
22 turbine." The steam turbine?

23 Q. The steam turbine.

24 A. I do not know --

25 Q. You do not know?

26

1 A. -- the status of it.

2 MR. BROCKBANK: Let's see here. Mr.
3 Chairman, if you'll bear with me for a minute. In
4 the interest of expedition, I'm going to get out of
5 the weeds a little and move up to the clouds a little
6 more.

7 Q. (BY MR. BROCKBANK) When did Desert Power
8 and Questar Gas first exchange an agreement for the
9 compressor station or do you know that? Or I can --

10 A. I don't know that specifically. I believe
11 it was back in 2001, but I'm --

12 MR. MECHAM: Are you referring
13 specifically to anyplace in his testimony?

14 MR. BROCKBANK: Not right now, I'm not
15 referring to any particular line in his testimony,
16 Mr. Mecham.

17 Q. (BY MR. BROCKBANK) You provided a copy, a
18 draft of a Desert Power Facilities Agreement and I
19 don't need to jump into that. I just wanted to point
20 out, and I'm happy to provide you a copy if you would
21 like, but I just want to point out that the date of
22 that agreement is October of 2004.

23 Would you like to see that or -- I'm not
24 necessarily planning on submitting it into evidence,
25 but it's a document that Desert Power provided.

26

1 A. And I'm still in the clouds, so to speak,
2 over what document you're referring to. Is it
3 dealing with Questar, is it dealing with PacifiCorp?
4 What is it?

5 Q. No. This is a Desert Power Facilities
6 Agreement between Questar Gas and Desert Power and
7 it's dated -- it's a draft and it's dated October
8 2004.

9 A. Yes.

10 Q. Okay. At the Technical Conference -- let
11 me strike that. You said -- yes, at the Technical
12 Conference -- you said you didn't feel comfortable, I
13 believe was the word, until November 9th, 2004 or the
14 effective date that you were going to have a project.
15 Is that your testimony?

16 A. That's my testimony. I would like to note
17 that no one has appealed it and we're moving forward.

18 Q. Okay. So with your experience with
19 US Magnesium, with Pioneer Ridge, and any other
20 qualifying facilities that you're familiar with, has
21 anybody ever appealed an order approving a QF
22 contract that you're familiar with?

23 A. No.

24 Q. Okay. Yet you didn't feel comfortable
25 that you had a deal until November of '04?

26

1 A. That's what I stated. You know, I don't
2 mean have a deal. What we don't know, we have an
3 effective contract that's something that can be taken
4 to a bank to acquire equipment.

5 Q. I understand, sure.

6 And that's not the question. The question
7 is, when did you feel reasonably comfortable that
8 Desert Power's project was going to fly?

9 And as a pretext I'll mention that Mr.
10 Darling testified this morning that he had sent Mr.
11 Cory at PacifiCorp Transmission a letter in June of
12 2004 stating that they were going to seek, I believe
13 he used an amendment of the transmission arrangement
14 or the Transmission Agreement, Interconnection
15 Agreement. And it just appears to me that Mr.
16 Darling was comfortable that things were moving along
17 in June of '04 and you're saying that you didn't feel
18 comfortable until November; is that correct?

19 A. I've been through this process enough to
20 know that there can be delays and there can be
21 frustrations. I have had a lot of other projects
22 that have taken a lot longer to get through the
23 negotiating phases and through the approval processes
24 than the four or five months you're talking about
25 right there.

26

1 Q. Why did you then begin negotiating with
2 PacifiCorp prior to the effective date if you didn't
3 know you had a project?

4 A. We were just always interested in
5 understanding what the costs of that would be for
6 commercial decision making.

7 Q. Okay. After two years, approximately,
8 just under two years of this draft Desert Power
9 Facilities Agreement with Questar, has Desert Power
10 executed a contract with Questar for the compressor
11 station?

12 A. And I would have to defer that question
13 maybe to Mr. Darling. I think we've done some
14 agreements associated with financing studies and
15 we've studied and studied and studied and looked for
16 timelines and we're waiting for engineering
17 information back from the last agreement that was for
18 a study at this time. So we've continued to try to
19 pin down what the costs and the timing would be for
20 that installation.

21 Q. Is that a no, no contract yet?

22 A. I believe we have a contract for --

23 Q. You have a contract?

24 A. -- for studying the cost of this.

25 Q. Do you have a contract with Questar Gas

26

1 for the installation of a compression facility?

2 A. No. Just to study the cost and the timing
3 of it right now.

4 MR. MECHAM: I thought the rules of the
5 game were if the witness deferred a question to
6 someone who was here at the table that if he had
7 anything additional to say it would go to him.

8 MR. BROCKBANK: I'm sorry. I thought Mr.
9 Swenson's testimony talked about the Questar Gas
10 relationship.

11 MR. MECHAM: He said he didn't know and he
12 would defer to Dr. Darling.

13 MR. SWENSON: And I assumed you were
14 referring to the agreement associated with the
15 Engineering Study.

16 Q. (BY MR. BROCKBANK) No. I was referring
17 to the actual Compression Agreement. Are you
18 familiar with that or should that be directed to
19 Mr. --

20 A. There is no Compression Agreement.
21 There's only an agreement to do the study.

22 Q. That was my question. Thank you. It
23 looks like you did know the answer. I appreciate
24 that clarification.

25 A. I just needed to get to what you were
26

1 asking. Sorry.

2 Q. I apologize if I was unclear.

3 Is the fact that Desert Power has not
4 executed a contract with Questar for a compression
5 station within Desert Power's control or does that
6 blame primarily lie with Questar?

7 A. It's within Desert Power's control, I
8 assume. We've been working on it for many, many
9 months. Many years I think I would say.

10 MR. MECHAM: I would also object on the
11 grounds that that assumes certain things that just,
12 frankly, aren't at issue because that assumes that we
13 have a firm Transportation Agreement in our contract.
14 That's a matter in dispute, I suppose, but they
15 themselves will show in a matter of minutes,
16 acknowledge there is no firm Transportation
17 Agreement. So the relevance of a contract with
18 Questar in this proceeding is irrelevant.

19 MR. BROCKBANK: I completely disagree,
20 Mr. Chairman. Mr. Swenson's testimony has made the
21 firmness of their fuel supply front and center in
22 this proceeding.

23 COMMISSIONER CAMPBELL: I'm going to
24 overrule the objection. You can continue with your
25 question.

26

1 MR. BROCKBANK: Thank you.

2 Q. (BY MR. BROCKBANK) Mr. Swenson, do you
3 know when Desert Power executed its EPC contract?

4 A. No, I do not.

5 Q. Subject to check, I'll state that it was
6 on August 14, 2005. Would you agree subject to
7 check?

8 A. I guess. I don't know how I cannot agree
9 with that.

10 Q. I'll represent that it does.

11 A. Okay.

12 Q. And I don't plan on introducing that.

13 That is 11 months later than the date of the Power
14 Purchase Agreement; isn't that correct?

15 A. That's the timing in my mind, subject to
16 check.

17 Q. Okay. Thank you.

18 Let's look at the transcript again. This
19 is on page 49, line 7. Are you there on page 49, Mr.
20 Swenson?

21 A. Yes.

22 Q. Line 7. Ms. Coon asked you, or asked Mr.
23 Darling, "Why did Desert Power take four months to
24 fill out the specific information about its equipment
25 once it made its request?"

26

1 Mr. Darling on line 12, "My impression" --
2 well, let's see. Mr. Darling on line 10, "We had
3 engineers and a project manager on this. Mr. Swenson
4 was working on this. My impression was that they
5 were in communications and discussions on submissions
6 of materials and that we were back and forth on
7 them."

8 Now down to line 17, "MR. SWENSON: And my
9 understanding of what people were waiting for, but I
10 wasn't the one who was getting the information back
11 and forth, was the maximum generation capabilities of
12 the equipment."

13 Do you see that?

14 A. Yes.

15 Q. It appears -- and I want to ask you about
16 this. It sounds like you and Mr. Darling thought
17 that the other person was taking care of providing
18 this data to PacifiCorp Transmission. Does that
19 sound like that to you?

20 A. There was a project manager and then
21 electrical engineering firm that were working
22 directly obtaining the information and I got copied
23 on e-mails, and I happened to be the owner's rep at
24 some of these meetings.

25 Q. He said that he thought you were in charge
26

1 and you say it wasn't you; is that correct?

2 A. Well, I think you've got to ask Mr.
3 Darling what he meant by that. I don't know that he
4 was suggesting I was in charge.

5 Q. Okay.

6 COMMISSIONER CAMPBELL: Do you want to ask
7 Mr. Darling that question?

8 MR. BROCKBANK: No. Thank you, Mr.
9 Chairman.

10 Q. (BY MR. BROCKBANK) Mr. Swenson, is
11 Desert Power a qualifying facility under the PURPA
12 regulations?

13 A. To my knowledge, yes.

14 Q. Okay. And you are their consultant for
15 these matters or not for the Federal matters?

16 A. I think he's got attorneys associated with
17 Federal matters, but I think I can help with some
18 questions.

19 Q. Okay. Who is Desert Power's steam host?

20 A. US Magnesium. And I believe he's got an
21 alternative steam use, but I'm not positive of that.

22 Q. Okay.

23 A. There are a couple of entities out there
24 at the site that can utilize steam.

25 Q. When did Desert Power and US Magnesium
26

1 sign the Steam Supply Agreement?

2 A. I think I would have to defer that to Mr.
3 Darling. I'm just not positive of any of the dates
4 or the status of that.

5 MR. BROCKBANK: Mr. Chairman, I would like
6 to move for the admission of -- well, let me see.
7 What are we on, Cross Exhibit 2, Cross 3 or 4?

8 COMMISSIONER CAMPBELL: You want to mark
9 something as Cross Exhibit 4?

10 MR. BROCKBANK: Yes. Thank you. And I
11 want to note, Mr. Chairman, that this is a
12 Confidential exhibit provided by Desert Power, it's
13 provided in yellow. We would like to give Mr. Mecham
14 the opportunity to look at it before we pass it
15 around to see how he would like us to handle this.

16 MR. MECHAM: Well, it is confidential. So
17 if people haven't signed Exhibit A to the Protective
18 Order --

19 MR. BROCKBANK: Perhaps I can make it
20 easy. Mr. Chairman, I don't plan on referring to
21 anything in this agreement other than the date of it
22 and the fact that it is not executed.

23 COMMISSIONER CAMPBELL: That isn't
24 confidential, is it, the date?

25 MR. MECHAM: No.

26

1 COMMISSIONER CAMPBELL: Or the fact it
2 hasn't been signed. All right, go ahead.

3 MR. BROCKBANK: Thank you, Mr. Chairman.

4 COMMISSIONER CAMPBELL: Can I give you a
5 heads up? You've got about ten more minutes.

6 MR. ELMONT: Can I interrupt just for a
7 second?

8 MR. GINSBERG: Just describe what the
9 agreement is.

10 MR. BROCKBANK: I will. Thank you, I will
11 do that.

12 Q. (BY MR. BROCKBANK) Mr. Swenson, can you
13 please read what this agreement is?

14 A. It's a Steam and Water Supply Agreement by
15 and between US Magnesium and the Rowley Thermal
16 Energy and Desert Power, LP.

17 Q. Can you tell me what the date is on the
18 first and second line of this draft agreement?

19 A. It says dated the blank day of August,
20 2006.

21 Q. When was Desert Power going to get around
22 to executing its steam contract with the steam host?

23 A. I believe Mr. Darling has been in
24 negotiations in earnest for quite some time with
25 US Magnesium. They have had a Letter of Intent in
26

1 place, is my understanding, for these transactions.

2 And I think as soon as he can get US Magnesium to sit
3 down to the table and Mr. Darling has time they'll
4 work this out.

5 Q. Wouldn't it be prudent for a qualifying
6 facility to have its relationship with the steam host
7 lined up before the scheduled commercial operation
8 date?

9 A. Mr. Darling, I think, expects that it's in
10 US Magnesium's interest to enter into this agreement
11 to help reduce its usage of natural gas and will
12 save, I expect, more than a million dollars a year
13 for the facility. So why wouldn't US Magnesium want
14 to enter into this? And as I said earlier, I believe
15 that Mr. Darling has an alternative steam utilization
16 in his plans, but I'm not sure he wants to use that
17 if he's got this alternative with US Magnesium that
18 will be economic for both parties.

19 Q. Thank you.

20 MR. MECHAM: Mr. Chairman, there again,
21 Mr. Darling is right here and he can answer the
22 question if that will help.

23 MR. BROCKBANK: That's fine. I'm just
24 trying to establish, Mr. Chairman, that there are
25 other issues that are causing delays with Desert
26

1 Power's project besides PacifiCorp Transmission. The
2 substance of this is not as relevant as the fact that
3 it's not executed.

4 COMMISSIONER CAMPBELL: I don't want to
5 take this away from your time, but let me ask Mr.
6 Darling why the agreement is dated -- I didn't hear
7 the answer to Mr. Brockbank's question from Mr.
8 Swenson there. And the basic question was is why is
9 this agreement dated after the commercial operation
10 date in the contract?

11 MR. DARLING: Because we haven't had an
12 agreement in principle since about January of 2006
13 that are reflected in the terms of this contract.
14 Certain things about metering equipment and placement
15 has been up in the air as we've -- a lot of the
16 things were underway to get specified in this thing
17 when we came to the shutdown. And it was --
18 US Magnesium wanted to get everything worked out
19 before they signed it.

20 But the economic terms of this agreement
21 have not changed for a year now. And it's just
22 getting now to the interconnection points and
23 assuring the interconnection points and the metering
24 that will be installed on site with the related
25 engineering that has, at this point in time, that has

26

1 the conditions that we've had at site, it has not
2 been an urgent matter between US Magnesium and us
3 having worked out the commercial terms of the deal.

4 COMMISSIONER CAMPBELL: Thank you.

5 Mr. Brockbank?

6 MR. BROCKBANK: Thank you, Mr. Chairman.

7 COMMISSIONER CAMPBELL: Before you move
8 on, do you want to move the admission?

9 MR. BROCKBANK: Thank you. PacifiCorp
10 moves for the admission of Confidential Cross
11 Exhibit Number 4.

12 COMMISSIONER CAMPBELL: Any objection?

13 MR. PROCTOR: No objection.

14 MR. MECHAM: No.

15 COMMISSIONER CAMPBELL: All right, we'll
16 admit it.

17 MR. BROCKBANK: Mr. Chairman, I would like
18 to introduce Cross Exhibit 5 and would like to --

19 Q. (BY MR. BROCKBANK) Mr. Swenson, this is
20 Cross Exhibit 5. It's an e-mail from you to Charles
21 Darling dated November 9, 2004. I'm going to read --
22 well, I'm going to read it because I think I'll read
23 faster in the interest of time. So I'll address it
24 in a moment.

25 "Charles, do you have a quantity of
26

1 distilled water that the plant will produce, gallons
2 per hour? I have a few ideas on other potential
3 thermal uses. There is another product that we can
4 distill that may work in a batching kind of mode with
5 your dispatchability. What I am thinking is ethanol.
6 Ethanol is produced from fermentation of sugars and
7 that product of fermentation, approximately 15
8 percent needs to be distilled to about 95 percent
9 purity." And then I'm not going to read any more in
10 the interests of time.

11 Mr. Swenson, isn't it true that when
12 Desert Power signed the Power Purchase Agreement --
13 and this I would note is on the effective date, the
14 date of your e-mail is the date of this e-mail --
15 Desert Power didn't know how it was going to be
16 qualified as a qualifying facility? It hadn't
17 decided how it was going to make those
18 determinations, had it?

19 A. Sure. It was expected that it was going
20 to use US Magnesium, its neighbor, which is the ideal
21 circumstance, but we wanted to have alternatives
22 because we're a commercially reasonable entity and
23 it's a negotiation process versus the economics of
24 that transaction over the fence. And it's never a
25 good alternative to walk into a negotiation and not

26

1 have any other alternatives.

2 Q. Is Desert Power -- and I don't mean this
3 pejoratively at all. There's a term that is used in
4 the industry called a PURPA machine, which generally
5 refers to a power plant that is looking for a way to
6 qualify as a -- to sell its power and looking for a
7 way to sell its power through cogeneration. Is
8 Desert Power a PURPA machine?

9 A. I wouldn't suggest that Desert Power is
10 a PURPA machine. Desert Power has an exceedingly
11 good use for that thermal energy that will make
12 US Magnesium healthier and reduce natural gas usage
13 that we seem to be talking about a lot lately.

14 MR. BROCKBANK: Mr. Chairman, PacifiCorp
15 would move for the entry -- what's the word?

16 COMMISSIONER CAMPBELL: Admission.

17 MR. BROCKBANK: -- admission, thank you,
18 of Cross Exhibit 5.

19 COMMISSIONER CAMPBELL: Any objections?

20 MR. PROCTOR: No objection.

21 MR. MECHAM: No objection.

22 COMMISSIONER CAMPBELL: All right, we'll
23 admit it.

24 Q. (BY MR. BROCKBANK) And I'm going to skip
25 a couple of lines of questioning here, Mr. Chairman,

26

1 in the interests of time, but one I believe is
2 critical and then I'll just have some brief summary
3 comments.

4 I would like to introduce Cross Exhibit 6.
5 And I'm not going to look at all of this exhibit, Mr.
6 Swenson. Cross Exhibit 6 is a series of e-mail
7 correspondence, and the parties can review this in
8 more detail at their leisure, but I'm going to look
9 at a few of these. And I want to mention, this
10 relates to Desert Power's Gas Supply Contract with
11 BPIGI.

12 The first couple of e-mails are
13 correspondence between you and PacifiCorp folks
14 inquiring about where the copy of the Gas Supply
15 Agreement is.

16 Under the Gas Purchase Agreement -- or
17 under the Power Purchase Agreement Desert Power is
18 required to provide a copy of that. Are you familiar
19 with that obligation.

20 A. Yes.

21 Q. Let's see. I believe Desert Power was
22 obligated under the agreement to provide PacifiCorp
23 with a copy of that contract by January 9, 2006.
24 Does that sound right to you?

25 A. I think that sounds right subject to
26

1 check. It was in the milestones and I think we have
2 e-mails associated with the requests and we kept
3 working on getting it.

4 Q. Thank you.

5 Does it sound right that you actually
6 submitted that contract to PacifiCorp on February 13,
7 2006?

8 A. Subject to check, yes.

9 Q. Okay. Let's look at something here. I've
10 gotten confused in some of this correspondence. The
11 representative for BPIGI is Mr. Mike McGarvey; is
12 that correct?

13 A. That's correct.

14 Q. Okay. Let's look at -- okay. So I want
15 to back up. I'm sorry.

16 According to, and I'm hoping not to have
17 to introduce the Gas Agreement. If we can talk
18 around it, I won't. But if we need to, I have that
19 here and I have copies for the parties.

20 On an e-mail dated February 3rd, 2006 --
21 well, let's look at the third sheet in this Cross
22 Exhibit 6. Is it Cross Exhibit 6? Yes, it's Cross
23 Exhibit 6.

24 Mr. McGarvey says to you in an e-mail
25 dated January 16, 2006, "I'm very concerned about the

26

1 progress with Desert Power. Is there anything you
2 can do to get some information for me?"

3 And you respond, "I will get something
4 back to you on this tomorrow." That's January 16th.

5 Let's skip the next e-mail. Mr. McGarvey
6 then sends to you on this sheet one, two, three,
7 four, the fifth sheet, on an e-mail dated February
8 3rd, 2006, Mr. McGarvey says, "Roger, at long last,
9 if this is agreeable, I will have signed originals
10 overnighted." February 3rd; is that correct?

11 A. That's correct.

12 Q. The next page, keeping in mind you
13 supplied Utah Power, PacifiCorp, with a copy of that
14 agreement on February 13, correct?

15 A. Subject to check.

16 Q. Okay. On March 6 there's another e-mail.
17 Mr. McGarvey. "Any contract progress that you know
18 of? Also, any word on the estimated start date would
19 help me."

20 Mr. Swenson replies on the same date, "I
21 will get an idea of where things stand for you."

22 The next e-mail dated March 30th, about
23 six weeks after you supplied a fully executed Gas
24 Contract to PacifiCorp. Mr. McGarvey says, "Roger, I
25 left word with my Boise office to let me know if they
26

1 have received the contract and will get back to you
2 ASAP. I do know, however, that as of last Tuesday we
3 hadn't seen it. Talk to you soon."

4 You say, "Thanks, Mike. I'll find out
5 where it is on my end."

6 It looks to me like Desert Power signed a
7 Gas Agreement on February 3rd, 2006, provided it to
8 Rocky Mountain Power, well, then Utah Power, February
9 13th, but as of March 30th still had not provided an
10 executed copy back to IGI. Am I missing something or
11 is that the case?

12 A. I'm not sure exactly what the case was. I
13 would probably have to defer to Mr. Darling since he
14 was handling the gas supply issues and the signatory
15 part of the contracts at that point in time. What I
16 do know is we were working off of an executed term
17 sheet that had the specific terms agreed to between
18 the parties well ahead of this. We also had
19 essentially -- the only thing that was holding things
20 up were making sure that credit requirements and
21 associated payment structures could be agreed to by
22 the Credit Departments. And that's the only thing
23 that was holding anything up that I ever saw.

24 Q. Okay. May 5th, the last e-mail. May 5,
25 keep in mind you sent your notice, Desert Power sent

26

1 the notice of force majeure on February 3rd, I
2 believe, 2006?

3 A. 10th, I think.

4 Q. Mr. McGarvey says, "Hi, Roger. Our
5 records show we are nearing the start month for
6 Desert Power. When we verified last, service was
7 estimated to begin sometime during the month of June.
8 Shall I consider that to be the same and have that be
9 our contractual start date?"

10 "Mike," Roger responds, "I will get an
11 update on the schedule for fine testing and the start
12 of operation. I know schedules are being worked out
13 right now. When I get that info I will give you a
14 call. My understanding is that there are some delays
15 for some of the final equipment for the power
16 interconnection."

17 Is that all you knew about the delay of
18 your project at that time, Mr. Swenson?

19 A. I didn't know when it was going to start.
20 The only thing I knew was we were working out
21 schedules associated with when the backfeed could
22 actually take place. There were discussions
23 associated with whether or not the simple-cycle
24 turbines could be run that summer. There were lots
25 of things being discussed. And if the simple-cycle

26

1 turbines could have been run that summer we would
2 have been able to start taking gas any time.

3 COMMISSIONER CAMPBELL: Would you like to
4 move the admission of Cross Exhibit 6?

5 MR. BROCKBANK: Yes. Thank you, Mr.
6 Chairman. PacifiCorp moves for the admission of
7 Cross Exhibit 6.

8 COMMISSIONER CAMPBELL: Are there any
9 objections?

10 MR. MECHAM: No objections.

11 MR. PROCTOR: No.

12 COMMISSIONER CAMPBELL: All right. Thank
13 you, it is admitted.

14 I'm going to go to Mr. Ginsberg and if
15 there's time remaining we'll come back to you.

16 MR. BROCKBANK: Mr. Chairman, can I ask
17 one more question with one more document, it's
18 critical, and then I'll skip everything else?

19 COMMISSIONER CAMPBELL: Okay. I'll make
20 sure we add that onto Mr. Mecham's time.

21 MR. BROCKBANK: I appreciate the parties'
22 and the Commission's forbearance on this. We would
23 like to introduce Cross Exhibit 7, Mr. Chairman.
24 This is an e-mail dated March 24, 2006 from Roger
25 Swenson to Charles Darling.

26

1 Q. (BY MR. BROCKBANK) And I would like to
2 ask Mr. Swenson to please read this e-mail in its
3 entirety for the record.

4 A. You want me to read the date and
5 everything into the record?

6 Q. Well, I introduced the date. Just
7 "Charles, at this point," and then read the text.

8 A. "Charles. At this point I do not believe
9 it makes sense not to just immediately turn around
10 and give them the money. If you hold out for
11 something like a breakdown of costs to date and a
12 more specific scope they may be able to say that we
13 are the cause of delay. (Although I will ask Shannon
14 Mahar for this breakdown to date and a forward
15 projection!) Since we are using them as the cause of
16 the delay in the project, I do not want to give them
17 a chance to turn it around on us."

18 Q. Mr. Swenson, isn't this force majeure just
19 a scapegoat for Desert Power to blame all of its
20 problems on?

21 A. No.

22 Q. Hasn't --

23 A. What I understood -- do you want me to
24 finish?

25 Q. Please.

26

1 A. What I understood was there was a force
2 majeure in effect because there were delays. And
3 when the Engineering and Procurement Agreement comes
4 with a request for money, what I suggested to Mr.
5 Darling is you just better turn this around and let's
6 not be picky and ask for even an accounting. Let's
7 just pay the money and sign it and move on.

8 Q. Isn't this claim of force majeure just a
9 mechanism that Desert Power is using to blame all of
10 its problems on PacifiCorp?

11 A. No.

12 COMMISSIONER CAMPBELL: Okay. Thank you.

13 MR. BROCKBANK: Thank you, Mr. Chairman.

14 COMMISSIONER CAMPBELL: Would you like to
15 move the admission of Cross Exhibit 7?

16 MR. BROCKBANK: Yes, I would.

17 COMMISSIONER CAMPBELL: Any objections?

18 MR. PROCTOR: No.

19 MR. MECHAM: No.

20 COMMISSIONER CAMPBELL: All right, it's
21 admitted.

22 Mr. Ginsberg, any questions?

23 MR. GINSBERG: I had one area I wanted to
24 ask about. Maybe it will end up being answered by
25 Mr. Darling too.

26

1 CROSS-EXAMINATION

2 BY MR. GINSBERG:

3 Q. When I read Mr. Darling's testimony, also
4 you're asking that all the terms be extended to June
5 1, '07. Mr. Darling says if we don't make it on June
6 1, '07 we'll come back to the Commission.

7 What would you come back to the Commission
8 for if you don't make it to address what would happen
9 if you don't make the June 1, '07 date?

10 A. And perhaps it's better addressed by Mr.
11 Darling because I'm just going to have to assume it's
12 to address what would happen after that date. I'm
13 still not sure what happens after that date.

14 COMMISSIONER CAMPBELL: Would you like Mr.
15 Darling to answer your question?

16 MR. GINSBERG: Yes.

17 MR. DARLING: I mean, it would be -- as
18 long as we can get this project off the ground
19 quickly and moving, we believe we can make June 1.
20 However, if that were not to be the case and we were
21 in substantial completion and we were going forward
22 we would have to come back before this Commission,
23 and we recognize that. At the present time, however,
24 we with ourself, with our purchaser, believe we can
25 make that June 1 date as long as we can get going

26

1 quickly.

2 MR. GINSBERG: The purpose, though, of my
3 question, what would you come back to the Commission
4 for? If you didn't make the June 1 date, are you
5 saying that the Commission would have -- I mean, the
6 contract provides damages and other remedies. Is
7 that what you would be asking the Commission to
8 relieve you of?

9 MR. DARLING: No. We have the contract as
10 it is, but we have the Stipulation out there on June
11 1 for facilities online or producing power by June 1,
12 2007. And if we weren't producing power then we
13 would have to come back to this Commission on the
14 matter at hand. But from my point of view we will
15 be, but it's not to seek contract relief.

16 MR. GINSBERG: The matter at hand would be
17 whether or not the price would be the same?

18 MR. DARLING: The matter at hand would be
19 what, under the Commission's stipulation, happens at
20 that point.

21 MR. GINSBERG: How does that provide you
22 any assurances from -- to be able to move forward if
23 you don't make the June 1 date you don't know what
24 the price would be?

25 MR. DARLING: We believe that we are in a
26

1 position to make that date right now.

2 COMMISSIONER CAMPBELL: Mr. Ginsberg, do
3 you have any questions for Mr. Swenson?

4 MR. GINSBERG: No.

5 COMMISSIONER CAMPBELL: Thank you.

6 Mr. Proctor?

7 MR. PROCTOR: No questions.

8 COMMISSIONER ALLEN: Mr. Swenson, during
9 the process of working with the parties, did you
10 utilize a formal project planning system where your
11 crew identified multitasking elements and milestones?

12 MR. SWENSON: I assume that the project
13 manager did that. But as I was involved in this as
14 only the owner's rep and just staying in touch with
15 these meetings and facilitating any kind of
16 information exchange between US Magnesium and Desert
17 Power, I didn't see that. So I can't answer that
18 question as to whether there was one. I assume there
19 has to be one with as complex a project as this is.

20 COMMISSIONER ALLEN: Thank you.

21 COMMISSIONER CAMPBELL: Any redirect?

22 MR. MECHAM: No thank you.

23 COMMISSIONER CAMPBELL: Thank you, Mr.
24 Swenson.

25 Are you going to call the Questar witness

26

1 forward now?

2 MR. BROCKBANK: Yes, Mr. Chairman.

3 PacifiCorp calls Mr. Ron Jibson of Questar.

4 MR. MECHAM: Mr. Chairman, I would at
5 least register for the record an objection. Questar
6 is not a party to this matter. We frankly don't know
7 precisely what the testimony is going to be. I did
8 speak to Mr. Brockbank about it yesterday to
9 determine what sorts of documents he thought he might
10 bring forward, but I would again state that the only
11 way that Mr. Jibson's testimony is relevant is if,
12 indeed, there is a firm transportation requirement
13 under the contract and there is not.

14 COMMISSIONER CAMPBELL: Let me take just a
15 minute.

16 (Commission conferring off the record.)

17 COMMISSIONER CAMPBELL: Mr. Jibson, we're
18 going to swear you in.

19 RON JIBSON,
20 called as a witness, being first duly sworn, was
21 examined and testified as follows:

22 COMMISSIONER CAMPBELL: Thank you. Please
23 be seated.

24 Mr. Brockbank.

25 /

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1 DIRECT EXAMINATION

2 BY MR. BROCKBANK:

3 Q. Thank you for appearing, Mr. Jibson. My
4 apologies for dragging you into this.

5 A. No problem.

6 Q. Could you please state your name for the
7 record, your title and business address?8 A. My name is Ron Jibson, Vice President of
9 Operations for Questar Gas. Our address is 180 East
10 100 South, Salt Lake City.11 Q. Are you familiar with Desert Power and its
12 proposed compression station near Tooele, Utah?

13 A. I am.

14 Q. And you're familiar with the relationship
15 between Desert Power and Questar Gas dating back to
16 2001?

17 A. Yes, I am.

18 Q. Thank you.

19 I'm going to -- I'm not sure what to call
20 this exhibit.21 COMMISSIONER CAMPBELL: Let's go ahead and
22 keep it as a Cross Exhibit.23 Q. (BY MR. BROCKBANK) I'm going to introduce
24 Cross Exhibit 8. Mr. Jibson, again, some of these
25 documents we will look at, some of them we will not
26

1 look at just in the interest of time. So there's
2 more here than we're going to look at. The parties
3 are certainly free to look at them.

4 A. That's fine.

5 Q. Please look at the second sheet of this
6 document. It's a letter dated September 8, 2005 to
7 Mr. Darling of Desert Power from you. Are you
8 familiar with this letter?

9 A. Yes, I am.

10 Q. Please note that you say in the -- I just
11 lost it. You say that "Time is of the essence," in
12 the first paragraph. Do you see that, three lines
13 from the bottom, "Time is of the essence"?

14 A. Yes, I do.

15 Q. "No agreement has been signed and now time
16 is of the essence." Why did you say that?

17 A. Well, basically with just the inherent
18 lead times that are necessary on projects like this.
19 We were aware of the summer of 2006 date that was
20 being requested. And in looking at that we felt like
21 with the lead time required for the engineering
22 studies, as well as procurement of equipment, that
23 time definitely was of the essence to get an
24 agreement with them.

25 Q. Was it possible to get something online by
26

1 May 9, 2006 as of September 8, 2005? Does that make
2 sense?

3 A. Well, we felt like if we started right
4 then and had it going that that would be possible.
5 Now, it depends again on the equipment procurement,
6 on the timing for permits, the timing for engineering
7 studies, agreements being signed. We were up to the
8 deadline at that point. That's why the letter.

9 Q. Thank you.

10 Does Desert Power currently have firm
11 transportation on Questar's line leading out to the
12 Desert Power facility?

13 A. No, they do not.

14 Q. Does that mean that Desert Power's gas
15 supply could be interrupted?

16 A. It could. It's an interruptible contract.

17 Q. Okay. Let's move back to the original
18 request in 2001. Could you -- and there's not a
19 particular document I'm referring to, I'm just in the
20 timeline. Desert Power first approached Questar Gas
21 about building a compressor station in 2001?

22 A. Yes. It was during the early part of the
23 year, probably February/March time frame, that we had
24 some initial discussions.

25 Q. Can you characterize those discussions as
26

1 far as Desert Power's requested timing? For example,
2 were they in a hurry, that type of thing?

3 A. To the best of my knowledge, it was an
4 issue of coming up with what would be the options.
5 Needing to get engineering studies done at that time
6 it seemed like it certainly was something that we
7 needed to get started with. Two separate bids were
8 procured during that time, during the early part of
9 2001.

10 Q. Thank you.

11 Did Desert Power act in a way to assist
12 Questar in fast tracking this process or expediting
13 it?

14 A. Yes, I believe so. I think that we got
15 the information we needed and got it to the
16 engineering companies that did the studies.

17 Q. Did Questar seek expedited treatment? Are
18 you aware of whether they sought expedited treatment
19 from the Department of Air Quality in obtaining an
20 air permit for the site?

21 A. Yes, we did.

22 Q. So would it be fair so say everybody was
23 scampering to get things done quickly?

24 A. Yes, I think so.

25 Q. Then what happened after the 2001 process
26

1 began, then what happened?

2 A. Essentially we received the initial bid
3 from Mountain West Fabrications for what the project
4 cost would be. As per the request from Desert Power,
5 we did a follow-up bid request from CEntry and
6 received those costs. That information was delivered
7 to Desert Power. And I believe it was in July of
8 2001 we received an e-mail from Desert Power
9 requesting us to discontinue the project at that
10 point.

11 Q. Thank you.

12 And then a couple of years later they came
13 back and said, "We're ready to continue." Can you
14 explain sort of how things started up again?

15 A. I don't have detail of that. But again,
16 during I believe the 2003 time frame, I believe there
17 were discussions with our marketing people as well as
18 potentially our engineering people. Nothing formally
19 took place until the 2005 time frame.

20 Q. Thank you.

21 Were they in a hurry again?

22 A. In 2005?

23 Q. Yes.

24 A. I believe so, yes.

25 Q. And did they respond timely in a way to
26

1 move things along quickly?

2 A. Yeah. I think that there was a good
3 exchange of information, at least. As far as
4 agreements, we were concerned about the timeliness of
5 agreements being signed. But as far as information,
6 there was information flow.

7 Q. Was there an estimated cost for this
8 project?

9 A. There were several. In the 2001 time
10 frame there were two different estimates given. I
11 don't know if that's the time frame or the 2005
12 estimates, but there were also two different options
13 looked at in 2005. That through the engineering
14 study at Wilbro's Engineering we had two options that
15 were being considered, and that information was
16 available in I believe it was December of 2005.

17 Q. I can't find --

18 A. I can give you those approximate amounts
19 for those different options.

20 Q. If you would, please. I was trying to
21 find one of my notes that had some of that on it, but
22 if you could tell us.

23 A. The 2005 estimates, one was for a gas
24 turbine and the other was for an electric-driven
25 engine. The gas engine estimate I believe was in the
26

1 range of \$5.7 million. That was -- had some other
2 issues associated with it as far as credits that were
3 being offered, but the amount was around 5.7. I
4 believe the Option 2, which was the electric driven
5 with the requirements by Wilbro's of upgrades would
6 have been around \$6.4 million.

7 Q. How did Desert Power react to the
8 approximately \$6 million estimate?

9 A. It was a fairly substantial increase from
10 the 2001 estimate and they were certainly concerned
11 about that cost, and we were working on ways to see
12 if there were other alternatives that would lower
13 that cost.

14 Q. This might be a silly question, but
15 \$6 million is a lot of money and that could have a
16 material impact on Desert Power's ability to move
17 forward with the firming process?

18 A. It's a little hard for me to answer that
19 based on not knowing what Desert Power's situation
20 is.

21 Q. That's understandable.

22 I just would like to look at another
23 exhibit here. And this one, there's two documents
24 that -- Mr. Chairman, if I may, just to the
25 Commission, I had a different line of questioning for
26

1 Mr. Swenson to address PacifiCorp's position of the
2 need for a firm gas supply and in the interest of
3 time was not able to pursue that. So some of these
4 questions may not make as much sense as they would
5 have. If there is additional time at the end of the
6 day, in the unlikely event, I would like to take a
7 few minutes to ask some of those questions.

8 This we will call Cross Exhibit 8.

9 COMMISSIONER CAMPBELL: We already have
10 Cross Exhibit 8.

11 MR. BROCKBANK: Or 9, I'm sorry.

12 COMMISSIONER CAMPBELL: Did you want to
13 move the admission of Cross Exhibit 8 at this time?

14 MR. BROCKBANK: Yes, please. Thank you,
15 Mr. Chairman.

16 COMMISSIONER CAMPBELL: Any objections?

17 MR. PROCTOR: No.

18 MR. MECHAM: No.

19 COMMISSIONER CAMPBELL: All right, we'll
20 admit it.

21 Q. (BY MR. BROCKBANK) Mr. Jibson, I'm going
22 to really only look at one document in this pile.
23 It's the third to last document on this pile. It's
24 an e-mail from Mr. Swenson to Bruce Rickenbock, I
25 believe, who is also a Questar employee?

26

1 A. Yes, that's correct.

2 Q. I'm going to just -- you can take a minute
3 to read through that and I'm going to read parts of
4 it for the record. "Bruce. One issue that Lee Brown
5 wants me to make sure we deal with is the hierarchy
6 of gas usage in the future on the gas line. If
7 Desert Power makes the improvements at the compressor
8 and you let Desert Power contract for 17 or 18,000
9 decatherms per day of firm supplies, what happens
10 when the load on the line gets tight? He needs to be
11 able to see in writing what will go on on those days
12 when the lines begin to get maxed out."

13 And then I would like to read the
14 handwritten notes. I believe Mr. Rickenbach is not
15 here to authenticate this, Mr. Chairman, but I am
16 told from Questar's attorney and paralegal -- I
17 should say Questar's paralegal, I think I spoke to
18 the paralegal on this -- that these are indeed Mr.
19 Rickenbach's handwritten notes.

20 "Talked with Roger regarding the issue of
21 hierarchy and gas usage on the MagCorp line. They
22 told Roger that any additional firm usage,"
23 underlined, "would only be approved in the case that
24 additional compression was supplied."

25 It looks to me, and I know you're not Mr.

26

1 Rickenbach, but you're the only one we have from
2 Questar.

3 A. That's okay.

4 Q. It looks to me like there was a concern if
5 US Magnesium increased its capacity demands that that
6 would cause more likely interruption on the part of
7 Desert Power. Is that how you read this? I'll let
8 you read this and give your interpretation.

9 A. The best, again, without knowing the full
10 discussion, the way I would interpret that would be
11 that that line is, for the most part, the firm
12 capacity is gone on that particular feeder line of
13 our system. The only way to get the additional firm
14 that would be required for additional compression
15 that would be required by Desert Power would be to
16 add a compressor.

17 In other words, we couldn't sign up
18 additional firm customers of any magnitude. There
19 may be minimal amounts, but any magnitude would not
20 be there and the magnitude that would be required
21 here. So that I think what Mr. Rickenbach is
22 indicating is that it would require additional
23 compression to be supplied in order to get that firm
24 transportation of that magnitude of 17 to 18
25 decatherms.

26

1 Q. Thank you, Mr. Jibson.

2 COMMISSIONER CAMPBELL: Mr. Brockbank, how
3 much longer do you want to go on this line?

4 MR. BROCKBANK: About one minute. I'm
5 just about done, Mr. Chairman.

6 Q. (BY MR. BROCKBANK) How long, if Desert
7 Power and Questar Gas were to execute a contract
8 today, the best case scenario, the shortest possible
9 firming compression alternative, how long would that
10 take? How many months, approximately?

11 A. Again, that's contingent on a lot of
12 issues, but I think that if we were to execute an
13 agreement immediately on the electric-driven engines,
14 which would be the shortest time frame, and I know
15 this is a range, but we would be looking at
16 approximately 10 to 16 months for that.

17 Q. So sometime June to October of 2007,
18 roughly?

19 A. That would be my best guess.

20 Q. Thank you.

21 MR. BROCKBANK: No further questions, Mr.
22 Chairman.

23 COMMISSIONER CAMPBELL: Mr. Mecham?

24 MR. MECHAM: Mr. Chairman, it seems that
25 some of this is relatively new, at least to the
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1 Commission. And with respect to things that happened
2 back in 2001, I would just as soon, if it would be
3 appropriate, have Mr. Darling try to describe for a
4 minute or two what was going on then because Mr.
5 Brockbank wants to leave the impression of things
6 being expedited and so on. And I think it would
7 behoove the Commission to hear what was going on at
8 that time.

9 COMMISSIONER CAMPBELL: Mr. Darling, go
10 ahead, if you want to provide your perspective.

11 MR. MECHAM: May I ask one quick question
12 and that's all I'm going to ask?

13 COMMISSIONER CAMPBELL: Okay. Go ahead
14 and ask your question and then I'll go to Mr.
15 Darling.

16 CROSS-EXAMINATION

17 BY MR. MECHAM:

18 Q. Has Desert Power been interrupted by
19 Questar?

20 A. Desert Power has not been interrupted
21 since they were signed up for their service in
22 January of 2004.

23 Q. So even though -- okay, I said one. Thank
24 you.

25 COMMISSIONER CAMPBELL: Mr. Darling, go
26

1 ahead if you need to respond about the 2001
2 information.

3 MR. DARLING: Just in terms of that, we
4 did work with Questar. When we looked at the total
5 -- and indeed, Mr. Jibson, we paid and rebuilt one of
6 your compressors and found the parts for it and
7 worked with Questar on that. But in a total cost
8 environment at that time, we decided that we could
9 get the reliability of service by installing between
10 200 horsepower of compression on our end of the line
11 and so, therefore, we terminated our request for
12 upstream compression from Questar.

13 COMMISSIONER CAMPBELL: It looks like you
14 have a follow-up question.

15 MR. BROCKBANK: One follow-up.

16 REDIRECT EXAMINATION

17 BY MR. BROCKBANK:

18 Q. Mr. Mecham asked you if Desert Power had
19 ever been interrupted and you said no. Are you aware
20 of how much or how often Desert Power's facility has
21 run?

22 A. I am not as far as the details of how much
23 it has run, no. I would have to get that from our
24 supply people.

25 Q. Would it surprise you if I told you not a
26

1 whole lot?

2 MR. MECHAM: Is that your testimony, Mr.
3 Brockbank?

4 MR. BROCKBANK: No. I was asking him if
5 it would surprise him.

6 COMMISSIONER CAMPBELL: He's answered your
7 question --

8 MR. BROCKBANK: Thank you.

9 COMMISSIONER CAMPBELL: -- as to how often
10 they have run.

11 Mr. Ginsberg, do you have any questions
12 for Mr. Jibson?

13 MR. GINSBERG: No.

14 MR. PROCTOR: No questions.

15 COMMISSIONER CAMPBELL: Before you get off
16 the stand, did you want to move for Cross Exhibit 9.

17 MR. BROCKBANK: Yes. Thank you Mr.
18 Chairman.

19 COMMISSIONER CAMPBELL: Are there any
20 objections?

21 MR. MECHAM: No.

22 COMMISSIONER CAMPBELL: All right, we'll
23 admit it. Thank you, Mr. Jibson.

24 Let's go ahead and start with your first
25 witness.

26

1 MR. ELMONT: Thank you, Mr. Chairman. Mr.
2 Kenneth Houston will be our first witness.

3 KENNETH HOUSTON,
4 called as a witness, being first duly sworn, was
5 examined and testified as follows:

6 COMMISSIONER CAMPBELL: Thank you. Mr.
7 Elmont?

8 MR. ELMONT: Thank you, Mr. Chairman.

9 DIRECT EXAMINATION

10 BY MR. ELMONT:

11 Q. Mr. Houston, can you give us your full
12 name and your business address and position within
13 PacifiCorp?

14 A. My name is Kenneth Houston. Business
15 address is 825 Northeast Multnomah Street, Suite 550
16 in Portland, Oregon. My title is Director of
17 Transmission Services.

18 Q. And did you direct the submission of
19 Rebuttal Testimony of Kenneth T. Houston on July 25,
20 2006 consisting of 24 pages of testimony?

21 A. Yes, I did.

22 Q. Do you have any corrections to offer to
23 that submission of testimony?

24 A. I do not.

25 Q. And if you were to be asked today under
26

1 oath the same questions that were asked in your
2 testimony, would you provide the same answers?

3 A. Yes, I would.

4 Q. Thank you.

5 Mr. Chairman, I move for the admission of
6 Mr. Houston's Prefiled Testimony as PacifiCorp
7 Exhibit 1.

8 COMMISSIONER CAMPBELL: All right. Are
9 there any objections?

10 MR. MECHAM: No.

11 MR. PROCTOR: No objections.

12 COMMISSIONER CAMPBELL: All right. We
13 will admit PacifiCorp Exhibit 1.

14 Q. (BY MR. ELMONT) Mr. Houston, do you have
15 a summary of your testimony you would like to provide
16 us?

17 A. Yes, I do.

18 I would just like to say that PacifiCorp
19 completed the interconnection studies on behalf of
20 Desert Power using our very best efforts. PacifiCorp
21 deviated from our normal mode open access
22 transmission procedures for interconnection studies
23 from the outset because as soon as PacifiCorp became
24 aware of the 11-month requirement for in-service
25 imposed by Desert Power, we knew that the normal OATT

26

1 procedures would not work.

2 PacifiCorp agreed to combine the System
3 Impact and Facility Study and to use commercially
4 reasonable efforts subject to employee availability
5 to complete the study within 120 days. PacifiCorp
6 knew when Desert Power applied in February 2005 that
7 the study process and the requirements subsequent to
8 the completion of studies for design, procurement of
9 materials and construction would not be completed
10 until sometime in 2007 using the OATT procedures.

11 Desert Power asserts that the
12 interconnection redesign created a force majeure
13 event. When, in reality, the redesign was
14 identified, Desert Power was notified in October
15 2005, the parties agreed to the final changes on
16 November 15th, 2005, and the normal Facility Study
17 proceeded at that point. This is a one-month delay.
18 The redesign was required to ensure employee safety
19 and to ensure network reliability in the area for the
20 other customers that were impacted.

21 I will note that Desert Power's own
22 actions created 16 months of delays in the project.
23 I'll summarize these in three parts. First there's a
24 six-month delay from the date a PPA was signed to the
25 Application for Interconnection. That was preceded

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1 by a three-month delay related to the initial
2 negotiations initiated by Desert Power for a PPA
3 prior to signing.

4 Secondly, there was a three and-a-half
5 month delay subsequent to the interconnection
6 application until generator and transformer technical
7 data was supplied in an acceptable fashion for
8 PacifiCorp to start studies. In filing there was a
9 four-month delay from the date the Interconnection
10 Agreement was first provided to PacifiCorp until
11 comments were initially received. Desert Power's own
12 self-imposed study schedule and their own action led
13 to the missed service dates.

14 Q. Thank you, Mr. Houston.

15 Do you have any Rebuttal Testimony you
16 would like to offer based on either the submission of
17 Ms. Coon's testimony or the comments from the
18 Committee of Consumer Services?

19 A. I do have two comments on Witness Coon's
20 testimony I would like to mention. On line 190 to
21 194 of her testimony she mentions that PacifiCorp
22 lost Desert Power's comments on an EMP agreement.
23 Subsequent to reading that testimony I discussed the
24 issue with the PacifiCorp employee involved, Larry
25 Soderquist, and we did indeed ask Desert Power to
26

1 resend those comments. However, we could find no
2 record the original comments were received. We don't
3 know if there was an e-mail filter issue or what the
4 problem was related to that.

5 And secondly, on line 202 through 205 of
6 her testimony she states that PacifiCorp should not
7 have entered into a 120-day study without being
8 relatively certain the schedule could be met. And I
9 would just add a comment to that, that when the
10 Desert Power requirements became known to us in
11 February, the 120-day combined study was proposed
12 again because we knew an extremely expedited study
13 process was essential to allow time for the design of
14 the installation, procurement of the materials and
15 construction to take place to allow the in-service
16 date to be met. The 120-day study was not a
17 contractual obligation on our part, but instead was
18 our commitment to try to use commercially reasonable
19 efforts to accomplish the study.

20 We agreed to this expedited study in an
21 effort to meet the customer's requirements. In
22 February of 2005 when we made that agreement we were
23 not aware of the safety and reliability issues that
24 the study bore out, nor were we aware of the voltage
25 issues and the additional study that would be

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1 required later on to determine the operational
2 requirements to manage the generator interactions and
3 the reactive interchange between all the generators
4 that were proposed for the site.

5 In hindsight, the 120-day schedule was not
6 realistic nor achievable in this case. However,
7 PacifiCorp -- if PacifiCorp had utilized the standard
8 OATT process, studies would likely still be underway
9 even today.

10 Q. Thank you.

11 MR. ELMONT: Mr. Chairman, with permission
12 from the Commission, in light of the fact that I
13 think Mr. Houston has taken very little time, I would
14 also like him the opportunity to respond to anything
15 he has heard from Desert Power's witnesses briefly if
16 that's appropriate.

17 COMMISSIONER CAMPBELL: We typically allow
18 that.

19 MR. ELMONT: Thank you.

20 Q. (BY MR. ELMONT) Mr. Houston, do you have
21 anything to say in response to Mr. Darling's or Mr.
22 Swenson's testimony this morning?

23 A. Yes, I do, from notes I took this morning.
24 So bear with me while I interpret my handwriting
25 here.

26

1 In Mr. Darling's comments today he
2 mentioned an existing agreement with PacifiCorp for
3 the original interconnection and seemed to imply that
4 Desert Power had the right to amend that for the
5 additional generation proposed here. I would like to
6 note that capacity increases in existing generation
7 are not allowed under the tariff, under the FERC
8 tariff. They create reliability issues that must be
9 studied, they create an infrastructure that must be
10 studied and defined, and they also require a new
11 contract. So in no case was an amendment to the
12 existing contract ever a possibility.

13 And secondly, Mr. Darling suggested or
14 mentioned a June of 2004 letter to Dave Cory in our
15 group. I would like to point out that that did not
16 constitute an interconnection application, it was
17 purely a heads-up that the project was being
18 proposed.

19 And finally, there was a discussion
20 earlier about the first interconnection that was
21 accomplished in 2001 that took four months. I would
22 like to point out that that was prior to the FERC
23 instituting Order 2003. It was also prior to all the
24 reliability issues that have come up in the Northeast
25 and the severe concerns for system reliability that

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1 we're obligated and mandated to study and define for
2 these types of interconnections.

3 Earlier today Mr. Darling and Swenson both
4 noted that much more than a one-month delay would be
5 attributed to the redesign as they were waiting on
6 PacifiCorp issues related to the designs as early as
7 January. I will note that the normal Facility Study
8 process is to hold a scoping meeting with the
9 customer to define which parts of the interconnection
10 the customer will be responsible for, which parts
11 PacifiCorp will be responsible for, to then start the
12 design work. Both sides then start design work which
13 leads to pricing and cost estimating and ultimately a
14 schedule being defined for the work that has to take
15 place.

16 And as I mentioned earlier, the redesign
17 was discovered several weeks after the first scoping
18 meeting, an agreement was reached one month later.
19 So the delays in January, February and March were a
20 part of the normal Facility Study design process that
21 had to take place regardless of the interconnection
22 configuration.

23 In Mr. Swenson's rebuttal exhibits he
24 provides notes of that scoping meeting. And I looked
25 through there very briefly and I could not find a

26

1 notice that Larry Soderquist has in his notes from
2 that same scoping meeting held in October. Larry's
3 notes clearly state that we notified Desert Power in
4 that meeting that we could not meet their in-service
5 date.

6 Again, it was clear to us then that due to
7 the work required, the design work, the procurement
8 of materials, that their schedule was not achievable.

9 Also, in Mr. Swenson's exhibits he notes a
10 timeline that appears to me, I didn't study it, but
11 it appears to me that he's assuming that all our
12 resources are devoted to the Desert project
13 specifically and uniquely. I just have one comment
14 to that.

15 By FERC requirements we must work all
16 projects on our queue in queue order. We cannot give
17 preferential treatment to any one customer to the
18 detriment of another. So we were working 20 or 30
19 projects all at the same time, Desert Power being
20 one. It was impossible for us, and in fact would
21 have been a violation of our obligation to other
22 customers, to focus all of our resources on the
23 Desert Power project uniquely. So we believe that
24 the schedule we produced was actually very
25 reasonable.

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1 And finally, both Witness Darling and
2 Swenson note that the interconnection application was
3 not made early when the PPA was being negotiated or
4 when it was signed due to the need for precise
5 transformer turbine generator data and to avoid a
6 complete start over of the studies and waste of
7 PacifiCorp's time. We certainly appreciate the
8 concern on our time.

9 However, I will note that a lot of
10 developers do choose to enter the interconnection
11 process using typical data with their initial
12 application. Again, the application process is
13 designed to give them the interconnection
14 requirements, a schedule, cost and other information
15 that they can use for themselves to determine if they
16 want to move forward with their application.

17 When other developers give us typical
18 data, if actual data later differs when the turbines
19 are purchased, restudy can be required. However, it
20 isn't all the time required. Only if the actual
21 purchase data differs significantly from the typical
22 data do restudy -- is a restudy required. And also,
23 not the -- the whole process does not have to start
24 over, only certain parts of the technical load flow,
25 stability studies and other portions of the studies.

26

1 Had Desert Power made their application
2 when the PPA was being negotiated nine months earlier
3 in this case, it's clear that the interconnection
4 configuration requirements and many other factors
5 that have held things up could have been discovered
6 much earlier.

7 In fact, when I was writing this I was
8 looking through a specific e-mail written in December
9 12, 2005 from the Desert Power's engineering firm,
10 and if you would permit me I would like to read a
11 couple of excerpts from this e-mail.

12 The first was from Joseph Bonbank with
13 Sega Incorporated to a Mr. Rod Shephard, who is I
14 believe the project manager. And in it he's saying,
15 "Rod. For your use, please find attached an updated
16 PacifiCorp Interconnection Application form, again
17 providing the generator data, with typical CTG,
18 combustion turbine generator, data inserted in the
19 blanks and the GE Prolosec STGGSU data filled in."
20 That would be the transformer, generator step-up
21 transformer data. "These new sheets are updates to
22 the original document that was submitted to
23 PacifiCorp. The previous application had a mixture
24 of combustion turbine generator name plate data and
25 copied information from the previous interconnection
26

1 agreement and GSU information from a transformer that
2 was being considered at the time."

3 And what that's telling me is even as late
4 as December, Desert Power is giving us typical data
5 and has at that point changed their generator step-up
6 transformer purchase and updated the entire data
7 sheet. So it's not clear to me at all why this
8 couldn't have been provided much, much earlier if
9 typical data was being provided even as late as
10 December.

11 That's all I have.

12 Q. Thank you.

13 Mr. Houston is available for
14 cross-examination, Mr. Chairman.

15 COMMISSIONER CAMPBELL: All right. Thank
16 you.

17 Mr. Mecham.

18 MR. MECHAM: Thank you.

19 CROSS-EXAMINATION

20 BY MR. MECHAM:

21 Q. Good afternoon -- or good morning, Mr.
22 Houston. Just a moment ago in your summary you
23 talked about knowing in October of '05 that the
24 schedule was not achievable. Did I misunderstand
25 you?

26

1 A. Yes.

2 Q. Where is the backup data for that? I'm
3 not sure we have any information that indicates that.
4 If you do, would you point it to me?

5 A. It is specifically stated in the closing
6 of Larry Soderquist's notes for the scoping meeting,
7 his handwritten notes.

8 Q. And did you inform Desert Power of that?

9 A. Well, I'm assuming that the Desert Power
10 people were in the scoping meeting. I was not in
11 that meeting.

12 Q. Nor was I.

13 Mr. Chairman, I forgot to ask. When does
14 my time expire, approximately?

15 COMMISSIONER CAMPBELL: About ten after.
16 Actually, it would be a quarter after.

17 MR. MECHAM: Thank you.

18 Q. (BY MR. MECHAM) Also a point of
19 clarification. Earlier in your testimony when you're
20 summarizing the alleged delays, you talk about six
21 months from the time that Desert Power applied for an
22 Interconnection Agreement, that is, that they waited
23 six months.

24 How do you count that? I mean, the
25 contract was signed September 24th and the
26

1 application was made February 22nd. I'm just trying
2 to make sure I understand how you're counting.

3 A. October, November, December, January,
4 February.

5 Q. I mean, it's only a matter of five months
6 versus six months, but the 24th of September to the
7 22nd of February is shaved a month by my count. And
8 in this situation -- well, go ahead. If you need to
9 respond, go ahead.

10 A. Well, the Study Agreement wasn't
11 technically signed until March 3rd, 15 days, 20 days.
12 I could agree it's a five-month delay.

13 Q. I just wanted to make sure that I
14 understand I'm counting correctly.

15 Let me ask you this. As I've looked at
16 your testimony and I've tried to work through your
17 timelines, you indicate on line 121 that the study
18 process in the most ideal setting takes 480 days and
19 perhaps the worst case it takes 570 days depending on
20 what kind of information the applicant wants?

21 A. Right.

22 Q. Now, assuming the application was made on
23 the 24th of September, the date the contract was
24 signed, the associated dates for the 480 would be, by
25 my count, again, January 17th of -- let's see, did I

26

1 get that right? '06, and 570 -- actually, it may be
2 '05. I think it's '06. '06, and at 570 it's April
3 17 of '06, again, based on that September 24th
4 request date. Am I within the ballpark?

5 A. You meant the February 24th request date?

6 Q. No. Actually, I'm trying to give the
7 benefit of the doubt to PacifiCorp on this. I'm
8 trying to see if these timelines actually would
9 accommodate under normal circumstances an
10 interconnection request made on the 24th of
11 September. And I guess I'll just cut to it. By my
12 count it really doesn't work. You yourself say in
13 your testimony on line 153 that under normal
14 circumstances the study process alone would take
15 until September of '06, correct?

16 A. Using the standard normal OATT procedures,
17 yes.

18 COMMISSIONER CAMPBELL: Mr. Houston, would
19 you speak into the microphone?

20 MR. HOUSTON: Sorry. Using the standard
21 normal OATT procedures, yes.

22 Q. (BY MR. MECHAM) And at the conclusion of
23 the study process there's a signing of the
24 Interconnection Agreement?

25 A. Correct.

26

1 Q. Which then sets in motion engineering,
2 procurement and construction?

3 A. Correct.

4 Q. So on average, how long does the
5 engineering take after the Interconnection Agreement
6 is signed?

7 A. That would be project specific and heavily
8 dependent on the upgrade requirements, one switch or
9 two, if there's a line required. It's hard to say.
10 I think I have -- we've looked at several projects
11 that we have completed in our queue and the typical
12 time, using the OATT procedures, from application to
13 completion, is about 630 some odd days.

14 Q. 633, according to your testimony, as I
15 understand it. Am I correct?

16 A. Yes.

17 Q. So again, if the interconnection request
18 were made on the date that the contract was signed,
19 September 24th of '04, that 633 days would still take
20 you beyond the online date, beyond the June 1, '06
21 date, and clearly beyond the May 9, '06 date,
22 correct?

23 A. Yes. Might I speak to that just for
24 another second?

25 Q. Go ahead.

26

1 A. Again, that's why it was clear to us in
2 February that this was a train wreck already. And
3 also --

4 Q. And that's an interesting statement. Go
5 ahead, I cut you off.

6 A. Also, I'll just mention that a lot of
7 developers come into our queue and apply for an
8 interconnection before they sign a PPA. In fact, a
9 lot of them feel like they get useful information out
10 of our studies that help them negotiate their PPA
11 price.

12 Q. Well, you indicated, as a matter of fact,
13 that at any one time you have 25 to 30 people in the
14 queue; is that right?

15 A. Yes.

16 Q. How would you characterize those people
17 generally? What are the majority of them?

18 A. Right at the present time they're wind
19 developers, a lot of people who are intending to hook
20 into PacifiCorp's integrated resource plan request
21 for proposals.

22 Q. And how many of them actually interconnect
23 with the PacifiCorp system?

24 A. It just depends. Generally one out of
25 three.

26

1 Q. So about a third. So of these 30, 10
2 achieve interconnection?

3 A. Roughly.

4 Q. Not all wind power, there are clearly
5 others mixed in?

6 A. Right.

7 Q. How many projects like Desert Power are
8 there that you're dealing with?

9 A. I would just have to guess. There are QFs
10 in our queue.

11 Q. How about in Utah?

12 A. I can pull my queue out and count if you
13 would like me to do that.

14 Q. Well, actually my question was how many
15 are like Desert Power. You said wind made up a good
16 portion of your 30. How many are gas-fired
17 combined-cycle projects?

18 A. Again, I would have to count. There are
19 several.

20 Q. In Utah?

21 A. Yes.

22 Q. How many?

23 A. I'm specifically aware of one that has
24 actually deferred his Interconnection Agreement.
25 He's still trying to get a contract, a PPA. He has a
26

1 signed Interconnection Agreement with no contract.

2 So he's deferred his interconnection.

3 Q. So he hasn't yet interconnected because he
4 doesn't have a contract?

5 A. Right.

6 Q. Has he built the facility?

7 A. No. But he's fulfilled all the study
8 requirements and signed an agreement with us.

9 Q. Have any of these facilities been in
10 existence before providing PacifiCorp power?

11 A. Not to my knowledge, no.

12 Q. So in that sense Desert Power is unique?
13 Plant on the ground, they've provided power in the
14 past, they're unique?

15 A. We have -- they're not in Utah, but we
16 have two, that I can think of, existing plants who
17 have increased their capacity and they're going
18 through the study. Actually, one is in Utah.
19 They're undergoing the interconnection studies under
20 the OATT procedures to get an approval for an
21 increase in capacity. The one in Utah is gas fired.

22 Q. And is it inside the fence sort of
23 operation, in other words, like a Tesoro, or is it
24 independent of a company that uses its own power?

25 A. It's not a qualified facility.

26

1 Q. Let me go back to your timelines. You
2 indicate in your testimony that several requests have
3 taken as long as 27 months, your average is 633 days
4 or 20 and-a-half months, but several or many have
5 taken 27 months. Is that a correct representation?

6 A. Yes.

7 Q. There again, under those circumstances,
8 isn't it true that if it took 27 months even from
9 September 24 of '04, the online date would not have
10 been before December 24 of '07?

11 A. That's correct.

12 Q. Do you know if the Merchant side of
13 PacifiCorp is aware of these averages that are in
14 your testimony?

15 A. They are if they look at our queue, which
16 is posted on our Internet.

17 Q. So they can look at your queue. They have
18 other prohibitions against contact, but they can look
19 at your queue?

20 A. As can everyone else, yes.

21 Q. So, I mean, is it possible that Merchant
22 is sending contracts to you that are train wrecks, as
23 you characterize them, dates that can't be met, right
24 out of the chute?

25 A. I'm not aware that our Merchant has
26

1 control over development -- or decision-making
2 processes. I can't say.

3 Q. Well, but your averages would indicate
4 that even in, in my opinion, the best of situations
5 for PacifiCorp, a September 24, '04 signing would
6 result in being beyond the online time in this
7 situation and well beyond it by months, possibly?

8 A. Possibly, yes. If I could add one
9 comment.

10 Q. Go ahead.

11 A. I believe that's why Schedule 38 is as
12 explicit as it is about the obligation to enter into
13 an interconnection process as early as possible.

14 Q. It says it's recommended, it doesn't say
15 it's required.

16 A. We need to rewrite it.

17 Q. Okay. But it's not a violation of the
18 tariff to do it as Desert Power did it, is it?

19 A. I can't answer that. I don't know.

20 Q. With respect to your own access tariff
21 we've had some discussion this morning about
22 reasonable efforts, that's strewn throughout this.
23 I've got the tariff before me and that's strewn
24 throughout the tariff with respect to these studies,
25 is it not? You'll make reasonable efforts to do, I

26

1 think it's a Facility Study in 90 days, reasonable
2 efforts to do the System Study in 90 days. What does
3 that mean? What does "reasonable efforts" mean?

4 A. I believe that means that you devote your
5 resources and you make an effort to accomplish the
6 studies you have to accomplish for each of these
7 interconnections.

8 Q. And what's the penalty if you don't make
9 it?

10 A. Under the tariff there's none. We're just
11 obligated to let the customer know that we need
12 additional time.

13 Q. Well, what's the penalty in a situation
14 like this that the parties are trying to impose on
15 this contract?

16 MR. ELMONT: I want to object to that
17 question. I'm not sure if Mr. Mecham is trying to
18 get a requirement of the contractor penalty or
19 tariff?

20 Q. (BY MR. MECHAM) Well, actually what I'm
21 getting at is there's contract pricing, avoided cost
22 pricing pursuant to a Stipulation entered into in May
23 of 2004.

24 MR. ELMONT: I would object. I don't
25 think Mr. Houston has addressed the PPA pricing

26

1 requirements in his testimony.

2 MR. HOUSTON: I am not familiar with that.

3 MR. MECHAM: Do you have someone -- does
4 Mr. Griswold?

5 MR. ELMONT: Yes, I believe Mr. Griswold
6 does address that in his testimony.

7 MR. MECHAM: He's not sworn so maybe I
8 will just wait for Mr. Griswold.

9 MR. ELMONT: If I could also, Mr. Mecham,
10 while you're getting to your next question, if you've
11 got it, I would appreciate it and I think it would be
12 helpful if you could sort of point to what you're
13 talking about in his testimony. I think Mr. Houston
14 probably has a copy of it there to keep for himself
15 too.

16 MR. MECHAM: I have tried to refer to the
17 lines as I have gone, Mr. Elmont.

18 Q. (BY MR. MECHAM) Now, the 120-day effort
19 to do the combined reports, tell me again how
20 PacifiCorp Transmission did on that.

21 A. How we did it?

22 Q. Yes.

23 A. We didn't.

24 Q. And it was how late? It was supposed to
25 be done towards the end of October and you're saying

26

1 it was a final report April 4th. So about six
2 months, somewhere in there.

3 COMMISSIONER CAMPBELL: Is that a
4 question?

5 Q. (BY MR. MECHAM) Yes. Well, I'm trying to
6 help him out.

7 A. Well, he's already proven that I can't
8 read the calendar so I won't agree.

9 Q. All right. Thank you.

10 Again, that was done under the standard of
11 reasonable efforts in the open access tariff?

12 A. I believe in this case it was.

13 Q. So was the report actually final on the
14 4th of April?

15 A. No. Desert Power's technical experts
16 reviewed some of the findings in the report and the
17 report was reissued in May 2006, I believe.

18 Q. May 16th?

19 A. Yes.

20 Q. And then in the documents I found that it
21 was sent to Desert Power on the 28th of June. So it
22 was revised, a final revised copy May 16 that went to
23 Desert Power June 28. Why the delay?

24 A. I can't answer that. Although I read the
25 May version on the way over here, I couldn't tell

26

1 what changed, to be perfectly honest.

2 Q. I was going to ask you, what did change?

3 A. I couldn't find any difference. I'm sure
4 there is some difference, but I didn't draft the
5 report so I can't tell you.

6 Q. Will there be additional changes?

7 A. Not to my knowledge, no.

8 Q. Will there be no change with respect to
9 the US Mag switches? My understanding is they were
10 underrated and that was incorrect. Will that change
11 the report?

12 A. It's my understanding from Mr. Darling's
13 testimony that that was the change in the report.

14 Q. The May 16 report?

15 A. Yes.

16 Q. You're not expecting anything further?

17 A. I don't, no.

18 Q. Now, in your testimony as well as in your
19 summary you indicate, and for your purposes line 311
20 in your Prefiled Testimony indicates that one of the
21 reasons that PacifiCorp sought to redesign the
22 interconnection was due to safety?

23 A. Yes.

24 Q. How long has that substation been
25 configured in a way that made it unsafe for
26

1 PacifiCorp employees?

2 A. I would like to defer that to Mr. Bennion.

3 He's much more familiar with the specific safety and

4 corrosion issues that are at the Rowley Substation.

5 Q. Do you know that US Magnesium bought that

6 substation in 2001?

7 A. I was aware of that, yes.

8 Q. In your testimony you indicate it was sold

9 and it was 2001, it didn't say when.

10 A. I haven't read the contract, but that

11 sounds correct, yes.

12 Q. How long has it been since any PacifiCorp

13 employee has gone out to grease the insulators?

14 A. I can't answer that question.

15 Q. Is that a Mr. Bennion question?

16 A. If anyone in this room knows, he will

17 know.

18 Q. I'm just trying to get at the safety

19 issue. You indicate it's a safety issue for the

20 PacifiCorp personnel. But if they haven't been going

21 out there, it seems to me, is that a problem for

22 them? If they're not going out, is there a safety

23 concern?

24 A. It's my impression the safety problem is

25 chlorine gas in the area. So in the area, vicinity

26

1 of the Rowley Substation. The reason the point of
2 interconnection was moved 300 some odd feet away from
3 it is to give a buffer zone for our own employees.
4 Again, Mr. Bennion, I believe, can explain the
5 training and the environmental protection issues that
6 we have in place are instituted to try to protect the
7 employees.

8 Q. Do you know if under the original plan,
9 the plan that caused the problem that resulted in the
10 redesign, was it designed similarly with respect to
11 the exposure on the part of the PacifiCorp employees
12 who would have to go out and take care of the
13 equipment? Is that a Mr. Bennion question?

14 A. I know that the original design left us
15 with the safety problem. That's why it was changed.

16 Q. But under either design, don't PacifiCorp
17 employees have to go out?

18 A. That's correct. Under the redesign they
19 don't have to get nearly as close as they would have
20 otherwise. I would just point out that another part
21 of the redesign was to install isolation switches so
22 that if maintenance was required at the Desert Power
23 facility, MagCorp would not have to be shut down.
24 Again, a reliability concern. So it was safety and
25 reliability.

26

1 Q. And I understand that. But why wasn't
2 that taken care of in 2001 when Desert Power went out
3 there?

4 A. I wasn't a participant in the 2001
5 studies. In fact, I'm not sure any studies were
6 conducted in 2001.

7 Q. Do you know that they weren't?

8 A. I don't.

9 Q. And is Mr. Bennion the better witness on
10 this issue?

11 A. For the safety issues, yes.

12 Q. Reliability as well or is that you?

13 A. We could both speak somewhat to
14 reliability, I think.

15 Q. Well, let me ask this. You speak on line
16 282 of your Prefiled Testimony that the redesign only
17 caused a one-month delay, and you restated it in your
18 summary.

19 Now, didn't Desert Power have to get
20 clearance from PacifiCorp for an engineer to do the
21 work?

22 A. Could you clarify what work you're
23 referring to?

24 Q. Well, you're more familiar with this than
25 I am. As I understand it, once there was a redesign

26

1 in place it became apparent that there were long lead
2 times for some of the equipment; poles, switches
3 meters, and so on. In your testimony you indicate
4 that Desert Power volunteered to take on some of that
5 work, which was your work. It was your
6 responsibility in the first instance, was it not?

7 A. Well, again, part of the scoping meeting
8 process is to define the work and then assign a
9 person or party that's going to accomplish that work,
10 both design, procurement and the installation.

11 Q. Well, metering, as an example, under the
12 contract, tell me if this is a Mr. Bennion question,
13 but metering specifically under Section 9 of the
14 contract is the responsibility of PacifiCorp, is it
15 not?

16 A. Yes. And again, metering is required for
17 any design.

18 Q. And what would have happened if Desert
19 Power hadn't volunteered to take on the work for the
20 poles?

21 A. PacifiCorp would have engineered, procured
22 and installed the poles.

23 Q. And what was the lead time, do you recall?

24 A. I'm not privileged to that. I don't know.

25 Q. Okay. Well, having taken on the work,
26

1 that's what I was talking about initially, then they
2 had to get PacifiCorp's approval for an engineer to
3 do the engineering, did they not?

4 A. Yes. The pole would have been owned and
5 been the responsibility for PacifiCorp to maintain.
6 And when we allow a customer to take on design and
7 installation obligations we require them to allow us
8 to review and approve the design and the ultimate
9 installation.

10 Q. And didn't they have to get approval for
11 the use of a particular engineer? Didn't they need
12 to get an engineer list?

13 A. Yes. We typically provide our vendors,
14 our approved vendors. They're familiar with our
15 standards and our requirements to shorten the
16 process.

17 Q. And I will tell you the source of my
18 timing here is the Division's timeline that is
19 provided as an attachment to Ms. Coon's testimony.
20 But based on that it appears that on November 8th
21 Desert Power requested to do the work?

22 MR. ELMONT: Excuse me, Mr. Mecham. Do
23 you have a copy for Mr. Houston?

24 MR. MECHAM: No, I don't.

25 MR. ELMONT: I can find one for Mr.

26

1 Houston if I need to. I would like Mr. Houston to
2 see that.

3 COMMISSIONER CAMPBELL: Mr. Houston, do
4 you have a copy of Ms. Coon's testimony or her
5 timeline?

6 MR. HOUSTON: I have it.

7 MR. ELMONT: You do?

8 MR. HOUSTON: Could you repeat the date?

9 Q. (BY MR. MECHAM) November 8 of '05. I
10 believe that was the date that the request was made
11 to do the work. And then the other references I can
12 find to it, December 12 of '05, the chart indicates
13 that Desert Power can't use Sega. And then on
14 December 19 of '05 the list of approved contractors
15 was given. Is that true? Is that the way it worked?

16 A. I have to -- yeah, according to this
17 timeline that's true.

18 Q. Okay. So the redesign, you state, takes
19 one month, but there was this process. First Desert
20 Power had to get an approved engineer to do the job,
21 correct?

22 A. Yes.

23 Q. And then the engineering had to be done;
24 is that not correct?

25 A. That's correct. I would just point out
26

1 that the original design required a pole and switches
2 too that would have required engineering procurement
3 and installation. So a pole is a pole. Maybe this
4 is a different pole.

5 Q. And I believe Mr. Bennion, and again I'll
6 get to this, indicates that there were three poles
7 that would have done the job. But this went from
8 eight poles to four poles, as I understand the
9 redesign, which left us one pole short, did it not?

10 A. I could agree to that, yes.

11 Q. So there still had to be engineering, the
12 design work was done, and you still had to procure;
13 is that not correct? Am I misrepresenting anything
14 by stating that?

15 A. That sounds correct.

16 Q. So even though -- I mean, the redesign
17 forced a four-pole situation, leaving one short,
18 which then took that one month of delay that you
19 indicate and pushed it out to include the approval of
20 the engineer, the engineering, the engineer design
21 work, that is, and the procurement that had a long
22 lead time? That's kind of the process, as I
23 understand it?

24 A. I could agree to that.

25 Q. Thank you.

26

1 And you don't take any of that into
2 account in the one-month delay that the redesign
3 caused?

4 A. My one-month delay is talking about the
5 stoppage and the Facility Study itself.

6 Q. But did it not cascade into additional
7 requirements as a result of the redesign?

8 A. Based upon your characterization, I could
9 agree to that.

10 Q. Thank you.

11 Let me just -- 12:15, Mr. Chairman?

12 Q. (BY MR. MECHAM) Both in your testimony as
13 well as in the Technical Conference last week, and
14 unfortunately my transcript is the draft copy, you
15 indicate -- well, let's see if we can do this anyway.
16 You indicate that in the application process Desert
17 Power could have simply supplied the typical case and
18 gotten the information they needed. Is that a
19 correct characterization?

20 A. They could have provided typical generator
21 and transformer impedance data that would have gotten
22 us started, yes.

23 Q. It would have gotten you started. Isn't
24 there some risk with that, that there could be
25 changes that would require almost a restart?

26

1 A. There is some risk that some of the
2 studies would have to be redone if the ultimate
3 transformer or turbine purchased varied significantly
4 from the typical data supplied. Again, most
5 developers are aware enough of what they're going to
6 buy and put in place that they can give us reasonably
7 close typical data.

8 Q. Well, I think Mr. Darling addressed that
9 in his testimony. We'll let the record stand on
10 that.

11 On line 388 of your Prefiled Testimony you
12 indicate that PacifiCorp cannot conduct a meaningful
13 Interconnection Study without actual generator
14 technical data. I think I said line 388. So what
15 does that mean in this context timewise and
16 repetitionwise?

17 A. Well, what that means is the results of
18 the study, fault, duty, dynamic performance, many of
19 the technical studies that we conduct, are very
20 dependent on the generator and transformer impedance
21 data that the developer supplies. And the equipment
22 that they install drives the results, it drives the
23 type of equipment we must put in place, the type of
24 relays, et cetera. We require them to give us that
25 data. Because if we make an assumption on what it is

26

1 and it's wrong, then it's our fault.

2 Q. How much does it cost to apply for an
3 Interconnection Agreement? What's the cost involved?

4 A. Under the FERC tariff there's an
5 obligation to supply for large generator
6 interconnections greater than 20 megawatts, there's a
7 \$10,000 application fee as long as the developer --
8 or the applicant can supply site control documents.
9 That's the only cost.

10 Q. So if the study has to be redone there
11 isn't an additional cost?

12 A. Just any employee labor associated with
13 redoing a specific study.

14 Q. It's only a matter of time, however, isn't
15 it?

16 A. Yes.

17 Q. It may be as others have said, a waste of
18 time.

19 MR. ELMONT: If I interject really
20 quickly, I apologize, but before we get too far down
21 on the question I want to make a clarification. I
22 believe Mr. Mecham in his question stated that actual
23 generator technical data is required from line 388 in
24 the testimony, and I just wanted to clarify. The
25 word "actual" is not in that line of the testimony.

26

1 MR. MECHAM: I'm sorry. I wasn't looking
2 at testimony. I must have been hoping.

3 MR. ELMONT: Thank you. I apologize for
4 the interruption.

5 Q. (BY MR. MECHAM) Now, again on the
6 Division's timeline, and perhaps this is in one of
7 the cross-examination exhibits, but I'm going to ask
8 anyway. On the timeline of April 4, 2005 it states
9 that Desert Power sent initial information that
10 PacifiCorp Transmission deemed insufficient. What
11 was missing?

12 A. I'm not sure I can answer that question if
13 we start talking about subsynchronous reactions or
14 anything, I'm not sure that's my expertise. I don't
15 know.

16 Q. Was there anything unique about this
17 interconnection?

18 A. I think if you would read the study
19 results, the first eight or ten pages, it's pretty
20 clear that there's a lot that's very unique. This is
21 five generators located on the end of a radial line
22 with a large load. There's a very, very clear
23 interrelationship between the generators and how
24 they're going to behave operationally. So yes, very
25 unique.

26

1 Q. And did any of that have anything to do
2 with the information that was rejected by PacifiCorp
3 Transmission?

4 A. I don't know that we rejected any
5 information.

6 Q. Well, I'm sorry.

7 A. We've asked for additional information.

8 Q. All right. But under the circumstances,
9 you've described it both last Thursday as well as
10 now, kind of as a unique situation where US Magnesium
11 and Desert Power are there together. And did that
12 require information that was atypical or more
13 complex, more burdensome?

14 A. Not to my knowledge, no.

15 Q. You also indicate on line 45 of your
16 testimony -- I'm switching here. At line 45 you talk
17 about the Generation and Interconnection Agreement
18 and you said that there had been a delay because --
19 well, I've forgotten the exact number of days. But
20 in any event, that you had supplied an executable
21 LGIA, or Large Generation Interconnection Agreement.
22 Which one are you referring to? Are you referring to
23 April 11th or some other time? April 11, I'll tell
24 you, comes from line 431 of your testimony.

25 You can't stall off the clock.

26

1 A. I know. Well, I've got so many timelines
2 and dates I can't find what I'm looking for. But I
3 believe that we provided a, again subject to check,
4 I'm going to go from my memory here, we provided a
5 draft Interconnection Agreement to Desert Power in
6 December 2005 at their request, and in April we
7 provided another copy with some completed exhibits.
8 Again, at that point we had a more clear scope of
9 work which was included in as a part of the
10 attachments to --

11 Q. Were any of them executable? You say here
12 it is executable. That one I didn't get wrong, Mr.
13 Elmont. Line 45, you provided an executable
14 Interconnection Agreement to Desert Power. And you
15 say there's a four-month delay. And try as I might,
16 all I could find were drafts. That may be as far as
17 we can go on that one. Let me ask one more question.

18 COMMISSIONER CAMPBELL: Do you want him to
19 answer?

20 MR. MECHAM: Well, yeah, if he's got an
21 answer.

22 MR. HOUSTON: In my opinion, the April
23 document would have been the first executable
24 document.

25 Q. (BY MR. MECHAM) And it wouldn't have
26

1 changed?

2 A. Typically these agreements take months to
3 negotiate. Both parties have lawyers. Lawyers never
4 agree on a document that's 300 pages long.

5 Q. One page.

6 A. And it takes a long time to negotiate an
7 agreement.

8 Q. So it really wasn't executable, was it?

9 A. If executable means both parties fully
10 agree to the terms, we don't have one today.

11 Q. And then lastly, on line 434 of your
12 Prefiled Testimony you referred to a July 12
13 conference call on a draft LGIA. One of the
14 complaints you make is that there was delay in
15 providing comments to PacifiCorp on the LGIA on
16 Desert Power's part. Desert Power provided comments
17 on June 28th, there was a conference call on July
18 12th.

19 Did PacifiCorp ever get back to Desert
20 Power following the conference call? Your -- well,
21 answer if you can.

22 A. I don't know what the status of the
23 current negotiation is. I don't know if you're
24 waiting on us or we're waiting on you, to be honest,
25 at all.

26

1 Q. Your testimony indicates -- all it says in
2 sequence is that we filed this emergency petition
3 which was filed August 9th. So nearly a month went
4 by without any return at all, did it not?

5 A. I don't know.

6 Q. Okay. So to the degree that there are
7 delays, and there were plenty that we could turn
8 around and say, "Wait a minute, isn't this at your
9 feet, PacifiCorp Transmission"?

10 A. All I can say is we're dealing with
11 multiple customers and it takes time. You know,
12 there's only a few people working these things and if
13 their priority is a higher guy on the queue, that
14 gets first treatment. And if it takes a month, it
15 takes a month to get to the next guy.

16 COMMISSIONER CAMPBELL: Thank you, Mr.
17 Mecham.

18 Mr. Ginsberg, any questions?

19 CROSS-EXAMINATION

20 BY MR. GINSBERG:

21 Q. Could you turn again to the timeline that
22 Mr. Mecham was referring to? What I wanted to ask
23 you about was this August 4, '05. It says,
24 "Generation Interconnection System Impact Draft
25 Report contribution from PT Planning." Do you see
26

1 that?

2 A. Yes.

3 Q. Now, was PT Planning your organization?

4 A. Yes, PacifiCorp Transmission Planning.

5 Q. And when you say "draft report," who did
6 it go to then?

7 A. The Planning Group, the System Protection,
8 the Relay Group, the Communications Group, the
9 Metering Group, Transmission Design Engineering.
10 They're all other departments who contribute to the
11 studies themselves. They do the work and then give
12 us their results, "us" being my department. We pull
13 their work together and create the report itself.

14 Q. This issue with respect to operational
15 issues that you raised, safety, who in your
16 organization would have provided that input?

17 A. The safety issue was raised by someone in
18 our Operations Group. You know, the man that
19 supervised the technicians that go out and do the
20 fieldwork on the equipment.

21 Q. So they then received this report after
22 August? In other words, would they have had that
23 input into the development of your report?

24 A. I believe the safety issue came out when
25 the System Impact Study Draft Report was completed

26

1 and shared with other departments. That's when that
2 particular operations manager got the document and
3 raised the issue. Up until that time he was not
4 aware of the project.

5 Q. Maybe I'm not clear. As I understand it,
6 Pacific Trans sort of operates as sort of a separate
7 entity; is that right?

8 A. That's a tough question. My group does,
9 yes. Primarily because we're dealing with tariff
10 compliance and other customers applying for service
11 to the PacifiCorp Transmission system. The other
12 Transmission employs people who do the maintenance,
13 who do the design engineering, who do the planning
14 studies are not in our group. So they're more
15 integrated with the utility. They're shared, so to
16 speak. If we need them for something, we borrow
17 them. Otherwise, they're doing the business of the
18 retail customer.

19 Q. So the study was done by this other group
20 that we're referring to?

21 A. A component of the study, yes.

22 Q. Thank you.

23 COMMISSIONER CAMPBELL: Any questions, Mr.
24 Proctor?

25 MR. PROCTOR: Yes. Thank you, Mr.

26

1 Chairman.

2 CROSS-EXAMINATION

3 BY MR. PROCTOR:

4 Q. Mr. Houston, you had mentioned in your
5 testimony and your summary a number of specific
6 events where there was a delay, for example, six
7 months between the PPA to request an interconnection
8 study, a three-month delay in negotiating the PPA.

9 Do you consider those to be examples of
10 Desert Power's failure to perform its contractual
11 obligations?

12 A. Again, I would hate to talk about
13 contractual obligations. My point was they were
14 fully in control of when they made the application
15 for interconnection which drove the in-service date
16 requirements. That date was their date as well.

17 Q. So the delay would be the responsibility
18 of Desert Power?

19 A. What I was trying to represent was had
20 they made an earlier request, we would have had a
21 much better chance of delivering a result on their
22 timeline.

23 Q. So their delay then caused delay later in
24 the completion of your work; is that correct?

25 A. Right. The sooner you start a two-year
26

1 project, the sooner you finish a two-year project.

2 Q. So the answer would be yes?

3 A. Yes.

4 Q. Now, in some correspondence between
5 counsel there was a reference to a -- I believe it's
6 a March 9, 2006 draft Facilities Impact Study that
7 stated that PacifiCorp, who would be responsible for
8 the metering equipment, would not have those meters
9 available before September 2006.

10 Do you recall that portion of the Impact
11 Study?

12 A. I believe you're referring to a draft
13 study. I do recall that there were several long lead
14 time pieces of equipment, and the Desert Power people
15 were not -- felt like they could expedite those
16 deliveries faster than we could do them. There was a
17 lot of give and take about changing the scope
18 responsibilities for various equipment, the pole,
19 interconnection pole and switches. I believe the
20 metering was one of those items.

21 Q. At that point when the draft Impact Study
22 was presented, was responsibility for acquiring
23 metering equipment PacifiCorp's?

24 A. I believe when we first accomplished the
25 scoping meeting in October the responsibility was

26

1 PacifiCorp's.

2 Q. Would that be also true in March of 2006
3 when you presented this draft study?

4 A. At that point in time I can't say. It
5 sounds like that was the time that the discussion was
6 taking place where that responsibility would shift.

7 Q. Up to that point, however, that was
8 something that PacifiCorp was in control of, was it
9 not?

10 A. I believe that's correct.

11 MR. PROCTOR: Thank you, Mr. Houston.

12 COMMISSIONER CAMPBELL: Thank you. Any
13 redirect?

14 MR. ELMONT: A little bit, Mr. Chairman.

15 REDIRECT EXAMINATION

16 BY MR. ELMONT:

17 Q. Mr. Houston, initially Mr. Mecham asked
18 you about the location of notes from Mr. Soderquist
19 with regard to the scoping meeting from October of
20 2005. You referred to those notes from the meeting.

21 Have you spoken with Mr. Soderquist with
22 regard to his recollection of any representations he
23 made to Desert Power during that meeting?

24 A. Yes. And he believes that at the end of
25 the meeting, at the close of the meeting, he

26

1 specifically pointed out that due to the work
2 requirements in front of us, we could not meet the
3 January -- at that time the January in-service date
4 was the date PacifiCorp had targeted, January 8,
5 2006.

6 MR. MECHAM: Mr. Chairman, I have a hard
7 time cross-examining Mr. Soderquist.

8 MR. ELMONT: I don't believe there's a
9 Commission prohibition on hearsay, Mr. Chairman.

10 MR. MECHAM: I didn't say there was a
11 prohibition, I said it was a little hard.

12 COMMISSIONER CAMPBELL: All I know is I
13 want to be done by 12:30.

14 MR. ELMONT: I'll be brief here.

15 Q. (BY MR. ELMONT) You discussed with Mr.
16 Mecham the issue of how many QFs are like Desert
17 Power, I believe is the way counsel characterized it.
18 Are you allowed to distinguish in the types of QFs in
19 handling the queue?

20 A. No.

21 Q. So how does the queue work, I guess, just
22 a little bit in terms of how the ordering?

23 A. First in, first served. And you handle,
24 if you've got a System Impact Study for queue number
25 one, you're supposed to finish it before you finish
26

1 the System Impact Study for queue number 2 or number
2 3, et cetera

3 Q. Thank you.

4 With regard to the effect of the redesign
5 and the engineering that had to be done by Desert
6 Power and then approved by PacifiCorp, would Desert
7 Power have had responsibility for some scope that
8 would have required engineering and approval by
9 PacifiCorp even aside from the redesign?

10 A. The approval by PacifiCorp was unique to
11 the components of the interconnection that we would
12 ultimately own and would --

13 Q. And is that something that came about only
14 by virtue of the redesign?

15 A. I don't know what the original scope was,
16 if Desert Power was going to take responsibility for
17 procuring or installing any of the equipment we would
18 own at that time or not. I just don't know.

19 Q. Okay. Aside from the approval aspect,
20 though, the engineering would have been required and
21 Desert Power would have had some portion of it prior
22 to the redesign?

23 A. Yes.

24 Q. Mr. Mecham talked with you about Desert
25 Power volunteering to take on additional work within
26

1 its scope to try to expedite things.

2 Did PacifiCorp do anything reciprocal?

3 Did it take on work that was originally within Desert
4 Power's scope, to your knowledge?

5 A. Not to my knowledge, no.

6 Q. That may be something that's for Mr.
7 Bennion as well.

8 A. I'm sorry, you're correct. Because we did
9 try at the last minute to find surplus materials that
10 was within their scope.

11 Q. Great. Can you sort of clarify for us
12 what the advantage would be of providing typical data
13 early in the process? It got a little muddled for me
14 as you were discussing that with Mr. Mecham. So just
15 in your own words, what would the advantage be of
16 having that particular data?

17 A. If we have projects that have gone through
18 our queue completely and have signed an
19 Interconnection Agreement using typical data, they
20 don't have a PPA signed yet, therefore, they haven't
21 purchased their turbines or a lot of their major
22 equipment. And the caveat is that if you do
23 something different you have to go back and restudy
24 and potentially resign an updated agreement. But
25 what it does give a developer is basically they're
26

1 ready to go. If they can get a signed agreement, all
2 they have to do is build it. They don't have to
3 wait. They get the cost data, they know what their
4 responsibility is to construct certain equipment,
5 what the schedule is to get the build completed.
6 They have all that information in their pocket.

7 Q. Whereas, in this case that would have
8 taken place with the scoping meeting in October of
9 2005; is that right?

10 A. Well, actually, you know, using typical
11 data you can get all the way through the process.

12 Q. So in other words, that scoping sort of
13 layout responsibility wouldn't have had to wait --

14 A. Correct.

15 Q. -- as long in the process, it could have
16 been done earlier?

17 A. Correct.

18 Q. You talked about with Mr. Mecham the issue
19 of this interconnection being unique and the five
20 generators located on end of the radial line. Isn't
21 that the very kind of stuff you would discover in the
22 study process?

23 A. Yes.

24 Q. So at the outset when you're doing your
25 best to make commercially reasonable efforts to
26

1 complete a study within 120 days, if you find that
2 kind of unique information, would you say that that
3 would be expected to delay that process?

4 A. Absolutely.

5 Q. Thank you.

6 MR. ELMONT: I don't think I have anything
7 further, Mr. Chairman.

8 COMMISSIONER CAMPBELL: Thank you, Mr.
9 Houston. We'll adjourn until 1:30.

10 (Noon recess taken.)

11 --ooOoo--

12 1:37 p.m. September 8, 2006

13 COMMISSIONER CAMPBELL: Let's go back on
14 the record.

15 While we were at lunch we discussed
16 closing argument, and I think what we decided is
17 we're going to allow each party ten minutes to make
18 that. I think we originally, I think, allotted like
19 20 minutes, but we have about 15 minutes of legal
20 questions we want to ask the attorneys. So just so
21 that you have time to plan in your mind what your key
22 points are.

23 All right. We are back now to the next
24 PacifiCorp witness.

25 MR. BROCKBANK: Mr. Chairman, PacifiCorp

26

1 would like to call Mr. Bruce Griswold as its next
2 witness.

3 BRUCE GRISWOLD,
4 called as a witness, being first duly sworn, was
5 examined and testified as follows:

6 COMMISSIONER CAMPBELL: Mr. Brockbank.

7 DIRECT EXAMINATION

8 BY MR. BROCKBANK:

9 Q. Mr. Griswold, could you please state your
10 full name and address for the record?

11 A. Bruce W. Griswold. I work for PacifiCorp
12 at 825 Northeast Multnomah, Portland, Oregon, 94232.

13 Q. And what is your title?

14 A. Manager in Origination.

15 Q. Are you the same Bruce Griswold that filed
16 testimony and three exhibits in this case?

17 A. Yes, I am.

18 Q. Do you have any corrections to make in
19 your testimony?

20 A. Yes, I do. My first correction -- I have
21 two corrections. My first correction is on page 9 of
22 my testimony in lines 169 and 171. I'll wait until
23 people get there. On those lines I have a date there
24 of June 1, 2006 as the commercial online date. And
25 the official date is May 9, 2006. So that the
26

1 corrected date to be put into that line 169 to 171 is
2 May 9, 2006.

3 The second correction I have is to make a
4 correction to Exhibit BWG-3 and replace the two
5 tables that are included in there. Both tables are
6 labeled Table 1, unfortunately, but it's the DPU data
7 request 2.3A and 2.3B.

8 Q. Okay. Mr. Griswold, thank you.

9 Could you please explain the reason for
10 changing out these exhibits?

11 A. Well, the first -- oh, the exhibits, sure.
12 Folks who do the modeling for -- according to the
13 avoided cost methodology as approved for QFs greater
14 than 3 and less than 99 discovered a couple of
15 modeling errors in their model as they were going
16 back through it. If you recall, the data requests
17 had a five-day turnaround and it didn't allow them
18 sufficient time to, you know, really do a thorough
19 review of it. So these are just corrected with those
20 corrections made.

21 Q. Thank you.

22 If you were asked all of the questions in
23 your testimony today, would you give the same answers
24 as you did in your written testimony?

25 A. Yes.

26

1 MR. BROCKBANK: Mr. Chairman, PacifiCorp
2 moves for the admission of PacifiCorp 2, Mr.
3 Griswold's testimony.

4 COMMISSIONER CAMPBELL: Are there any
5 objections?

6 MR. PROCTOR: No objections.

7 COMMISSIONER CAMPBELL: All right, we'll
8 admit it.

9 MR. BROCKBANK: Together with all of the
10 exhibits?

11 COMMISSIONER CAMPBELL: Right, 2.1 through
12 2.3.

13 MR. ELMONT: Mr. Chairman, do we want to
14 number separately the corrected exhibit or just keep
15 it as part of 2? It's replacing the one that's
16 already in 2.

17 COMMISSIONER CAMPBELL: I've just replaced
18 it.

19 MR. ELMONT: Okay. Thank you.

20 Q. (BY MR. BROCKBANK) Mr. Griswold, do you
21 have a summary of your testimony, a brief summary?

22 A. Yes, I do.

23 Q. Could you please provide that?

24 A. Desert Power and PacifiCorp have a
25 Purchase Power Agreement dated September 24, 2004

26

1 with an effective date of November 9, 2004, and are
2 in disputes over delays in their 95-megawatt QF
3 project.

4 Desert Power argues that an event of force
5 majeure has occurred with respect to PacifiCorp's
6 efforts to interconnect the facility to PacifiCorp's
7 system. PacifiCorp disputes Desert Power's claim of
8 force majeure. Desert Power believes that the event
9 of force majeure suspends and otherwise relieves them
10 of any further obligations under the term of the
11 agreement.

12 PacifiCorp believes that, even assuming
13 for the sake of argument there is an event of force
14 majeure, that the event does not alleviate Desert
15 Power from its obligations under the agreement,
16 including its obligations to post default security
17 and provide additional adequate assurances under the
18 agreement.

19 In an effort to resolve the dispute,
20 PacifiCorp and Desert Power attempted to negotiate a
21 term sheet as a precursor to an amendment modifying
22 the terms of the agreement. The most significant
23 term of the proposed term sheet was a new scheduled
24 commercial operation date of June 1, 2007 for the
25 facility as opposed to the May 9, 2006 date in the
26

1 original agreement.

2 During the negotiation of the term sheet,
3 PacifiCorp learned of three events; a work stoppage
4 at the facility, additional liens imposed on the
5 facility, and Desert Power's inability to secure firm
6 gas transportation service from Questar to serve the
7 facility. These events, plus questions surrounding
8 Desert Power's financial situation, constitute a
9 material adverse change as contemplated by the terms
10 of the agreement.

11 Today, PacifiCorp specifically is
12 requesting that the Commission make a straightforward
13 determination that no force majeure had occurred and
14 according to the terms -- and accordingly, the terms
15 of the agreement stand, including the requirement
16 that Desert Power post default security and provide
17 PacifiCorp the additional requested adequate
18 assurances.

19 Alternatively, if the Commission does find
20 that a force majeure event has occurred, PacifiCorp
21 requests the Commission make a ruling on the scope
22 and duration of the event of force majeure pursuant
23 to Section 13.2 of the agreement.

24 Further, PacifiCorp requests the
25 Commission make a determination as to whether the

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1 scope and the duration of that force majeure excuse
2 Desert Power's performance with regard to default
3 security and a requirement to provide PacifiCorp
4 adequate, additional adequate assurances. And if
5 not, that Desert Power be required to meet such terms
6 immediately.

7 Finally, PacifiCorp requests that the
8 Commission find that if the parties execute an
9 agreement, an amendment to the agreement, any such
10 amendment must have a provision calling for refreshed
11 avoided cost pricing per the current avoided cost
12 methodology for a QF greater than 3 megawatts or less
13 than 99 megawatts that would be effective if the
14 facility has not achieved commercial operations on or
15 before June 1, 2007 to ensure that the Stipulation is
16 enforced and ratepayer neutrality is met.

17 Q. Thank you, Mr. Griswold.

18 Mr. Chairman, Mr. Griswold would like to
19 provide a response to some of what's been said
20 earlier this morning. Could he take a few minutes to
21 do that?

22 COMMISSIONER CAMPBELL: Yes.

23 Q. (BY MR. BROCKBANK) Mr. Griswold, please
24 provide whatever response you need to to what has
25 been said this morning.

26

1 A. I want to specifically respond to a number
2 of comments from Mr. Swenson, and specifically I want
3 to address the gas delivery issue. The gas delivery
4 is really not at the heart of the force majeure that
5 we're sitting here to make a decision on. And it's
6 just one of three major events that I referenced
7 earlier that led us to seek additional assurances as
8 we're allowed to under the agreement.

9 The fact is that Desert Power is working
10 on trying to develop and put in a system to provide
11 for getting their gas supply firm in order to meet
12 our scheduled deliveries. And I believe that's a
13 recognition on their part that, in fact, firm gas
14 delivery is required.

15 That's my comment.

16 Q. That's it. Thank you, Mr. Griswold.

17 MR. BROCKBANK: Mr. Chairman, PacifiCorp
18 offers up Mr. Griswold for cross-examination.

19 COMMISSIONER CAMPBELL: All right.

20 Mr. Mecham?

21 MR. MECHAM: Thank you, Mr. Chairman.

22 CROSS-EXAMINATION

23 BY MR. MECHAM:

24 Q. Why don't we start right where you left
25 off, Mr. Griswold. It is true that the firm
26

1 transportation requirement is one of three issues
2 that you say is the reason that this all fell apart.
3 You maintain in your testimony, do you not, that
4 there is a firm transportation agreement in the
5 contract?

6 A. I do not, no. My testimony says that in
7 order to meet scheduled deliveries that there should
8 be a firm gas supply. If we dispatch the plant, then
9 gas, firm gas is required to be there. And per the
10 Stipulation, if you actually do look at the
11 Stipulation, it requires payment by PacifiCorp for
12 firm gas under Questar's firm gas tariff.

13 Q. In your testimony, my recollection of your
14 testimony is, is that the firm gas issue is your
15 issue, and in fact -- well, here on line 241 it says,
16 "Mr. Swenson's testimony contends that the agreement
17 does not require firm gas transportation service. Do
18 you agree? No."

19 A. That's correct. You asked me if it was
20 written into the agreement that there was -- well, I
21 would have to maybe repeat the question back.

22 Q. So is your answer, Mr. Griswold, that the
23 contract does not require firm gas -- or firm
24 transportation of the gas?

25 MR. BROCKBANK: I think Mr. Griswold asked

26

1 for the question to be repeated.

2 MR. MECHAM: I think that was it.

3 MR. BROCKBANK: Oh, you said your answer
4 was.

5 MR. MECHAM: If I did I misspoke.

6 COMMISSIONER CAMPBELL: It sounded to me
7 like Mr. Mecham just repeated his question.

8 MR. BROCKBANK: Okay.

9 MR. MECHAM: Thank you, Mr. Chairman.

10 MR. GRISWOLD: Okay. Under the agreement
11 our position is that it does require firm gas
12 transportation to meet the obligations, the power
13 delivery obligations that we've scheduled.

14 MR. MECHAM: Mr. Chairman, may I
15 distribute a Cross Exhibit?

16 COMMISSIONER CAMPBELL: Yes. We'll mark
17 this Cross Exhibit 10.

18 Q. (BY MR. MECHAM) Mr. Griswold, as you can
19 see, this is PacifiCorp's response to Desert Power
20 Data Request 1.7. The question, of course, is:
21 "Does the agreement state that firm transportation is
22 required?"

23 The answer, after getting beyond all the
24 objections is "No." "The answer is no," it says.
25 And then it goes on to explain, "The PPA between
26

1 PacifiCorp and Desert Power is for the delivery of
2 unit-contingent capacity and energy, not natural gas.
3 PacifiCorp has the right to schedule and dispatch
4 Desert Power's generation 24 hours per day, 365 days
5 per year except for scheduled maintenance and Desert
6 Power has the obligation to deliver the scheduled
7 power on a firm basis."

8 Okay. The answer, the quick answer is no,
9 there's no firm transportation requirement.

10 COMMISSIONER CAMPBELL: Is that a
11 question?

12 Q. (BY MR. MECHAM) Well, do you agree?

13 A. According to the specific provisions in
14 the PPA, I agree.

15 Q. Thank you.

16 May I distribute another one, Mr.
17 Chairman?

18 COMMISSIONER CAMPBELL: Do you want to
19 offer these?

20 MR. MECHAM: These are a series of things.
21 Well, I'll offer Cross Exhibit 10.

22 COMMISSIONER CAMPBELL: Any objection?

23 MR. PROCTOR: No objection.

24 MR. BROCKBANK: No.

25 COMMISSIONER CAMPBELL: All right. We'll
26

1 admit it.

2 We'll mark this, it's titled "Desert Power
3 Data Request 1.8," and we'll mark it Cross Exhibit
4 11.

5 Q. (BY MR. MECHAM) As Mr. Chairman has
6 pointed out, this is Desert Power's Data Request 1.8
7 asking for PacifiCorp's understanding of how the
8 contract actually works and what is required under
9 the standard of commercially reasonable.

10 Again, getting past the objections,
11 "PacifiCorp and Desert Power negotiated the term
12 commercially reasonable efforts because the PPA
13 contains liquidated damages payable by Desert Power,"
14 without reading the rest of it.

15 Essentially it says how it works, does it
16 not, if PacifiCorp fails to -- excuse me, if Desert
17 Power fails to perform?

18 A. Yes. It's a general liquidated damages
19 clause for nonperformance.

20 Q. Okay. Let me go to line 104 of your
21 testimony, Mr. Griswold. There's a discussion, it
22 goes to the points you were just talking about with
23 respect to your summary and the reasons that we're
24 here today. There was a term sheet that circulated
25 June 21st of this year and you say it wasn't

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1 finalized.

2 What was left to finalize on it? Do you
3 remember what happened?

4 A. As I recall, the term sheets were
5 exchanged between the parties. We, and I believe the
6 last place it was was I believe we had sent it to
7 Charles, to Mr. Darling, excuse me, waiting to get
8 some response on him from that. And I can't recall
9 if he did respond or not, but I guess that's the last
10 I remember of it.

11 Q. Okay.

12 MR. MECHAM: Mr. Chairman, may I
13 distribute two items? They actually can be treated
14 as one, but one is an e-mail and one is the
15 attachment.

16 COMMISSIONER CAMPBELL: All right.

17 MR. MECHAM: One is confidential. And I
18 assume, is the term sheet considered confidential?
19 It says "Confidential" on it so I put it on yellow.

20 MR. BROCKBANK: Yes.

21 MR. GINSBERG: Well, in terms of it, it's
22 certainly been discussed in people's testimony so I'm
23 not sure it hasn't already been disclosed.

24 COMMISSIONER CAMPBELL: Well, why don't
25 you give him a chance to look at it and then we can

26

1 hear the discussion.

2 MR. GINSBERG: Okay.

3 COMMISSIONER CAMPBELL: Mr. Mecham, while
4 you're distributing that, do you intend to offer
5 Cross Exhibit 11?

6 MR. MECHAM: I did. I would offer it.

7 COMMISSIONER CAMPBELL: Any objections?

8 MR. BROCKBANK: No objections.

9 COMMISSIONER CAMPBELL: All right, it's
10 admitted.

11 Q. (BY MR. MECHAM) What I have distributed
12 to you, Mr. Griswold, is actually, just to sort of
13 short-circuit it, on the 21st of June you sent to Mr.
14 Darling the term sheet and this, in turn, the
15 non-confidential white sheet is the e-mail that Mr.
16 Darling sent back to you with the attached
17 confidential terms sheet.

18 Now, if you look at what was sent back to
19 you, look at Section 6. Should we mark these
20 together? One is not confidential and one is --

21 COMMISSIONER CAMPBELL: Do you intend to
22 make a distinction between the two or are they --

23 MR. MECHAM: Well, the one was just to
24 refresh everyone's memory that there was a response
25 back and it was the next day, that's the e-mail. And

26

1 then the term sheet is being offered because it was
2 an item going between the parties.

3 COMMISSIONER CAMPBELL: All right. We'll
4 mark them separately since they're separate
5 documents, they're not combined. So we'll mark the
6 e-mail Cross Exhibit 12 and the confidential terms
7 sheet as Cross Exhibit 13.

8 MR. MECHAM: Thank you.

9 Q. (BY MR. MECHAM) Now, if all the sections
10 are I believe as you sent them, except for Section 6;
11 is that correct? Section 6 is what, Mr. Griswold?

12 A. Section 6 is labeled "Settlement."

13 Q. And the marked-up parts of the term sheet
14 address what issue?

15 A. Basically it's trying to settle the
16 dispute between the two parties relative to the
17 generation interconnection status.

18 Q. The tying together of the two?

19 A. Yeah. Basically it's a settlement. If we
20 agree to the terms of this and make an amendment,
21 then it settles all the issues between the party
22 around timing.

23 Q. So apart from Section 6, what was left
24 unsettled, unresolved between the parties?

25 A. Well, I would say specifically the term
26

1 sheet is simply that. It has a highlight of the
2 significant commercial terms that need to be carried
3 forth into an amendment. And the term sheet is
4 simply a term sheet. It's not finalized until it's
5 turned into some sort of amendment that's signed by
6 the parties.

7 So I can't tell you that just because
8 these have these major points in it there wouldn't be
9 other issues that came forward. So I don't -- I
10 can't say that -- I will tell you that these points
11 here that sit here in front of you, one, two, three,
12 four and five, are all points that we believe -- and
13 I mean, you can ask your client also -- if we believe
14 we reached major agreement on.

15 Q. Are you aware of other issues that weren't
16 settled?

17 A. Like my testimony says, while we were
18 going through this negotiations we found we were
19 provided information relative to three other points,
20 one being the work stoppage that was going on; two
21 being that there was liens placed on the facility;
22 and three, that had to do with the gas transportation
23 issue. Those three things were brought to our
24 attention in the middle of the discussions on the
25 term sheet. Those three conditions led us to believe

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1 that -- to not move forward on the term sheet because
2 we felt there were serious enough additional issues
3 out there that we needed to address them differently.

4 Q. Wasn't the firm transportation issue a
5 Desert Power problem, not a PacifiCorp problem?

6 A. That's correct. But it's one of three
7 that -- it's not the single issue that had to do with
8 the force majeure, absolutely not, and I said that at
9 the front. It was simply one of a number of items
10 that were pointed out to PacifiCorp. And frankly,
11 these weren't ones that we went looking for, people
12 brought them to our attention. And that generated
13 sufficient concern, and as our rights under our
14 contract allows, to look at getting some assurances
15 around some of these issues to move forward.

16 Q. Well, are you aware of how the work
17 stoppage occurred or why it occurred?

18 A. No. You know, my -- we were simply
19 notified that there were liens placed on the
20 property. Our counsel looked into it and found that
21 there was, and during the investigation of that found
22 out that one of the big liens was from the primary
23 contractor who had left the job site. Now, that's
24 just what we were informed of.

25 Q. And whoever was doing the informing didn't
26

1 tell you that the work stoppage was caused by
2 financing drying up? That wasn't part of it?
3 Clearly at some point it must have come into the
4 picture because we were asked for additional
5 assurances, financial assurances --

6 A. That's correct.

7 Q. -- at that point too. So somebody was
8 aware of the linkage between the work stoppage and
9 financing drying up?

10 A. Yes, there were people aware of that. I
11 was not the person, though, I was informed of that.

12 Q. And the liens, the contractor, is it a
13 surprise that the contractor puts a lien on a project
14 when there is no financing and the work stops? Did
15 that come as a surprise to PacifiCorp?

16 A. I can't speak about other people --

17 Q. Well, how about you?

18 A. -- in PacifiCorp. Well, from my
19 perspective, these were simply issues that had been
20 pointed out which caused the Company concern, caused
21 individuals who were management people who were being
22 questioned about what was going on to have concerns
23 about them.

24 Q. But aren't each of these three quite
25 easily addressed? Or if not easily, at least

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1 addressed in a business way?

2 A. Well, I guess I can't address them
3 individually. I can just say that there was
4 sufficient momentum around them, sufficient mass that
5 the Company, including our credit and security folks,
6 had significant concerns about it.

7 Q. Before PacifiCorp took that action,
8 though, the parties were working together, as
9 evidenced by the term sheet, and had we finalized
10 this, which was at least Desert Power's expectation,
11 there wouldn't be any need for this hearing, would
12 there?

13 A. Like I said before, the term sheet is a
14 term sheet. The term sheet is turned into a binding
15 agreement once it's turned into an agreement and
16 signed by both parties, and in this case would have
17 to come before the Commission for approval. And so
18 would there be any more issues? I can't answer that.
19 I can simply tell you that we had reached agreement
20 on these five terms within the term sheet.

21 Q. Let's go hypothetical for a minute.
22 Supposing we had reached agreement and come to the
23 Commission. Would an extended contract with a
24 delayed commercial operation date be in the public
25 interest?

26

1 A. For -- specifically for this, the one-year
2 delay which we're talking about -- well, for actually
3 a year and a month, May 9 through June 1st, 2007, we
4 looked at it. And from the perspective of the
5 original contract and now where gas prices were
6 relative to power, yes, to do that actual delay for
7 the one year, we felt it was in the best interest.
8 Particularly if you could settle some of the other
9 issues that you see in here.

10 Q. Did that change on June 2, 2007?

11 A. Yes, it does.

12 Q. Why?

13 A. Because you no longer have met the
14 Stipulation. The project has not come online by June
15 1st. And I think that's at the crux of the matter on
16 the Stipulation.

17 Q. So it's no longer in the public interest
18 and it's no longer of any value to PacifiCorp? Is
19 that -- am I mischaracterizing it on June 2nd? Is
20 that the way it is?

21 A. On June 2nd, and if you go right by the
22 plain language that's included in the Stipulation, it
23 says the project has to be online by June 1st, 2007.
24 And if they're not then they get -- then those
25 Stipulation prices no longer apply.

26

1 Q. I know what the Stipulation says. I'm
2 asking you if it's of any value to the Company and
3 there's any public interest consideration on June 2nd
4 to have that plant operating?

5 A. If you -- well, from a physical
6 perspective, you know, having a resource in the
7 middle of the summer, yes, there is. But
8 economically, what you're sitting there is a plant
9 that did not meet the Stipulation. You now have an
10 approved methodology within -- for the project
11 between 3 and 99 megawatts. And as you can see from
12 my -- the data responses that we did for the DPU,
13 there is a significant difference in the prices that
14 would be paid on avoided cost for a project that came
15 online under the Stipulation and a project that came
16 online if they didn't meet the Stipulation. That's a
17 significant amount of dollars. If you looked at it
18 from a ratepayer standpoint and you did a net present
19 value of the difference over that 20-year deal, it's
20 anywhere from 150 to \$200 million. I believe that's
21 significant.

22 Q. So -- well, I won't keep going there.

23 COMMISSIONER CAMPBELL: Did you mean to
24 offer Cross Exhibit 12 and 13?

25 MR. MECHAM: I did, I'll offer them.

26

1 COMMISSIONER CAMPBELL: Any objection?

2 MR. BROCKBANK: No objection.

3 COMMISSIONER CAMPBELL: All right. We'll
4 admit them.

5 Q. (BY MR. MECHAM) Let me ask you, going
6 back to the gas issue for just a minute, you talked
7 about the Company's right to run the plant 24 hours a
8 day, seven days a week, 365 days a year. How
9 probable is that?

10 A. I really couldn't answer that without, you
11 know, knowing the situation that we would be under.
12 Hypothetically, if we had a huge amount of power
13 plants go off-line for some reason, for a year, yeah,
14 you could ask them to run all the time.

15 Q. When was the last time that happened?

16 A. You asked me if there was a situation and
17 I believe I responded. So yes, there is a situation.
18 Is it probable? Not. But we've been through some
19 situations where on a shorter duration than a year we
20 would run them 24/7.

21 Q. I found an interesting article in Power
22 Magazine about the Currant Creek Plant. And I don't
23 know if you've seen it or not, but it's actually a
24 feather in PacifiCorp's cap, as far as I can tell.
25 But it indicates that Currant Creek is run on a 12 to
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1 15-hour day basis, per day basis with 250 to 260
2 starts per year.

3 Is that at all reflective of how the
4 Desert Power Plant might be operated?

5 A. I don't know specifically. I think we
6 would -- well, first, ultimately we have the ultimate
7 control over Currant Creek. You know, we run it.
8 Desert Power, we tell them a day ahead the schedule
9 and they have an obligation to meet that delivery
10 schedule. And in the event, it's like other Power
11 Purchase Agreements, if they don't meet it there's
12 liquidated damages for replacement power. It is a
13 tolling arrangement. We would run it based on the
14 economics of the plant and the need for power within
15 the Wasatch Front.

16 MR. MECHAM: Mr. Chairman, how am I doing
17 on time?

18 COMMISSIONER CAMPBELL: You have until 20
19 after.

20 MR. MECHAM: Thank you.

21 Q. (BY MR. MECHAM) Let me go to your
22 interpretation of the contract at 8.1. Well,
23 actually it's 8.2. It's the Company's position, is
24 it not, that 8.2 is effective right now? In other
25 words, you can ask for a \$4 million letter of credit

26

1 for assurances for delay damages? Default security,
2 excuse me.

3 A. Yes. We -- I believe we've actually asked
4 for it. We do believe, and as you can see under 8.2,
5 item number 1, a letter of credit to the benefit of
6 PacifiCorp on or before the scheduled commercial
7 operation date in the amount of \$4 million.

8 Q. Well, why did you skip over 8.1?

9 A. Well, you pointed to 8.2.

10 Q. I know. Because you don't address 8.1 so
11 I appreciate that. And you're right, I directed you
12 there. But isn't 8.1 the status we're in currently?
13 Essentially, 8.1 requires that Desert Power post
14 \$500,000 of development, project development
15 security. And let me ask, did Desert Power do that?

16 A. Yes. They provided it on whatever the
17 actual six-month date was from the effective date.
18 So I couldn't tell you what the date was.

19 Q. And then a little lower, maybe six lines
20 down, five lines down, 8.1 says, "In the event that
21 the commercial operation date occurs after the
22 scheduled commercial operation date, PacifiCorp shall
23 be entitled to withdraw from the project development
24 security deposit account an amount equal to the delay
25 damages. If at any time during the delay period the

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1 delay damages exceed the project development
2 security, then seller shall deposit additional funds
3 into the project development security account to
4 return the project development security to \$500,000."

5 Isn't that more the position that Desert
6 Power is in today?

7 A. I think that one of the key words to look
8 at would be the delay period which is a defined term.
9 So let me at least look at that. If anybody can help
10 me find it. It must be defined in the actual
11 agreement, not in the definitions.

12 MR. PROCTOR: Mr. Griswold, look at page 8
13 of the contract, it's 2.4, and the delay period is
14 defined there.

15 MR. MECHAM: Thank you, Mr. Proctor.

16 Q. (BY MR. MECHAM) Isn't it just the period
17 between the scheduled commercial operation date and
18 the commercial operation date that ultimately occurs?

19 A. Yes. You have 120 days from the scheduled
20 commercial operation date.

21 Q. Unless something like a force majeure or
22 some other thing excuses the party or parties from
23 it?

24 A. Well, it points to 11.1.4 so --

25 MR. BROCKBANK: Mr. Chairman, I would just
26

1 like to say, and I'm not objecting to this line of
2 questioning because Mr. Griswold did address it in
3 his testimony, but I would point out that he is not
4 an attorney and he makes clear that in his testimony
5 he is not an attorney, that his discussion, his
6 testimony is based on discussions with counsel. I
7 would just point out he's not making legal
8 conclusions.

9 MR. MECHAM: And I recognize that. Thank
10 you, Mr. Brockbank.

11 Q. (BY MR. MECHAM) But on the other hand, I
12 also know Mr. Griswold works a lot with these
13 contracts, having worked with him, and he does very
14 well.

15 A. Thank you.

16 So you have -- I mean, this basically says
17 that you have 90 days and if you can't get it within
18 the 90 you have the option to put another 120 in the
19 project for security for a total of 120 days from the
20 thing.

21 Q. Go ahead.

22 A. I guess all I was going to say is, I'm not
23 an attorney, but there are other clauses within the
24 contract which allow for the Company to make
25 additional requests for assurances, including

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1 additional amounts of security.

2 Q. Well, okay. Let's go to 8.2, the
3 \$4 million letter of credit. You say -- well,
4 PacifiCorp says that the Company position is is that
5 is due now.

6 Has Desert Power achieved commercial
7 operation?

8 A. No, it has not.

9 Q. And doesn't this really kick in after the
10 commercial operation thing?

11 A. Well, 8.2 says it -- we receive a letter
12 of credit on or before the scheduled commercial
13 operation date, not the commercial operation date.

14 Q. I recognize you're not a lawyer, but
15 that's not a liability. You have to read the two
16 sections together. And anyway, I better ask a
17 question or the Chairman will be on my case.

18 A. You can ask me if I'm a lawyer.

19 Q. But look at the way 8.2 operates. It
20 assumes that commercial operation has been achieved
21 and then it builds up over time and then it plateaus
22 and then it drops down. So actually it's being paid
23 back over time. And you took us to Section 11.1. In
24 fact, I would like to go there because that's where
25 you indicate in your testimony that force majeure and

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1 so on, that doesn't affect the obligation to pay.

2 But to pay what? Default security that
3 gets returned to Desert Power or PacifiCorp to pay
4 Desert Power?

5 A. Well, I mean, I am not an attorney but,
6 you know, as my testimony said, our position is is
7 that the force majeure does not relieve the party
8 from an obligation to pay.

9 Q. Okay. I believe it's in Section 11, is it
10 not, where you address, as I just was saying, the
11 issue about not affecting the obligation to pay?
12 What section is that? No wonder I can't find it.

13 MR. BROCKBANK: I would be happy to point
14 it out, Mr. Chairman.

15 MR. MECHAM: Section 13.

16 MR. BROCKBANK: 13.1.

17 Q. (BY MR. MECHAM) Now, you indicate that
18 Section 13.1 doesn't effect the obligation to pay,
19 and you note that that's some sort of a mistake
20 because you put "sic" next to it. What if it weren't
21 a mistake, effect versus affect? That could change
22 the whole meaning of the contract, couldn't it?

23 A. I know that -- you know, I'm not an
24 attorney, but I know that contract terms get
25 interpreted different ways. And that's, you know, a
26

1 lot of times the basis for disputes.

2 MR. BROCKBANK: I'm sorry, Mr. Mecham,
3 where are you looking in his testimony?

4 MR. MECHAM: Actually, his testimony is
5 line 220 to 224. It says, "Nothing contained herein
6 shall effect the obligation to pay." I don't think
7 that's an issue for an attorney, I think that's just
8 grammar.

9 Q. (BY MR. MECHAM) But if it were effect,
10 wouldn't that mean -- cause something to come into
11 being, so it wouldn't cause the obligation to pay to
12 come into being? And I'm assuming with -- go ahead.
13 Did you have something to say or do you want me to
14 keep going?

15 A. Well, you asked me -- I guess could you
16 ask me the question again? I was trying to
17 understand your definition.

18 Q. Yeah. Well, you point to this language as
19 clear language of the contract and it's a mistake,
20 effect versus affect, apparently. Does that mistake
21 show the clear language?

22 A. I -- you know, I guess you then have to go
23 back to the intent of it, whether there was a
24 spelling mistake or what. You know, but I guess if
25 you go look at other force majeure clauses, generally

26

1 from a general term of force majeure it doesn't
2 relieve you of obligations to pay.

3 Q. But again, an obligation to pay what?

4 A. In this case we believe it's the
5 obligation to pay the default security requirements.

6 Q. As opposed to the obligation to pay
7 capacity and energy and so on as contemplated,
8 perhaps, by the contract?

9 A. I don't know what's contemplated other
10 than this is a general force majeure clause that the
11 Company uses. I think it was trying to say that
12 neither party gets released from any obligation to
13 pay.

14 Q. I think you described this in your
15 summary, and this will be my last question. With
16 respect to the Company's determination to know today
17 that the avoided costs are going to be, I guess the
18 new number is \$17.41 on June 2nd, tell me why the
19 Commission needs to decide that when it hasn't
20 happened yet.

21 A. I think from the Company's perspective, it
22 provides a certainty around the project, it provides
23 an urgency on your perspective to come online by that
24 date. I've heard Mr. Darling and Mr. Swenson say
25 that, you know, they don't see any reasons why they

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1 couldn't be on by that date, but we want assurances
2 that in order to pay you the stipulated prices that
3 are part of this agreement that require you to be
4 online by that date, we want assurances that you will
5 be on by that date or that you will be paid the
6 avoided cost in effect per the methodology that's
7 been determined on June 2nd, 2007.

8 Q. And you heard Mr. Miller last Thursday
9 from MMC Energy who is negotiating for a Purchase and
10 Sale Agreement with Desert Power, that if that
11 decision is made it's not financeable? Did you hear
12 that?

13 A. Yeah. I remember him saying that, yes.

14 Q. So the project essentially won't occur,
15 will it?

16 A. I can't answer that.

17 Q. Thank you.

18 COMMISSIONER CAMPBELL: Mr. Ginsberg?

19 CROSS-EXAMINATION

20 BY MR. GINSEBERG:

21 Q. I noticed in this Exhibit 12, the term
22 sheet -- do you have that? What's it called?

23 COMMISSIONER CAMPBELL: It's Cross Exhibit
24 13.

25 Q. (BY MR. GINSEBERG) Thirteen, I'm sorry.
26

1 You propose to keep the term of the contract for 20
2 years from the date of the commercial operation date;
3 is that right?

4 A. I think if you actually look at the term
5 it's not quite 20 years.

6 Q. But you extended the end of it by one year
7 also?

8 A. We did, yes.

9 Q. Now, if there was a force majeure event
10 under the contract that altered the commercial
11 operation date or otherwise occurred even during the
12 term of the contract, does that alter the end date of
13 the contract?

14 A. I would have to look at the language in
15 the contract, but to the extent that there's an
16 allowance made under force majeure to correct
17 whatever the events were that caused the force
18 majeure, no, it does not. I believe, subject to
19 check, that's my answer.

20 Q. So at least if it was clearly a force
21 majeure event, the contract would terminate at the
22 same time it was originally contemplated to terminate
23 when originally approved by the Commission?

24 A. I believe so, subject to checking the
25 language in the agreement.

26

1 Q. When you said that the price, talking
2 about the change in the price, was that under either
3 condition whether it be a force majeure or just under
4 a renegotiation of the contract? In other words, if
5 there was a force majeure event, was it your view
6 that the price would change if they were not online
7 by June 1, '07?

8 A. Let me make sure I understand it. Are you
9 asking me even if there's, like I say, an order that
10 says that there was force majeure, that there was an
11 opportunity to meet that or to extend their current
12 commercial date, our -- I mean, our position is that
13 the June 1, 2007 date is basically a cliff.

14 Q. Meaning what?

15 A. If they do not come online by that date
16 then that basically says they shouldn't get the
17 stipulation price.

18 Q. And that would be under any event, whether
19 it was extended for -- you were negotiating an
20 extension or there was a finding that there was
21 actually a force majeure, correct?

22 A. Yes.

23 Q. Thank you.

24 COMMISSIONER CAMPBELL: Mr. Proctor?

25 MR. PROCTOR: Thank you, Mr. Chairman.

26

1 CROSS-EXAMINATION

2 BY MR. PROCTOR:

3 Q. Mr. Griswold, I want you to assume that
4 the force majeure event continued to exist through
5 June 1, 2007. Would that cliff still be there?

6 A. I guess our belief is that the cliff is
7 still there and one of the things that we're asking
8 the Commission to decide is if they do rule on that
9 force majeure and the duration and -- and the
10 duration of it, that there's also some decision made
11 about what happens if it, in fact, is something that
12 affects that June 1, 2007 date. I mean, all of the
13 parties, including Desert Power, signed that
14 Stipulation. And the Company believes that that
15 Stipulation for that date, you know, that's when
16 those prices are available for.

17 Q. So the force majeure provision of the
18 contract, Section 13, which suspends performance
19 during the force majeure in fact no longer applies
20 after June 1, 2007; is that your testimony?

21 A. Well, I believe there's some -- if you
22 look at the force majeure, 13.5, it does have some
23 conditions around the inability to cure that force
24 majeure and the rights for the Company to terminate.

25 Q. That's 18 months after the event, correct?

26

1 A. Right. That's correct, after the event.

2 Q. And that has no reference, however, to
3 June 2nd of 2007? That is internal to the contract,
4 it is a function of when the force majeure event
5 occurs, correct?

6 A. That's correct.

7 Q. Now, you mentioned that this contract, and
8 the force majeure provision in particular, is the
9 clause that the Company always uses? It's a standard
10 PacifiCorp force majeure clause; is that correct?

11 A. If you look at, I guess, our standard QF
12 contract, we start with that and then, depending on
13 if it's a negotiated deal we work through that. So I
14 guess my inference is that it's standardized from the
15 perspective of we start with a very, very specific
16 agreement, you know, definition of force majeure.
17 And then if there are specific conditions that we
18 want to try and work into it, we try to do that
19 through the negotiations.

20 Q. Schedule 38, in fact, states that the
21 first draft of the Power Purchase Agreement shall be
22 the Company's draft, correct?

23 A. Correct.

24 Q. Is there anyplace within this contract
25 where the Stipulation is incorporated also as a
26

1 governing term for the contract?

2 A. The actual Stipulation Order that came
3 out?

4 Q. Yes.

5 A. Or the exhibits that were attached to it?

6 Q. The Order and the Stipulation that was
7 signed.

8 A. No, no. I don't believe that there is,
9 subject to me reading through it, any specific
10 reference to the Stipulation as the Order came out --
11 or as it was signed, I should say.

12 Q. No reference and no incorporation,
13 correct?

14 A. Yes.

15 MR. PROCTOR: Thank you very much, Mr.
16 Griswold.

17 COMMISSIONER CAMPBELL: Redirect?

18 MR. BROCKBANK: Yes, Mr. Chairman, I do
19 have a few questions. Thank you.

20 REDIRECT EXAMINATION

21 BY MR. BROCKBANK:

22 Q. Mr. Griswold, Mr. Mecham, you recall, was
23 asking you about the specific language in the
24 contract, whether it required firm transportation or
25 whether it didn't.

26

1 Practically speaking, why, in your view --
2 or does it, in your view, require that Desert Power
3 provide firm transportation notwithstanding a
4 specific reference to that in the contract?

5 A. You know, I think from a general
6 perspective, and I could show you where the -- in
7 different sections in the agreement, but there's a
8 number of things. First and foremost, in one of the
9 sections, in one of the operational sections we say
10 that the plant shall be operated according to prudent
11 electrical practices.

12 If you go look at how you would be
13 providing gas service for meeting a firm power
14 obligation, and our own folks are good examples of
15 that, you know, we buy firm transportation in
16 addition to day-ahead non-firm to meet our gas needs
17 at our plant with one exception, and that is the
18 exception where the plant is on a lateral. And in
19 those cases we buy firm transportation specifically
20 to that plant to meet a firm power delivery.

21 Q. Thank you.

22 Remember when Mr. Mecham was asking you
23 about the assurances that PacifiCorp had requested
24 and the material adverse change discussion?

25 A. Yes.

26

1 Q. He indicated that those assurances that
2 PacifiCorp were requesting, I believe his words were
3 "easily addressed." Have they been addressed to this
4 point?

5 A. No, not to my knowledge.

6 Q. Let's look at the July 14th letter --

7 MR. MECHAM: Mr. Chairman, I didn't say
8 that. The thing I said was easily addressed was the
9 work stoppage, the liens and the firm gas
10 transportation.

11 COMMISSIONER CAMPBELL: Does that clarify
12 it for you, Mr. Brockbank?

13 MR. BROCKBANK: Sure. That's why I said I
14 thought he had said that it was -- that the
15 assurances were easily addressed. Notwithstanding,
16 and if I mischaracterized you, Mr. Mecham, please
17 accept my apology.

18 MR. MECHAM: Accepted.

19 Q. (BY MR. BROCKBANK) Mr. Griswold, do you
20 remember what the assurances were that PacifiCorp
21 asked Desert Power?

22 A. I would like to look at the July 14th
23 letter so I could be accurate.

24 Q. I don't think that's been introduced at
25 all.

26

1 MR. MECHAM: It has, it's attached to
2 Charles --

3 MR. GRISWOLD: It's in Mr. Darling's.

4 Q. (BY MR. BROCKBANK) Do you have it there?

5 A. I do.

6 Q. If you'll just look on page -- the second
7 page of that letter that lists four assurances that
8 PacifiCorp requests.

9 A. I have it.

10 Q. Okay. The first of those is the default
11 security?

12 A. Yes.

13 Q. Is that correct?

14 A. We asked that it be post the additional
15 default security within 15 days hereof, and this is
16 dated July 14th, including the \$4 million letter of
17 credit.

18 Q. Okay. The second is a request for a legal
19 opinion that there's no default?

20 A. That they're not in default on any
21 financing agreement or material debt instruments
22 entered into by Desert Power.

23 Q. And the third is that they'll have
24 sufficient financing?

25 A. That they will be able to secure adequate
26

1 and available and liquid financing and continue with
2 all work necessary for the facility to achieve
3 commercial operation no later than June 1st, '07.

4 Q. Thanks.

5 And the final is a representation that --

6 A. That all work will be -- that all
7 contractors, engineers, consultants and the like are
8 continuing with all work necessary to achieve the
9 commercial operation no later than June 1st, '07.

10 Q. Thank you.

11 In the contract, the Power Purchase
12 Agreement, PacifiCorp has the right to request
13 assurances if they believe there's been a material
14 adverse change. And I want to just have you explain.

15 Please go to Section 1.18 of the Power
16 Purchase Agreement. And really, you could just read
17 the first four lines of that definition of material
18 adverse change and describe whether you think
19 PacifiCorp was reasonable in demanding these
20 assurances.

21 A. The definition of "material adverse change
22 shall mean with respect to the Seller, if the Seller,
23 in the reasonable opinion of PacifiCorp, has
24 experienced a material adverse change in ability to
25 fulfill its obligation under this Agreement,

26

1 including, but not limited to, any such change that
2 results in its inability to satisfy the Credit
3 Requirements."

4 Q. Okay. So please explain why, I mean,
5 whether you believe PacifiCorp had a legitimate
6 reason to request these assurances under this
7 definition?

8 A. Yes. You know, if -- our credit folks
9 review the agreements, the fact that there was
10 concern that the financing, bridge financing had was
11 no longer in place, there was work stoppage, and they
12 felt that this was because of these changes that were
13 made known to us that it was reasonable for the
14 Company to request these assurances.

15 MR. BROCKBANK: Mr. Chairman, I'm
16 sensitive to the time. I don't want to take more
17 than I have. How are we? Do I have a few more
18 minutes or --

19 COMMISSIONER CAMPBELL: We are done.

20 MR. BROCKBANK: We are done, okay.

21 COMMISSIONER CAMPBELL: You can go ahead
22 and ask a couple more questions.

23 Q. (BY MR. BROCKBANK) Okay. Two or three
24 more here. Mr. Mecham asked you about whether
25 PacifiCorp would ever dispatch the Desert Power Plant

26

1 24 hours, seven days a week. Recall this last July,
2 just a couple of months ago, when temperatures hit
3 over 100 degrees for several days.

4 What kinds of extraordinary measures does
5 the Company take on a day or a week like that when it
6 is trying to meet load?

7 A. I think in that case if Desert Power had
8 been available we would have dispatched them pretty
9 much around the clock to ensure the reliability and
10 the power needs were met within our system. I
11 recall, I think, what Mr. Mecham asked me was if we
12 would do that for like a year. And that would be an
13 extraordinary circumstance. But in the case where
14 there's extreme heat and/or plants have been taken
15 down for a period of a week or so for an unforced
16 outage, it's not unreasonable for the Company to
17 dispatch plants like that.

18 And in this case I believe we dispatched,
19 we ran our own steam generators who had significantly
20 higher heat rates than what's proposed under this
21 agreement. So, yeah, we were doing everything we
22 could to meet the system peak at that time.

23 Q. Two more questions, Mr. Chairman.
24 Regarding Section 8.1 and 8.2, the development
25 security and the default security, again, could you
26

1 just reiterate in Section 8.2 what is the trigger for
2 the payment of the default security? It's in the
3 third line.

4 A. Under the -- under 8.2 in the Power
5 Purchase Agreement, it's the trigger for payment of
6 the posting the letter of credit is the scheduled
7 commercial operation date.

8 Q. It has nothing to do with the actual
9 commercial operation date?

10 A. Correct.

11 Q. And then my final question is, in
12 addressing why the Commission needs to decide the
13 June 1, 2007 cliff issue, Mr. Mecham asked you about
14 what the public interest required and such.

15 Really, doesn't the public interest and,
16 indeed, a utility's obligation under PURPA to
17 purchase QF power, really hinge on paying the actual
18 true avoided cost? Could you please elaborate
19 whether you agree with that and elaborate?

20 A. Yeah, that is correct. I mean, in the
21 event that they did not meet the June 1, 2007 date,
22 it does not relieve the company of its obligations
23 under PURPA to buy power from Desert Power should
24 they come online at some point. Our position is
25 simply that under the Stipulation they have to be

26

1 online by that June 1, '07 date in order to receive
2 the prices under the Stipulation. Absent that coming
3 online, we believe it's appropriate for them to be
4 paid at whatever the current avoided cost is. And
5 there is a methodology to determine that.

6 Q. I think he said 2008. Did you mean 2007?

7 A. Yes.

8 Q. I'm not positive, but I think you said
9 2008. Thank you.

10 COMMISSIONER CAMPBELL: All right. Thank
11 you.

12 Commissioner Boyer has a question.

13 COMMISSIONER BOYER: Mr. Griswold, I think
14 it's been mentioned, I think in your testimony and
15 perhaps other witnesses, of a Stipulation setting the
16 commercial operation date of June 1, '07. Is there
17 such a stipulation or are you talking about the
18 nonbinding term sheet?

19 MR. GRISWOLD: No. There is, if you
20 reference the Stipulation Order, and I don't know
21 what the date of that was.

22 COMMISSIONER BOYER: I know our Order set
23 the date for the QF pricing of June '07, but how does
24 that relate to your PPA? Isn't the commercial
25 operation date 18 months after the effective date?

26

1 MR. GRISWOLD: Yes.

2 COMMISSIONER BOYER: Which would have been
3 June '06?

4 MR. GRISWOLD: Actually, it's May 9, '06,
5 correct.

6 COMMISSIONER BOYER: So what agreement is
7 there among the two parties here extending the
8 commercial operation date to June of '07?

9 MR. GRISWOLD: The only document was the
10 one that was discussed on the term sheet. And as I
11 said, what we had tried to do at that point was to
12 reach some commercial terms that would allow them to
13 complete their project and come online and still meet
14 the Stipulation date for Stipulation prices.

15 COMMISSIONER BOYER: So is your testimony
16 today that the Company is willing to honor that date,
17 that September -- or rather than that June '07
18 commercial operation date?

19 MR. GRISWOLD: June 1, '07?

20 COMMISSIONER BOYER: June 1, '07?

21 MR. GRISWOLD: Yes. Our position is that
22 we're willing to honor that. But our issue is what
23 happens after that date, if they're not online by
24 that date.

25 COMMISSIONER BOYER: I understand. Thank
26

1 you.

2 MR. BROCKBANK: Could I just ask one
3 clarification, or just for Mr. Griswold. The Company
4 could agree to that, but it would require a
5 Commission approval of that amendment; is that
6 correct?

7 MR. GRISWOLD: That's correct, yes.

8 COMMISSIONER CAMPBELL: All right. Thank
9 you, Mr. Griswold.

10 Next witness?

11 MR. BROCKBANK: Mr. Chairman, PacifiCorp
12 calls its final witness, Mr. Douglas Bennion.

13 DOUGLAS BENNION,
14 called as a witness, being first duly sworn, was
15 examined and testified as follows:

16 COMMISSIONER CAMPBELL: Thank you.

17 Mr. Brockbank?

18 DIRECT EXAMINATION

19 BY MR. BROCKBANK:

20 Q. Mr. Bennion, could you please state your
21 name and business address?

22 A. My name is Douglas Bennion. I work at
23 1407 West North Temple, Salt Lake City, Utah, in
24 Suite 275.

25 Q. And by whom are you employed and what is
26

1 your title?

2 A. I'm employed by PacifiCorp and my title is
3 Managing Director of Network Reliability and
4 Investment Delivery.

5 Q. Are you the same Douglas Bennion that
6 filed testimony in these proceedings?

7 A. Yes, I am.

8 Q. Do you have any corrections to your
9 testimony?

10 A. No, I do not.

11 Q. If you were asked the same questions today
12 that you were asked in your written testimony, would
13 you have the same answers?

14 A. Yes, I would.

15 MR. BROCKBANK: Mr. Chairman, PacifiCorp
16 moves for the admission of Mr. Bennion's testimony as
17 PacifiCorp Exhibit 3.

18 COMMISSIONER CAMPBELL: Are there any
19 objections?

20 MR. PROCTOR: No objections.

21 MR. MECHAM: No.

22 COMMISSIONER CAMPBELL: All right. We'll
23 admit it.

24 MR. BROCKBANK: Again, Mr. Chairman, Mr.
25 Bennion would have a brief summary. Could he provide
26

1 a brief summary and then a brief response to some of
2 what he's heard today?

3 COMMISSIONER CAMPBELL: Yes.

4 Q. (BY MR. BROCKBANK) Please provide your
5 summary, Mr. Bennion.

6 A. Okay. In my summary what I would like to
7 do is, once Desert Power executed their agreements
8 with payment to PacifiCorp to complete the
9 engineering design, procurement of materials and
10 constructing the pieces at the interconnection point
11 for the PacifiCorp construction services team, we
12 immediately assigned resources to put in place
13 multiple options to meet their requested customer
14 in-service date. Additionally, but not required, the
15 Company was cooperative to work with Desert Power to
16 locate the long lead material items that Desert Power
17 was responsible to procure in the scope of work.

18 Regrettably, PacifiCorp did not have
19 excess inventory in all cases to meet Desert Power's
20 request. The schedule put forward by Desert Power
21 created unnecessary challenges for PacifiCorp.
22 However, in the end, PacifiCorp was ready in May of
23 '06 to install our material portion as listed into
24 the agreed scope of work.

25 That's kind of the summary. What I would
26

1 like to do also is kind of touch on four items I
2 think I heard earlier in various statements. Two of
3 those would be comments that were made by Mr.
4 Darling. I think he focused on, one, the
5 communication path that we had looked at from US Mag
6 offices out there, and I'll touch on that.

7 The secondary would be long lead items
8 that were talked about in October of '05 and what did
9 we do about that going forward. And then I'll move
10 into Mr. Swenson's comments about metering. Then
11 last is about the safety. And I think I can maybe
12 clear up a few things in that area.

13 I think earlier this morning when Mr.
14 Darling made a comment about one of our options to
15 get the microwave path out to the Rowley subsite, he
16 indicated somebody at US Mag, one of their vice
17 presidents, would not allow that to occur.

18 What I would like to point out is that we
19 are working with Bruce Searle, who is a US Mag
20 employee, and he provided the approval. In fact, in
21 the early part of May we did test that particular
22 path, it was a four-wire analog channel that was used
23 previously when PacifiCorp owned the substation out
24 there. That was going to be a temporary solution
25 that we had in place and to test it.

26

1 The second thing that he wanted to talk
2 about or indicated is in October of '05, that we did
3 not have our long lead items in stock, and that is a
4 true statement. At that point in the period the
5 statement of work would have sorted out who owns what
6 or who would have done that work and we would not
7 have ordered any of that material until we had it
8 available.

9 And later in the testimony, I think Mr.
10 Swenson's, he also pointed out that PacifiCorp would
11 not buy material until they provided us the money,
12 which at that time came in March of '06, and shortly
13 thereafter we placed those orders.

14 In Mr. Swenson's testimony, I think he
15 directed it at me, is in March of '06 Desert Power
16 also had requested PacifiCorp to take back the
17 responsibility to buy the metering. Once they found
18 out the vendor couldn't accelerate it any sooner than
19 we could get it, it made sense for us to go ahead and
20 order it, which we did at that point in time. But as
21 we found out later, we also had other options with
22 metering and whatnot we pursued with the Order, but
23 we found other options that we could do in the short
24 time for their schedule.

25 I think the last comment I would like to
26

1 make is on the safety. It's very clear it's been a
2 major discussion that in October a change in the
3 design was made to serve two customers out in the
4 Rowley area of Utah. Customer number 1, which is
5 US Mag, they own and operate a substation at that
6 point. Customer number 2 is Desert Power.

7 And there are two situations on the safety
8 that we would like to keep in mind, and I want to
9 sort those out. The first one is the chlorine gas,
10 whether we have switches or equipment inside their
11 substation or outside the fence, we deal with it. So
12 that's really not an issue in our safety side of the
13 business.

14 The second thing is how do you operate the
15 equipment? And in that particular case, PacifiCorp
16 still owns 13.7 miles of transmission line. From an
17 operator's perspective, any time of the year you're
18 going to be doing work in that area, whether it be
19 maintenance, outage response and whatnot. And one of
20 the things our operators need to do is they need to
21 isolate the source on both sides. So they need an
22 open point. The three-way switch is an opportunity
23 for that employee to go to that location, open up the
24 switch, put the grounds, isolate it and do their
25 work. That's the only change that was really made

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1 from a safety perspective.

2 Q. Thank you, Mr. Bennion.

3 MR. BROCKBANK: Mr. Chairman, PacifiCorp
4 offers up Mr. Bennion for cross-examination.

5 COMMISSIONER CAMPBELL: All right. We're
6 going to take a 15-minute break and let's come back
7 at 5 after.

8 (Recess taken.)

9 COMMISSIONER CAMPBELL: Let's go back on
10 the record.

11 Mr. Bennion?

12 MR. BENNION: Just one point of
13 clarification on the safety side of it that I wanted
14 to point out.

15 When an employee shows up on the job site
16 they need to do an assessment of what needs to be
17 done. In the case of US Mag and Desert Power, I
18 think we all understand there are five generators
19 that exist on the end of that line and at any given
20 time those generators could be turned on and produce
21 power and generate back into the system.

22 So from a safety perspective, the addition
23 of the three-way switch that was introduced in
24 October, as I tried to convey earlier, provides an
25 opportunity for that employee when they're doing work

26

1 anywhere in that section. They go to that switch,
2 they open it up, where they can completely isolate
3 those five generators, and under no circumstance
4 would they depend on that third party to make a
5 promise not to turn them on. So when they open the
6 switch, ground out the wires, that way they know they
7 have a site that is safe and prevents them from being
8 hurt and continue their work. So that was one of the
9 primary things I wanted to talk about in the safety
10 side.

11 COMMISSIONER CAMPBELL: All right. Thank
12 you.

13 MR. BROCKBANK: Mr. Bennion is now ready
14 for cross-examination.

15 COMMISSIONER CAMPBELL: Mr. Mecham?

16 MR. MECHAM: Thank you, Mr. Chairman.

17 CROSS-EXAMINATION

18 BY MR. MECHAM:

19 Q. Mr. Bennion, during your summary you said
20 about the safety issue that chlorine gas is not the
21 safety issue?

22 A. Well, it is a safety issue, but we know
23 how to deal with it. Employees in our organization,
24 when they show up to a site, they need to do an
25 assessment. We have a history out at the Rowley
26

1 Substation with chlorine gas in the air. So when
2 they show up on the site, there are monitors that
3 would indicate what is the level of it? Is it safe
4 to work? Do they have the appropriate equipment,
5 ventilators, et cetera? Yes, they do. So it is a
6 concern, but we deal with that as well. So that was
7 one thing that we needed to work with.

8 Q. So it is a safety concern?

9 A. Yes.

10 Q. Along with the three-way switch, that
11 takes care of some safety issues for you as well
12 because you can shut one down, or however many,
13 without disrupting anybody and protect your
14 employees? Did I understand that correctly?

15 A. Correct.

16 Q. Okay. So chlorine stays on the map,
17 however --

18 A. Yes, it does.

19 Q. -- as a safety concern? Now --

20 COMMISSIONER CAMPBELL: Mr. Mecham, can
21 you pull the microphone a little closer to you?

22 Q. (BY MR. MECHAM) Thank you.

23 You were given to me as the one who would
24 know when the -- I think it was you, anyway -- that
25 you would know that US Magnesium bought that

26

1 substation in 2001?

2 A. I'm aware of that, yes.

3 Q. So has anyone from PacifiCorp had to go
4 out there since 2001 to do greasing of insulators or
5 that kind of stuff?

6 A. No, we have not because we do not own that
7 site anymore. That's the responsibility of US Mag.

8 Q. So there hasn't been any safety
9 consideration out there for the last five years?

10 A. Inside the fence where we would normally
11 do the work we still perform maintenance and work on
12 our transmission line up to that site.

13 Q. And how far away is that? How close do
14 you get to it?

15 A. Well, our transmission line dead ends
16 inside the US Mag Substation.

17 Q. So you go right up to the substation?

18 A. Yes, we do.

19 Q. Tell me about this redesign. From a
20 safety standpoint, I'm trying to sort through what
21 I'm hearing with respect to the safety issues that
22 remain. Under the previous design, before October
23 20, 2005, my understanding is is that even with
24 respect to the redesign, a PacifiCorp employee is
25 still going to have to go to the site because you'll

26

1 have a switch, and I've forgotten what other piece of
2 equipment, but you still have to maintain that,
3 correct?

4 A. Yes. We're responsible for that three-way
5 switch and the transmission pole it would sit on.

6 Q. The transmission pole and the three-way
7 switch. So under the new design has it been
8 determined that it's any different than the old
9 design from the standpoint of PacifiCorp's
10 maintenance? The delivery point issue with respect
11 to US Magnesium, wasn't there some determination that
12 it was going to have to stay exactly where it was,
13 which leaves the equipment where PacifiCorp didn't
14 want it to be, or have I misunderstood something?

15 A. Well, I don't know about the specific
16 location of where the pole would go and whatnot, but
17 in a general sense what I would probably suggest in
18 looking at the diagram is the way the original design
19 was put together was the equipment was inside Desert
20 Power's equipment fence, inside US Mag's fence. I
21 would look at that and say, well, that's my home and
22 those two companies or customers would have to
23 provide me a key to their facility in order for me to
24 go in and isolate, operate and so forth. By
25 relocating the switch outside where PacifiCorp can

26

1 have access to it, then we have access to it, we can
2 put our locks on it, we can tag it, et cetera,
3 without asking for permission.

4 Q. Well, I'm not intimately familiar with
5 exactly how the design works, but I'm trying to
6 figure out if a PacifiCorp employee, under the new
7 design, is going to be in the same predicament as
8 they would have been under the old design.

9 In other words, are they going to get as
10 close to the areas of whether it's a safety concern
11 that they would have under the old design?

12 A. Well, I think what I tried to convey early
13 on, the two issues, one, the chlorine gas which is in
14 the air, it's going to be around that entire
15 environment. When an employee would show up on that
16 site, whether we have the switch where it originally
17 was or where it was relocated, that would still
18 exist. That's just part of the normal environment.

19 We would address that by understanding you
20 would use appropriate filters, equipment, they take
21 that under consideration.

22 The second safety aspect is the ability
23 for our employees to perform their work when required
24 to work on that 13.7 miles of 138 volt line. If they
25 have to do maintenance on that and you go out there,

26

1 they need to make sure that on the other end they can
2 open up the switch, have a visual disconnect and put
3 the wires across that. Knowing where the location is
4 at, it's acceptable to them.

5 Q. Well, taking a look at the old design
6 versus the new design because I'm still not sure I
7 understand that a PacifiCorp employee is better off
8 under the new design versus the old design.

9 A. Maybe I can also --

10 Q. I've got pictures.

11 A. That's fine. I'll do that.

12 MR. MECHAM: May I, Mr. Chairman?

13 COMMISSIONER CAMPBELL: Yes.

14 MR. MECHAM: We would mark this 14.

15 COMMISSIONER CAMPBELL: Cross Exhibit 14.

16 Q. (BY MR. MECHAM) Mr. Bennion, Cross
17 Exhibit 14 is supposed to be a depiction of the old
18 design as it was presented in the September 23rd,
19 2005 System Impact and Facility Study. And the next
20 page, as I understand it, is a depiction of the new
21 design.

22 Now, PacifiCorp only comes -- I'm looking
23 at the new design now which is the second page.

24 A. Okay.

25 Q. Are they only going to be on the 138 kV
26

1 line on its way to Horseshoe? I mean, where is the
2 equipment that you'll be maintaining?

3 A. On the new design, if you look in the
4 center, there's a square box that says "Desert Power"
5 and then to the right of it is a square box?

6 Q. Yes.

7 A. And then to the right of that you see a
8 138 kV and then there's a dot with three lines that
9 are a diagonal. That would represent a three-way
10 switch on a pole. And if you also look at the dotted
11 line above, that would say from that point to US Mag,
12 they are responsible for that point, and on the left
13 side of the dotted line Desert Power would be
14 responsible to that section of equipment.

15 So PacifiCorp in that particular design
16 from that point back to our Horseshoe Substation, if
17 we had to do any work on that side, and/or if Desert
18 Power had to do any work, they would go to that pole.
19 And let's say Desert Power had a requirement to go
20 off-line to do work on their substation, bus work and
21 whatnot. They would open up that switch, we would
22 tag it, and that would allow them to perform their
23 work without impacting US MagCorp and/or our
24 employees.

25 Q. But under the old design then on page 1,
26

1 where is -- now, I'm assuming this is still current
2 information, nothing has changed from this design?

3 A. From?

4 Q. I'm sorry, the second page.

5 A. The second page, that's the one I'm
6 working from.

7 Q. On the first page, I'm trying to figure
8 out where would the PacifiCorp employee be to
9 maintain the equipment, where the arrow is with
10 respect to the 138 kV? It says "138." Actually,
11 MagCorp. Maybe that's not it.

12 A. If you look at that, my understanding is
13 down at the -- you can see the CTG1 at the bottom
14 left of the page right in the center.

15 Q. Yes.

16 A. Follow the line over to the right, okay?

17 Q. I've got you.

18 A. If you've got that line right there, let's
19 say -- and if you move from that point to the US Mag,
20 that section of line is owned and operated by
21 PacifiCorp.

22 MR. BROCKBANK: Mr. Chairman, could we
23 just have one clarification? Are these diagrams, is
24 the first page diagram actually lifted out of the
25 draft System Impact Study and the second diagram

26

1 actually lifted out of the Revised Study, or are
2 these reconfigured?

3 MR. MECHAM: I found this document this
4 way.

5 MR. BROCKBANK: Okay. I just wanted to
6 clarify.

7 MR. MECHAM: Yeah, I don't know for sure.

8 MR. DARLING: I think that's what it is.

9 MR. BROCKBANK: Thank you.

10 Q. (BY MR. MECHAM) Now, under the old
11 design, couldn't the 13 miles still be isolated?

12 A. Yes, it could.

13 Q. So where is the safety issue?

14 A. On that particular one, the employee could
15 open up that switch, isolate the line and do their
16 work.

17 Now, on the other hand, if you want to add
18 to this reliability, if you have to do work on that
19 side of the switch north of it, you are now taking
20 out the two customers. And one of the things that
21 came out in Mr. Houston's testimony as well is the
22 ability to not degrade the reliability to an existing
23 customer on the system. So what you're doing by
24 changing to the new design, you're also addressing
25 reliability, operation and safety.

26

1 Q. So wasn't that a problem, though, in 2001
2 when Desert Power started?

3 A. In my opinion today, looking at how they
4 connected in 2001 is a concern to me, yes.

5 Q. So why wasn't it corrected then?

6 A. Safety rules change on an annual basis.
7 I'll give you an example at our company. You
8 continually look at your safety programs and what
9 works and what does not work. And as lessons are
10 learned in the field you make modifications to your
11 safety programs and so forth.

12 Since that period of time we have also had
13 a change in the FERC rules, which indicate you cannot
14 degrade the reliability to a customer to the area.
15 So in this particular case, in the safety side of it,
16 if we would have stayed with the original design, we
17 would been able to protect our employee, open the
18 switch and isolate. But then again, we would have to
19 ask the permission of a second customer for them to
20 go off-line and do the work.

21 Q. Wouldn't the reliability be exactly the
22 same? I mean, it was designed essentially this way.
23 If you did work on one it was going to take out
24 US Magnesium. So if you had left it that way you
25 weren't degrading it, it was staying just the same?

26

1 A. No, it was not. Because the way the
2 existing design was done, they also used the
3 substation bus at US Mag to put all of their PTCTs.
4 So if there was a fault on that particular bus, it
5 would take out US Mag and it would also take out
6 Desert Power.

7 Under the new design you are isolating
8 both of those customers so that if you have a fault
9 in the Desert Power substation site they will go
10 off-line and US Mag will not be impacted. So that's
11 another element that we would be doing in the new
12 design is separating the protection systems.

13 Q. But under the old one, and I'm looking on
14 page 1, can't you just open up the two switches at
15 Desert Power to do the work at Desert Power and still
16 operate US Mag?

17 A. No, we cannot. Because the way Desert
18 Power designed that, they built it right below the
19 transmission line and did an aerial tap and hardwired
20 right onto our system. And that is a concern that
21 happened back in that period of time.

22 Q. Is that depicted on page 1?

23 A. Well, what it doesn't show, it just shows
24 a single line, that there's an opportunity inside the
25 Desert Power substation, that they have ownership to
26

1 open up and isolate their site, we do not.

2 Q. So Desert Power can isolate?

3 A. Yes.

4 Q. And if you collaborated with Desert Power
5 couldn't you as well?

6 A. Yes. But if you're that employee, are you
7 going to put your life in somebody else's hands?

8 Q. Well, it depends on whether or not I trust
9 them.

10 A. That's why the change in design.

11 Q. Well, I think that's a -- well, we won't
12 go there. Luckily I get to continue to ask the
13 questions.

14 I'll move the admission of Cross Exhibit
15 14.

16 COMMISSIONER CAMPBELL: Any objections?

17 MR. PROCTOR: No objection.

18 MR. ELMONT: No objection.

19 COMMISSIONER CAMPBELL: All right. We'll
20 admit it.

21 Q. (BY MR. MECHAM) You mentioned in your
22 summary that the drop-dead time for this project was
23 May, is that what you said, or did I misunderstand?
24 It became clear that the online date of June 1 wasn't
25 going to occur as of May?

26

1 A. No. What I tried to say is if you think
2 about the way the process works, once a project is
3 ready to be delivered, that would move over to our
4 side of the business, we call it Construction
5 Services, and we did everything in our power to meet
6 the customer's in-service date, which they wanted to
7 be online by June 1. And that's what we did on our
8 part for the requirements in our scope of work.

9 Q. Well, on Thursday, and unfortunately I
10 don't have the finished transcript product, but on
11 Thursday in the Technical Conference you indicated
12 that in April it became clear to you that this
13 project wasn't going to meet its commercial operation
14 date.

15 MR. BROCKBANK: Can you refer where in the
16 draft transcript?

17 MR. MECHAM: Yeah, I can. In the draft
18 it's page 100 and it's in response to a question that
19 Ms. Coon -- and if it would help you, may I approach,
20 Mr. Chairman?

21 COMMISSIONER CAMPBELL: Go ahead.

22 Q. (BY MR. MECHAM) Ms. Coon asked, "What is
23 the latest date for which it remained genuinely
24 feasible and probable for PacifiCorp to meet the June
25 1st online date?"

26

1 "MR. BENNION: Well, for us it would have
2 been in the April time frame."

3 A. Okay. And what I was referring to at that
4 point in time walking through the process, we had
5 people negotiating scope of work. In January Desert
6 Power forwarded us money to complete or begin our
7 engineering design work which basically put us in a
8 position to have all the drawings and material
9 specifications ready to go.

10 Then in March when we received the
11 remaining money from Desert Power, which was
12 basically the go-ahead to say please purchase that
13 material, there in March and April we were able to
14 order the material, we could put resources on
15 building it.

16 The reason why I say that time, from our
17 perspective, for the items that remained in the scope
18 of work, that was the latest that we could juggle all
19 of our other items that were going on to meet that
20 particular date for Desert Power.

21 Then my opinion was, could that be done at
22 that point in time? And from what I knew about the
23 job site out at Desert Power and the elements that
24 they needed to put in place for us to install our
25 equipment was not going to happen.

26

1 Q. Thank you.

2 I want to talk for just a minute about the
3 redesign and its effect on the project after that.

4 There's been discussion previously about the
5 requirement for four poles, correct? I mean, the new
6 design at page 2 of Cross Exhibit 14 required four
7 poles and the prior design required one?

8 A. I'm not familiar with how many the first
9 design would have required.

10 Q. Okay. Who is?

11 A. Well, we would have to go back to the
12 folks that were in that scoping meeting, which would
13 include Kenneth Houston's people, Larry Soderquist
14 and Desert Power.

15 Q. Well, again, didn't you indicate, or maybe
16 it was the redesign you were talking about where
17 there were four poles required. So you're familiar
18 with the new one?

19 A. I'm familiar with the four poles at the
20 end. Because what happened in February is when I was
21 notified that we have this job that needs to be
22 online by June 1st, could we assist Desert Power in
23 finding this additional equipment? And at that point
24 in time we were asked to look for a circuit breaker,
25 transmission poles and a three-way switch.

26

1 That's when I became aware that they were
2 looking for that type of equipment. We found excess
3 material in one of our jobs up in Northern Utah that
4 had three poles that were available that could have
5 worked, but because it was one short I didn't
6 question whether they needed three, four, five
7 because I haven't been out to the site. You would
8 have to take into consideration what the geography
9 is, where the train tracks are, where the substations
10 sit, et cetera. But could they have done it with
11 three? We would have to go back to the design
12 engineers.

13 Q. There was a design for four?

14 A. As far as I understand, that's what the
15 final design was.

16 Q. So there was still a requirement to go out
17 for that fourth and do the engineering design and so
18 on? Well, the engineering design, the procurement
19 which had a long lead time, it was still required for
20 that one nevertheless, was it not?

21 A. It would have been required for that, yes.

22 Q. And at that point, whether there's three
23 available or not, as good as that was, it didn't do
24 the job?

25 A. No. But that was the responsibility of
26

1 Desert Power. They took on the ownership of
2 procuring those poles and that switch. So what we
3 did on our side was to see if we could assist and
4 accelerate that for them.

5 Q. So are you saying it would have been
6 better for them not to have taken that on?

7 A. Not necessarily because we would have both
8 been under the same constraints.

9 Q. You couldn't have beaten their lead time?

10 A. We work with the same vendors. All of our
11 vendors do the same exercise; first in, first out.

12 Q. But were it not for the redesign, that
13 fourth pole wouldn't have been necessary?

14 A. I can't speak to what the first design
15 would have done. I wasn't part of it and did not see
16 it.

17 Q. Well, I'm talking about the redesign. The
18 redesign required four poles and one was missing.
19 Had there not been --

20 A. Well, when you say one was missing,
21 PacifiCorp was able to find three poles in our
22 inventory to assist.

23 Q. I understand that. But not the fourth?

24 A. No.

25 Q. Thank you.

26

1 Now, the line that's being built or
2 affected in this interconnection, as I understand it,
3 it becomes -- it will be abandoned by PacifiCorp and
4 it will become the property of Desert Power?

5 A. I'm not familiar with that part of the
6 contract. I would have to defer that to Kenneth
7 Houston.

8 MR. MECHAM: Well, I'll play by those
9 rules, Mr. Chairman, if you would let me. Do you
10 know the answer to that, Mr. Houston?

11 MR. HOUSTON: Those terms would be defined
12 in the Interconnection Agreement we haven't signed
13 yet. But I believe you're correct, is that the
14 redesign, the change of ownership would be at that
15 three-way switch. So the facilities from that point
16 back to the Desert Power facility would be owned by
17 Desert Power.

18 MR. MECHAM: And does that line have to be
19 abandoned by PacifiCorp?

20 MR. HOUSTON: Yes.

21 MR. MECHAM: Is there a process for that?

22 MR. HOUSTON: I believe there's a State
23 regulatory process where we have to apply in every
24 state and get approval. I know there is to sell an
25 asset, I'm not sure about giving one away.

26

1 MR. MECHAM: Is it State or is it FERC?

2 MR. HOUSTON: I believe it's a State
3 requirement.

4 MR. MECHAM: And has there been any effort
5 to abandon it yet?

6 MR. HOUSTON: Not to my knowledge, no.

7 Q. (BY MR. MECHAM) Okay. Mr. Bennion, I
8 wanted to ask you. US Magnesium has been out at this
9 site since I think 1973, but in any event, sometime
10 quite a long time ago.

11 How long has that substation been
12 configured in a way that created safety concerns?
13 Was it configured "unsafely," put that in quotation
14 marks, before 2001 clear back to 1973, or did it
15 happen when Desert Power built its plant?

16 A. Well, I think there's a lot of questions
17 in what you were trying to ask me. If I start before
18 Desert Power made their interconnection, and I think
19 you said in 2001, fortunately for me, in part of my
20 career from 1984 to 1991 I was the area engineer in
21 our Park City Tooele District so I had an opportunity
22 to work in that area where I was responsible for the
23 transmission distribution system.

24 And during that time that I was the
25 engineer in that area, the safety concern at that

26

1 point in time was solely around the chloride gas that
2 was emitted into the air and resided on our
3 substation. As a result of that, it would create an
4 acid that would eat away at all the metals and
5 whatnot. And during that period of time we put in
6 practices to do regular maintenance on that site
7 because US Mag experienced a number of outages.

8 So we would go out and clean, which would
9 be a high-pressure sprayer, clean those off, put on
10 the wax so that we would reduce that. During that
11 period of time the employees were required to wear
12 different apparel than they normally would because of
13 the environment they were working in. That was one
14 safety concern. But if you know what you're working
15 with then you also can put around your working
16 practices to deal with it.

17 The second safety concern that would be
18 out there in any situation is the ability for the
19 company to isolate the point. When we owned that
20 substation in 2001, we were the owner/operator of the
21 bus work and the switches at that point. So that we
22 would open them, tag them, and the employees who did
23 that understood they had a clean environment to work
24 in.

25 Following 2001, when Desert Power came on
26

1 in 2001, and that was the same time we sold the
2 substation, the chlorine gas situation did not go
3 away because we still owned transmission poles out
4 there, but we had fewer times our employees had to
5 visit the site. But we still had the same safety
6 practices to go through.

7 When the Desert Power situation was
8 connected in 2001, I wasn't part of that project, I'm
9 only looking at how they were connected today. And
10 in looking at that part of it, by interjoining the
11 two customers, Desert Power and US Mag, the way the
12 protection system works out there as well, when
13 something goes wrong on either customer, both go
14 down. That is a concern because from that point
15 forward then we want to be able to control that.

16 So when Desert Power connected, I've got
17 some pictures here you can see an aerial tap, there
18 is no physical way without going up and just cutting
19 the wires free if we had a serious problem at that
20 point.

21 Q. Mr. Bennion, let me ask you a couple of
22 questions about the FCC license that you needed to
23 apply for.

24 MR. MECHAM: May I approach, Mr. Chairman?

25 COMMISSIONER CAMPBELL: Go ahead.

26

1 MR. MECHAM: This will be Cross Exhibit
2 15.

3 Q. (BY MR. MECHAM) Mr. Bennion, what I have
4 just given you is a response from PacifiCorp to
5 Desert Power Data Request 3.7 on the FCC license that
6 needed to be obtained for this project. I know you
7 addressed this in your summary somewhat, but the
8 question was basically, when did PacifiCorp apply for
9 the license? And in the end what it says is the
10 license was given July 25 and effective July 6th,
11 correct?

12 A. Correct.

13 Q. Why so late?

14 A. Why so late?

15 Q. Yeah.

16 A. Well, back to my original statement.

17 During the scope of work, PacifiCorp will not proceed
18 until the Company receives money from the customer
19 instead of putting us at risk. The first amount of
20 money received from Desert Power was in January,
21 which gave us permission to proceed with the
22 engineering design for their particular site. When
23 they signed the Engineering and Procurement Agreement
24 in late March and provided the remaining money in the
25 early part of April, we then began the process to
26

1 secure that particular path, but not until.

2 Q. And you mentioned that you were going to
3 use a temporary path. Well, it's not a temporary
4 path, but you were going to temporarily use US Mag's
5 path?

6 A. It was an interim solution. When, again,
7 we get a response that says the customer needs to be
8 online, when you bring the people together that deal
9 in operations, they're very creative. Now, the
10 unique thing here, one thing that we recommend or
11 found out, is when Utah Power owned Rowley Substation
12 we had a dedicated line that went from Rowley
13 Substation to the US Mag offices in Salt Lake to our
14 terminal site. That line was abandoned when we sold
15 that particular substation. One of our
16 communications engineers said, "Hey, is that line out
17 there and still available?"

18 They found out it was, they tested it, and
19 in the interim they would have used it at that point
20 in time until this license came through.

21 MR. MECHAM: Let me share with you, if I
22 could, Mr. Chairman, what I would like to mark as --
23 well, I move for the admission of Cross-Examination
24 Exhibit 15.

25 COMMISSIONER CAMPBELL: Any objections?

26

1 MR. PROCTOR: No objection.

2 MR. ELMONT: No objection.

3 COMMISSIONER CAMPBELL: It's admitted.

4 MR. MECHAM: Did I move for the admission
5 of 14 before then?

6 COMMISSIONER CAMPBELL: It's in the
7 record.

8 Q. (BY MR. MECHAM) The reason I give you
9 this, this is an e-mail from Phil Civello who was
10 working for Desert Power to Shannon Mahar at
11 PacifiCorp at a time when they were sorting through
12 potential online times. I'm kind of testing this
13 against when you figured you could still get this
14 thing online.

15 Mr. Civello tells Ms. Mahar, and mind you,
16 this is in April 20, 2006 e-mail, that essentially,
17 based on everything that had happened to that point,
18 he was looking at an online date -- and of course now
19 I can't find it -- oh, of October/November 2006. And
20 this is in April.

21 How does that square up with what was
22 happening on your side? This is his view, April
23 20th. "As of April 20th, the online date can't go
24 before October or November of '06." That's in the
25 second paragraph of the e-mail.

26

1 Just the second sentence just says, "For
2 sometime now it was understood that PC Engineering
3 and associated equipment deliverables constitute the
4 project's critical date which indicated a COD,
5 commercial operation date, of October/November 2006."

6 A. Well, actually I'm reading two things in
7 this e-mail. In the first paragraph it indicates
8 that "Our equipment will be delivered to the site by
9 May 17, 2006." That was our temporary solution in
10 order to meet the June 1st date.

11 In addition to that parallel we continued
12 with the orders that we placed for the permanent
13 solution. And in October/November our final metering
14 would have arrived and been replaced. And what we
15 would have used in May, our communications path would
16 have been secured, which you identified in July.

17 So that is a true statement for all the
18 new equipment that was required in the scope of work
19 that would comply with your agreement. Ahead of that
20 we did a parallel path for interim solution which we
21 were able to accomplish and have in place by May
22 17th.

23 Q. But that fourth pole still wasn't
24 available?

25 A. That fourth pole was Desert Power's
26

1 responsibility.

2 Q. Or if they hadn't stepped forward it would
3 have been PacifiCorp's, wouldn't it have been?

4 A. It would have. And then I would have gone
5 into a similar mode on is there any other option,
6 solution, et cetera, we could have done.

7 Q. But you had done that, hadn't you?

8 A. We searched for poles and we found the
9 three that were available.

10 Q. So if it were your responsibility, are you
11 saying you could have found a fourth?

12 A. We searched our entire inventory and those
13 were the three that we came up with that were not
14 dedicated to a project. So yes.

15 Q. So it wouldn't have mattered?

16 A. No.

17 Q. You would have been in the same situation,
18 correct?

19 A. On that particular piece, yes.

20 MR. MECHAM: Thank you. That's it.

21 COMMISSIONER CAMPBELL: Mr. Ginsberg?

22 MR. GINSBERG: I don't have any questions.

23 COMMISSIONER CAMPBELL: Mr. Proctor?

24 MR. PROCTOR: Yes, very quickly.

25 /

26

1 CROSS-EXAMINATION

2 BY MR. PROCTOR:

3 Q. Mr. Bennion, you testified that the
4 driving reasons for the redesign with the isolation
5 switches and moving, basically, responsibility for
6 maintenance as found on the second page of Cross
7 Exhibit 14 was reliability, operation and safety.
8 And that would be with respect to PacifiCorp's
9 system; is that correct?

10 A. That's correct. And also following the
11 FERC Guidelines as well.

12 Q. And those FERC Guidelines are applied to
13 PacifiCorp, correct?

14 A. Correct.

15 Q. And so it was PacifiCorp, in PacifiCorp's
16 interest to make that change to the interconnection,
17 correct?

18 A. Correct.

19 Q. So there was a delay, then, in the study
20 and also in the construction in order to provide the
21 betterment to PacifiCorp's system, correct?

22 A. I don't know if I would agree with that
23 particular comment because I heard two statements in
24 there. One is per the study process, which both
25 parties are working close together, they need to
26

1 understand the requirements and at the end of the
2 study they'll understand that piece. The
3 construction begins after you agree with that.

4 Q. Okay. But PacifiCorp certainly would have
5 been, their system would have been better with the
6 change in this particular interconnection design?

7 A. And the service to Desert Power and the
8 service to US Mag, yes.

9 Q. Now, you stated also that you were asked
10 in February to accelerate your work in order to
11 accommodate Desert Power's June 1, '06 online date,
12 correct?

13 A. What my request is, "Doug, we have a
14 project here that has a date to be online by June 1.
15 What can you do with the people in the operations
16 side to see that that happens?"

17 Q. Was that in connection with the October
18 2005 redesign of the interconnection?

19 A. No, that would not have been. At that
20 time we assigned a project manager that was becoming
21 aware of that particular project. It was only in
22 January when Desert Power signed an Engineering
23 Agreement to say, we want you to proceed, that we
24 would have started that.

25 Q. Was February the first time that you were
26

1 asked to accelerate your work on the October 2005
2 design?

3 A. That would have been, yes.

4 MR. PROCTOR: Thank you, Mr. Bennion.

5 COMMISSIONER CAMPBELL: Mr. Mecham, did
6 you mean to move for the admission of Cross Exhibit
7 16?

8 MR. MECHAM: I certainly do, and I would
9 move it now.

10 COMMISSIONER CAMPBELL: Any objections?

11 MR. PROCTOR: No objection.

12 MR. ELMONT: No objection.

13 COMMISSIONER CAMPBELL: We'll admit it.

14 Do you have any redirect?

15 MR. BROCKBANK: Just one question.

16 REDIRECT EXAMINATION

17 BY MR. BROCKBANK:

18 Q. Mr. Bennion, is it a true statement or is
19 it fair to say that PacifiCorp did everything within
20 its power, within reason, to try to assist Desert
21 Power in accelerating the project to procure
22 equipment and such?

23 A. Yes.

24 MR. BROCKBANK: That's all, Mr. Chairman.

25 COMMISSIONER CAMPBELL: Thank you, Mr.

26

1 Bennion.

2 Mr. Ginsberg?

3 MR. GINSBERG: Ms. Coon.

4 ANDREA COON,

5 called as a witness, being first duly sworn, was

6 examined and testified as follows:

7 COMMISSIONER CAMPBELL: Thank you.

8 Mr. Ginsberg?

9 DIRECT EXAMINATION

10 BY MR. GINSBERG:

11 Q. Would you state your name for the record?

12 A. Yes. My name is Andrea Coon.

13 Q. And you were lead in the responsibility

14 for this case?

15 A. Yes, I am.

16 Q. You prepared testimony that has been

17 marked DPU Exhibit 1 with two exhibits; is that

18 correct?

19 A. Yes.

20 Q. DPU Exhibit 2.1 is the timeline that was

21 handed out at the Technical Conference and it has

22 additions to it since then; is that right?

23 A. Yeah. That's actually Exhibit 1.1, it is

24 the timeline and it has been updated since it was

25 handed out at the Technical Conference to include

26

1 comments from Mr. Mecham.

2 Q. And do you have any corrections to make in
3 your testimony?

4 A. I do not.

5 Q. So if those questions were asked you those
6 would be the answers you would give?

7 A. Yes.

8 Q. And do you have a brief summary and any
9 additional comments you wish to provide?

10 A. I do. And in the interest of time, Mr.
11 Chairman, I will keep it very brief.

12 COMMISSIONER CAMPBELL: Thank you.

13 MS. COON: The Division has three main
14 points that we covered in the testimony, the first of
15 which is that we feel, outside a force majeure event,
16 extension of the contract should not be made due to
17 issues over changed avoided costs.

18 The second is that if the Commission does
19 find that a force majeure event did occur, the
20 Division believes that an extension of the online
21 date may be appropriate, but the contract does not
22 provide for an end date extension for any reason.

23 And the third point is that the Division
24 did not find sufficient evidence to support finding
25 of force majeure.

26

1 And the one additional thing that I would
2 like to point out, earlier this morning Mr. Darling
3 addressed my testimony and seemed to point to a lack
4 of emphasis on the phrase "of not limited to." The
5 Division would direct the Commission and the parties
6 to DPU Exhibit 1, lines 71 through 73 and lines 105
7 through 177, all of which directly relates to a
8 possible use of "not limited to" for a force majeure
9 determination.

10 Thank you, Mr. Chairman.

11 MR. GINSBERG: With that I ask for Exhibit
12 DPU 1, 1.1 and 1.2 to be admitted.

13 COMMISSIONER CAMPBELL: Are there any
14 objections?

15 MR. PROCTOR: No objections.

16 MR. BROCKBANK: No objection.

17 COMMISSIONER CAMPBELL: All right. We'll
18 admit it.

19 MR. GINSBERG: She's available for
20 cross-examination.

21 COMMISSIONER CAMPBELL: Mr. Mecham, shall
22 we go to you first?

23 MR. MECHAM: Sure.

24 CROSS-EXAMINATION

25 BY MR. MECHAM:

26

1 Q. Ms. Coon, how much experience does the
2 Division get with force majeure provisions?

3 A. Very little.

4 Q. You're probably pleased with that.

5 A. I have to admit I am.

6 Q. Have you ever had the experience
7 personally of dealing with a force majeure situation?

8 A. I have not.

9 Q. What did you use for your authority in
10 determining what would constitute a force majeure
11 event?

12 A. What did I use as my authority?

13 Q. Yeah.

14 A. Well, I did my best, not being an
15 attorney, to determine what the language of the
16 contract allowed and tried to find some manner in
17 which the event in question could be determined under
18 the terms of the contract to be a force majeure. So
19 basically the answer to your question was is I used
20 the best judgment that I had.

21 Q. Okay. Now, I'm a little curious. As you
22 deal with kind of your interpretation, I believe
23 beginning with line 67 through 75 or so.

24 A. Yes.

25 Q. And am I misreading your statement? The
26

1 way it looks to me, it isn't exclusively an act of
2 God or some natural force that is exclusively a force
3 majeure. It could be humanly caused, correct?

4 A. Correct.

5 Q. But not by a party?

6 A. The specific examples that are listed in
7 the contract, it did not appear to me that any of
8 those could be caused by a party. Granted, I think
9 there probably are companies in this world that are
10 large enough to cause a war, but I don't think either
11 of the two parties in question here are among them.

12 Q. So you're drawing it back to the examples?
13 In other words, the examples of what constitutes
14 force majeure, it has to fall in one of those?

15 A. No, that is not correct.

16 Q. Okay.

17 A. If you'll read further down I said,
18 "According to the strict reading of the PPA, the
19 event contemplated would seem to fall into a category
20 of is not limited to because it did not fit any
21 specific example that was listed." But the language
22 specifically states "is not limited to." So that's
23 the area that I worked to try and fit this under.

24 Q. Is not limited to acts of God?

25 A. Yes.

26

1 Q. In all of the examples?

2 A. Yes.

3 Q. So it's something other than that?

4 A. It can be, yes.

5 Q. And it can be humanly caused, but not by a
6 party?

7 A. No, no. The reference that I made to "not
8 caused by one party or the other" is the specific
9 list of examples that are contained within the
10 contract. I apologize. Apparently that language in
11 my testimony was somewhat confusing.

12 Q. Well, point to me. I see the "is not
13 limited to" language. But what else are you using?
14 What other language?

15 A. I'm sorry, I guess I don't understand your
16 question.

17 Q. Well, I'm trying to understand your
18 testimony. I'm looking at 13.1.

19 A. What line in particular, Mr. Mecham, are
20 you talking about?

21 Q. Well, I'm looking at the contract.

22 A. Okay. And you're looking at 13.1?

23 Q. And I'm trying to reconcile it with your
24 interpretation of force majeure.

25 A. Well, there is the list of examples here
26

1 which is act of God, fire, flood, et cetera, et
2 cetera, on down to action or inaction on behalf of a
3 public authority. And that is the list that I said
4 is beyond the reasonable control of the party and
5 apparently not caused by one party or the other.

6 Because like I said, I don't think that
7 fire, flood, storm or hostility, unless of course you
8 have something like a party setting fire to the
9 facility, I don't think any of those fall under a
10 category of caused by one party or the other.

11 I did not, however, say that the "is not
12 limited to" would necessarily have that same
13 qualification.

14 Q. So if one party in a contract acted in
15 such a way that the other party couldn't perform, is
16 that a force majeure under your interpretation?

17 A. It would depend upon whether that action
18 could fall into the bottom part of what I see as
19 13.1, which was that the list of three qualifications
20 that I discussed later in my testimony, all of which
21 seemed to have qualifications of whether or not an
22 event not listed would indeed be a force majeure.
23 And those are listed Roman Numeral (i), (ii) and
24 (iii).

25 Q. And so I know that you reached the
26

1 conclusion that -- it's not the redesign, but the
2 lead times on equipment that you say is not within
3 the control of either party? Is that the conclusion
4 you reached?

5 A. I don't believe that the lead time for the
6 items are in the control of either party, no.

7 Q. Was the redesign in the control of either
8 party?

9 A. Well, it wasn't within the control of
10 Desert Power.

11 Q. Okay.

12 A. Of course -- because PacifiCorp
13 Transmission is in charge of designing the
14 interconnection, of course it's within their control.
15 But that doesn't necessarily mean that a redesign
16 would fall under the three categories here, and I
17 explained that later in my testimony, Mr. Mecham.

18 Q. Well, I read it. I'm still trying to
19 understand it.

20 If a party to a contract were slow to act
21 which rendered it impossible for the other party to
22 act or perform under the contract, and I'm not giving
23 any more facts than that, is that a force majeure or
24 not?

25 A. I do not feel comfortable actually making
26

1 that judgment unless I saw specifics of the case
2 because it looks to me like under this clause the
3 "not limited to" provision is meant to be taken on a
4 case-by-case basis. And so without an actual case in
5 front of me, I wouldn't feel comfortable in making
6 that determination.

7 Q. So somehow I still, after reading your
8 testimony and listening to you, it sounds like you're
9 narrowing this through the funnel of these specific
10 things. You say but it's not limited to.

11 What does it mean above that where it
12 talks about "an event of force majeure means any
13 cause, any cause beyond the reasonable control of the
14 seller or PacifiCorp, that despite the exercise of
15 due diligence, such party is unable to prevent or
16 overcome"? What does that mean?

17 A. Well, I think what that means is what is
18 listed down below, only in more detail.

19 Q. Well, except that it says "by way of
20 example," but it's certainly not limited.

21 A. Yeah, it says "by way of example." But
22 then it says, "includes but is not limited to." And
23 then further down it says, "In each case is i, ii and
24 iii," which leads me to believe there are three
25 qualifying factors which determine whether or not

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1 something actually is a force majeure.

2 MR. ELMONT: I'm sorry, can I interrupt,
3 Mr. Chairman? Mr. Houston needs to head to the
4 airport. If we could excuse him, we would appreciate
5 that.

6 COMMISSIONER CAMPBELL: Yes, he is
7 excused.

8 MR. ELMONT: Thank you, Mr. Chairman.

9 MS. COON: And again, Mr. Mecham, I'm not
10 an attorney, but this is how I read it based on my
11 experience with contracts in the past.

12 Q. (BY MR. MECHAM) Well, thank you. I
13 appreciate that.

14 You heard the testimony of Mr. Houston
15 this morning, and one could come away from that
16 saying, you know, the schedule could be designed in
17 such a way that it's doomed from the outset the way
18 this process works. Is that a force majeure?

19 A. Again, I have -- I hesitate to make any
20 sort of determination like that unless I have
21 specific facts in front of me that I can analyze.

22 Q. Well, here's the fact. Two parties enter
23 into an agreement, an Interconnection Agreement, or
24 at least that's their intent, pursuant to a Power
25 Purchase Agreement.

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1 And following entering into a Power
2 Purchase Agreement they look to interconnect just as
3 occurred here. But from the outset, maybe
4 unbeknownst to both parties, I don't know, but let's
5 say unbeknownst to one, the schedule is impossible
6 from the beginning. It's out of their control. Is
7 it a force majeure or an uncontrollable event?

8 A. Does it fit all three of the
9 qualifications listed? Because if it doesn't then
10 the answer would have to be no.

11 Q. So somebody is penalized when they get
12 into a contract that is absolutely impossible to
13 perform under that scenario; is that correct?

14 A. Would you consider it a penalty if
15 somebody knowingly entered into a contract that they
16 were not able to perform under? I mean, whose at
17 fault there?

18 Q. What if they didn't know? What if the
19 previous experience had been that it was completely
20 possible to reach the online date, that was their
21 experience?

22 A. Well, I believe in a business setting the
23 unknown, Mr. Mecham, is considered risk. And, you
24 know, nothing is ever completely known in a business
25 environment. And so to put that out there as a force

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1 majeure that somebody signed a contract that it
2 actually wasn't possible for them to perform under, I
3 don't know that that would be a force majeure event.
4 It could have just been a matter of not enough
5 foresight into the workings of what they were getting
6 into.

7 Q. Is it a breach?

8 A. I couldn't say unless I saw the
9 particulars, Mr. Mecham.

10 Q. Well, but I gave you the particulars.

11 A. You gave me little enough information that
12 I can make a very general statement, but not specific
13 enough information for me to make that type of
14 determination.

15 MR. GINSBERG: Also, she didn't address
16 whether under the terms of this arrangement there's a
17 breach or no breach. So I think that goes a little
18 bit beyond --

19 MR. MECHAM: That's all right. You're
20 right. I'll go --

21 COMMISSIONER CAMPBELL: Withdraw the
22 question and go on to your next question.

23 MR. MECHAM: I don't want to withdraw the
24 question, her answer was interesting.

25 Q. (BY MR. MECHAM) But in any event, what
26

1 you're telling me, though, is that this is your first
2 round looking at a force majeure situation?

3 A. Yes. And I'm really hoping my last.

4 Q. Okay. Let me ask you this. Does the
5 public interest include -- I'm not even going to go
6 there.

7 Thank you, Mr. Chairman.

8 COMMISSIONER CAMPBELL: Thank you.

9 Mr. Elmont?

10 MR. ELMONT: Thank you, Mr. Chairman.

11 CROSS-EXAMINATION

12 BY MR. ELMONT:

13 Q. I just have one question for Ms. Coon in
14 light of the discussion she was just having with Mr.
15 Mecham, that is, to refer to your testimony, lines 66
16 and 67, and then carrying on to the next page on line
17 68 and 69.

18 A. Yes.

19 Q. I've got to tell you, you said exactly
20 what I would say as a lawyer, which is to say, what
21 normally comes to mind when you're talking about a
22 force majeure are these kinds of things. And you've
23 just discussed with Mr. Mecham what is or isn't the
24 first time dealing with this kind of stuff.

25 What made you determine what would

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1 normally come to mind? Is that your specific thing
2 or is that presenting the Division's position that's
3 broader than your own?

4 A. I actually think it's more of my specific
5 understanding. When I hear the term of "force
6 majeure," what usually comes to mind is an act of
7 God, some sort of natural occurrence, some sort of
8 civil strife that's beyond the control of the parties
9 and possibly outside even of their scope.

10 Q. So you do have some experience with the
11 meaning of the term? That's not what you meant,
12 then, when you said this is the first time you've
13 dealt with a force majeure?

14 A. Well, the clause of force majeure is in
15 every contract that I deal with. And I deal with, as
16 Mr. Brockbank can tell you, several on a regular
17 basis and have been the Division's lead witness on
18 all contract matters for a couple of years now. So
19 I'm not unfamiliar with the term. I've just never
20 had to deal with any specific instance in which a
21 claim has been made.

22 Q. As to whether it constituted a force
23 majeure under the contract?

24 A. Correct.

25 Q. But you're very familiar, it sounds like,

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1 with the concept it is entered in normal usage in a
2 contract?

3 A. Yes.

4 MR. ELMONT: Thank you.

5 COMMISSIONER CAMPBELL: Thank you for that
6 redirect.

7 Mr. Proctor?

8 MR. PROCTOR: I have many questions, but I
9 will not ask any of them.

10 MR. GINSBERG: Well, with that, I don't
11 think I have any redirect.

12 COMMISSIONER CAMPBELL: Just a minute. We
13 don't either. So thank you, Ms. Coon.

14 MS. COON: Thanks, Mr. Chairman.

15 COMMISSIONER CAMPBELL: Let's take an
16 eight-minute break for you to prepare your final
17 remarks. Mr. Ginsberg and Mr. Proctor, I don't know
18 if you were planning to make any final comments or
19 not?

20 MR. GINSBERG: They'll be short.

21 MR. PROCTOR: Very short, shorter than
22 Mike's.

23 COMMISSIONER CAMPBELL: Five minutes for
24 each of you?

25 MR. PROCTOR: Yes.

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1 COMMISSIONER CAMPBELL: At the most?

2 MR. PROCTOR: At the most.

3 COMMISSIONER CAMPBELL: All right. Let's
4 break until 10 after.

5 (Recess taken.)

6 COMMISSIONER CAMPBELL: Let's go back on
7 the record.

8 After Commissioner Boyer asks some legal
9 questions, I think we'll just go to concluding
10 statements. I'm going to start with the Committee,
11 then the Division, then the Utility and then Desert
12 Power.

13 Commissioner Boyer?

14 COMMISSIONER BOYER: Thank you, Mr. Chair.

15 And I guess I'm going to address this
16 first question, I'm going to give a little background
17 and address it to Mr. Mecham, but I would appreciate
18 hearing from the other lawyers in the house if they
19 choose to respond.

20 Just cutting to the chase, I'm having
21 trouble understanding the applicability of the force
22 majeure provision in this case. Based on my
23 experience, this is a fairly typical force majeure
24 provision, defining force majeure as a cause beyond
25 the reasonable control of the seller or PacifiCorp,

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1 that is, either party, and then it parades out the
2 horribles, the examples such as wars, storms and
3 floods and those sorts of things. Never does it
4 mention the action or inaction of any party to the
5 contract.

6 And all of the testimony we've been
7 hearing all day long deals with what PacifiCorp did
8 or didn't do or should have done or Desert Power did
9 or didn't do or should have done. For example,
10 whether PacifiCorp should have changed the design of
11 the interconnection or not? Or it should have done
12 it at that point in time? Whether or not PacifiCorp
13 should have used the 120-day timeline rather than
14 something longer? Whether Desert Power should have
15 applied for interconnection at the time they were
16 negotiating their PPA? Whether Desert Power should
17 have secured their equipment sooner, firmed up their
18 financing sooner, firmed up natural gas service
19 requirements?

20 All these things are volitional acts
21 within the control of each party. You know, there
22 may be some other contractual concepts that might
23 work in this case, such as anticipatory breach, which
24 might under some circumstances excuse subsequent
25 behavior or performance. You might have a mutual

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1 mistake issue. You might have an impossibility of
2 performance issue, something like that. But I just
3 don't understand how force majeure applies to this
4 case, this contract and these facts that we've been
5 discussing.

6 Mr. Mecham, enlighten me.

7 MR. MECHAM: Well, the first part of 13.1
8 indicates that anything that is beyond the reasonable
9 control of the seller or PacifiCorp essentially
10 establishes an event of force majeure. And to read
11 it in a way that somehow narrows that when you're
12 using examples negates that whole portion of that
13 part of the provision.

14 And when you talk about the facts in this
15 case --

16 COMMISSIONER BOYER: Just a moment, Mr.
17 Mecham. Aren't those examples illustrative of the
18 types of things? I mean, it didn't list tsunami.
19 That would also perhaps be a force majeure.

20 MR. MECHAM: When it says "includes but is
21 not limited to" or "by way of example," I mean you
22 don't --

23 COMMISSIONER BOYER: Well, I've just given
24 you an example of something that's not listed there
25 but is of the same nature. It's an act beyond the

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1 control of the parties. Parties can't start
2 tsunamis.

3 MR. MECHAM: Clearly acts of God have been
4 events of force majeure forever. But the fact of the
5 matter is, if you look at the facts of this case,
6 there are events that are beyond the control perhaps
7 of both parties, and certainly Desert Power following
8 redesign. So you don't -- acts of God are not the
9 only things that are force majeure, forces majeure.
10 They can be humanly caused. To do otherwise -- well,
11 as I say, you basically negate that whole provision.

12 And you typically would take the facts of
13 the case and apply those facts to a situation like --
14 well, to this provision and determine whether or not
15 a party could control that. Can a party control the
16 lead time of a pole? Our whole purpose here -- well,
17 and PacifiCorp's whole purpose is to show that
18 somehow there were delays that Desert Power caused by
19 not submitting an application for interconnection
20 that, okay, everything gets laid at their feet for
21 that.

22 But when the facts continue and you can
23 still come online and then something else occurs,
24 like this redesign that has long lead times, when you
25 apply those facts to the force majeure language here,

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1 Desert Power can't control -- they couldn't control
2 the redesign, they couldn't control the lead times,
3 and yet up to that point they could have made the
4 June 1st, '06 online time.

5 So if what you're saying is that somehow
6 this provision only applies in cases that are given
7 by way of example, which are by way of example and
8 are not limited to those examples, it negates the
9 whole purpose of that provision.

10 And my recollection of the negotiation of
11 this contract is, I don't know what the start point
12 is for PacifiCorp's contract. I couldn't tell you
13 each word that was changed, but I remember that we
14 actually did negotiate different words, at least I
15 believe we did. That's my recollection. And the
16 common law may have focused hard on acts of God as
17 the only way to evoke the force majeure language, but
18 this isn't the common law. There are cases,
19 subsequent cases that indicate that contract language
20 can control, facts of situations can control where
21 events get beyond a party. I just -- I frankly don't
22 -- well, obviously I don't share your concern because
23 I believe this fits squarely within the provision 13.

24 COMMISSIONER BOYER: Thank you. Would
25 anyone else like to discuss my --

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1 MR. ELMONT: I would, Commissioner Boyer.

2 I don't want to step on anyone else's toes.

3 MR. PROCTOR: Go ahead.

4 MR. ELMONT: I view it exactly as you do.

5 COMMISSIONER BOYER: Well, I'm not stating
6 a view here, I'm asking.

7 MR. ELMONT: I apologize.

8 COMMISSIONER BOYER: It may have looked
9 like I was advocating, but I was really just asking
10 my questions.

11 MR. ELMONT: I put it ineloquently. The
12 question that you raised I would answer as saying,
13 yes, this is not a force majeure event.

14 Mr. Darling referenced something earlier
15 on the stand that I actually want to give a little
16 bit of sympathy to and, that is, talking to some
17 Federal litigation, and I'm not sure, I think he was
18 talking about FERC cases maybe. But I do think it
19 matters.

20 It does take you a little bit out of the
21 normal common law regime when you say "include but
22 not be limited to." I think if you don't say "not
23 limited to," if you only say "include," then you are
24 very squarely in the ejusdem generis doctrine where
25 in the context of giving a list the general words are

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1 controlled by the specific examples and they very
2 clearly have to be right exactly that same type.

3 I think you would find cases, frankly,
4 that would say when you throw in "is not limited to"
5 you do get a little bit more flexibility. But it
6 doesn't open up the entire horizon and we're not
7 talking about merely acts of God. I mean, that is
8 really a non sequitur to the issue here.

9 We've got examples of civil strife and
10 strikes and labor disturbances. Those are clearly
11 human issues. The real question is, can a force
12 majeure event be one caused by another party. This
13 case, to me, looks like, feels like, smells like, and
14 when you listen to the testimony of Desert Power,
15 they're doing everything short of calling it a
16 breach. That's where they're heading here. They're
17 saying PacifiCorp caused the problem and it should
18 excuse them for their performance.

19 But if you look through the remainder of
20 the contract, the force majeure section here, and you
21 do have to read the contract as a whole, you have to
22 give effect to all provisions, you have to read it
23 reasonably and not make any meaning less as a matter
24 of law . You have some stuff as you go down into
25 Section 13.2, for example, "if either party is unable
26

1 to perform by virtue of the force majeure event, both
2 parties shall be excused."

3 They want to read the contract as saying
4 the party that foists on the other the inability to
5 perform also gets off the hook. If you read 13.2.1
6 it says, "The nonperforming party will give notice to
7 the other of the force majeure event." They're going
8 to say this is what you did to me? You're going to
9 give them written notice describing the particulars
10 of the occurrence, how you, as the other party to the
11 contract, caused me to not be able to perform it?
12 That seems like a meaningless provision if it was
13 caused by the other party.

14 13.5, "PacifiCorp gets to terminate the
15 agreement if seller fails to remedy the inability to
16 perform due to the force majeure event." PacifiCorp
17 gets to cause the force majeure and then escape any
18 consequences thereby by terminating the contract
19 after a period of time if it can't be cured? That
20 just doesn't jive. That kind of language is not
21 consistent with the force majeure being caused by one
22 of the other parties, nor is it within the realm of
23 any force majeure provision that I'm aware of to say
24 that it can be caused by the other party.

25 So take it outside the normal acts of God

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1 kind of stuff, maybe give some more flexibility in
2 terms of the list and what it means for something to
3 be not limited to that specific list, fine. But you
4 can't go all the way to say it's caused by the other
5 party.

6 Because here's the problem that that
7 brings. It allows the ability of Desert Power to be
8 excused from its performance without proving the
9 breach, without proving that there is a
10 responsibility by PacifiCorp. It takes away a
11 threshold responsibility on their part to demonstrate
12 that they deserve to be let off the hook by virtue of
13 us. They just say, "Hey, it was out of our control."
14 I think we're mixing concepts here and this is
15 clearly not a force majeure case.

16 COMMISSIONER BOYER: Mr. Proctor or Mr.
17 Ginsberg, would you like to add something?

18 MR. PROCTOR: I will try, Commissioner
19 Boyer.

20 And you have to understand that the
21 Committee of Consumer Services is in an odd position
22 in this particular case because we're concerned about
23 the end result of your resolution and the contract
24 itself as they go online and provide energy. But let
25 me tell you the way that we analyzed this particular
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1 dispute.

2 One, we don't believe it is a force
3 majeure issue. And for that matter, we don't believe
4 it's a breach issue either. It's not a force majeure
5 because the plain terms of the contract,
6 notwithstanding Counselor Coon's assessment, in order
7 to have a force majeure under the terms of this
8 agreement, both the seller and the buyer, PacifiCorp,
9 it must be beyond their both reasonable control. The
10 balance of the contract of that section talks in
11 terms of it has to be an event, the exercise of --
12 with the exercise of due diligence, the party is
13 unable to overcome.

14 No force majeure provision, no contract
15 requires that Desert Power, for example, exercise due
16 diligence to overcome another party's breach. So
17 that would say that it has to be outside of the
18 control of both parties.

19 In Section 13.2 it says, "If the party is
20 rendered wholly or in part -- if a party is rendered
21 wholly or in part unable to perform its obligation
22 because of a force majeure, both parties shall be
23 excused from whatever performance is affected by the
24 event of force majeure."

25 So again, if it's within the control of
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1 PacifiCorp, for example, that provision doesn't apply
2 because they're in breach.

3 13.2.1 through 3 has equal language that
4 discusses nonperforming parties, suspension of
5 performance, and it's no longer and no greater scope
6 than is reasonably required to buy the force majeure.
7 And that certainly would not be applicable when one
8 party has acted or failed to act in a manner that has
9 caused a failure to perform.

10 And finally, 13.3 speaks about "no
11 obligations of either party which arose before the
12 force majeure causing suspension of performance shall
13 be excused." In this case prior breaches are not
14 excused.

15 So if there was a prior breach, for
16 example, on the part of both parties that goes back
17 to early 2005, either Desert Power's failure to
18 request an Interconnection Study in a timely manner
19 or PacifiCorp's conclusion that the study was
20 unrealistic and not achievable, but never saying
21 anything about it, two opposing breaches. Neither of
22 those are excused by the force majeure. So based
23 upon a plain reading, the plain language of the
24 Section 13 of the contract it's not a force majeure
25 case.

26

1 You've got two parties claiming a breach.
2 The question in my judgment is not whether or not
3 it's a force majeure or a breach because I think if
4 the Commission were to do that then you raise the
5 question of whether or not this Commission has the
6 jurisdiction to make such a finding.

7 I think the way that the Commission can
8 review this dispute is in terms of this is a Power
9 Purchase Agreement entered into by two parties in a
10 regulated utility environment. The terms of the
11 contract itself require these parties to continue to
12 work toward an online commercial operation date. It
13 has provision both in Section 8.1 to cover the events
14 where they couldn't come online in a timely way that
15 compensates PacifiCorp in this case for that event,
16 and ultimately has a date by which there has to be
17 momentum progress towards completion or the contract
18 is over.

19 Section 8.2 provides for nonperformance
20 after they're online, by its plain terms it does. It
21 doesn't apply at this point in time. And then the
22 contract, the parties agree to submit these types of
23 concerns to the Commission. And that is, there has
24 been some mistakes made mutually. There are
25 allegations about control over particular elements of

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1 performance and delays in performance, but those can
2 be resolved in this jurisdiction.

3 A plain force majeure dispute, in my
4 judgment, and based upon some decisions from the Utah
5 Supreme Court, Garkane Power Association being the
6 most obvious, would belong in District Court. Just
7 because this is a utility doesn't mean that it is an
8 issue related to the Commission's jurisdiction. But
9 this contract, as far as these types of construction
10 delays, and I would call them mistakes of
11 communication more than anything, those plainly do
12 belong here.

13 So in the judgment of the Committee, it is
14 not a force majeure, it is not a breach, it is an
15 issue that the Commission must take into account and
16 resolve in order to perform its obligation to provide
17 sufficient, safe, reliable, properly priced electric
18 service to customers, our constituents.

19 COMMISSIONER BOYER: Thank you.

20 Mr. Ginsberg, did you want to add anything
21 to the discussion?

22 MR. GINSBERG: No, I don't think so.

23 COMMISSIONER BOYER: Okay. I have another
24 question now.

25 MR. MECHAM: Commissioner Boyer, may I
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1 respond to two things, one that Mr. Proctor said?

2 COMMISSIONER BOYER: Go ahead, Mr. Mecham.

3 MR. MECHAM: I disagree with Mr. Proctor
4 with respect to the meaning of the second line of
5 13.1 where he says it's both seller and PacifiCorp.
6 It clearly says "seller or PacifiCorp." "Control of
7 the seller or." I mean, it can be one or the other,
8 it's not both together.

9 And I guess the other thing I would remind
10 the Commission of, Mr. Elmont talked about giving
11 notice, giving notice to the other party of something
12 they already know. But don't lose sight of the fact
13 that PacifiCorp in this instance, it's at least three
14 entities, but two that we were dealing with,
15 PacifiCorp Transmission and PacifiCorp Merchant. And
16 I don't know all that goes on between them, but I
17 know there's supposed to be a Chinese wall, at least
18 as to some issues.

19 And I don't believe, I could be wrong, but
20 I don't believe that PacifiCorp Merchant was aware of
21 what was happening at PacifiCorp Transmission. So
22 for us to follow the notice provisions of this
23 contract by giving notice to PacifiCorp Merchant in
24 Oregon, I think that they were alerted to things, I
25 guess they can speak for themselves. But again, I

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1 would say we're talking about two entities and I
2 don't see anything inconsistent with the notice
3 provision of provision 13 and our take, our position
4 on events being beyond our control.

5 COMMISSIONER BOYER: Thank you, Mr.
6 Mecham.

7 The last question I have, I suppose if you
8 wish you can discuss it in your closing arguments
9 because we are running out of time. But my question
10 is, what are the range of alternative solutions we
11 have in our quiver here as a Commission in the event
12 we find that an event of force majeure exists or it
13 doesn't? The parties have asked for different kinds
14 of relief.

15 We've all heard the evidence now with the
16 discussion and I would like some advice on that. Do
17 we void the contract? Do we amend the contract? Do
18 we do nothing? You know, those sorts of things.

19 MR. BROCKBANK: Commissioner Boyer, I can
20 kick that off from the Company's perspective.

21 We've been very clear from the very
22 beginning what we would be seeking. And first of
23 all, that would be a finding that there has not been
24 a force majeure, in which case Desert Power would
25 clearly be in breach. PacifiCorp issued a demand
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1 letter in July of this year seeking assurances for
2 certain items. If there is no force majeure, Desert
3 Power has failed to provide those assurances and
4 PacifiCorp would hold Desert Power in breach and
5 would terminate the contract.

6 If the Commission finds that there were
7 some kind of a force majeure, PacifiCorp would ask
8 the Commission to define the scope of it so that we
9 would be able to address whether it's still going,
10 whether it's ongoing, if it was a three or four-month
11 event of force majeure.

12 And lastly, PacifiCorp would like a
13 finding, as we've requested, and we believe that the
14 Commission can do this. In some degree it's a moot
15 point if the Commission decides that there is not a
16 force majeure, but the Company would like to know and
17 have this Commission decide that if there were an
18 amendment, if the Company and Desert Power executed
19 an amendment and brought it before the Commission,
20 whereby the scheduled commercial operation date would
21 be accelerated or pushed forward to June 1 of '07,
22 the Company would request the Commission to find that
23 the Stipulation avoided costs go away if the project
24 is not in line on January 21, 2007. That's what the
25 Company is looking for.

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1 COMMISSIONER BOYER: Thank you.

2 MR. MECHAM: Well, first of all, as Mr.
3 Darling pointed out this morning, Desert Power,
4 indeed, does want the Commission to find an event of
5 force majeure. These events have been, certainly as
6 of the redesign, the events have been out of their
7 control and they have cascaded to a point where the
8 project has ground to a halt. And there is no other
9 way to revive this project than with a quick solution
10 in favor of Desert Power in this matter.

11 And in favor of Desert Power means that
12 the Commission would extend the online date to June
13 1st of '07. And I think it's been amply clear, both
14 from Mr. Darling, Mr. Swenson and Mr. Miller of MMC
15 that if the Stipulation pricing can't hold beyond
16 June 1st, in the event -- and it is possible. I
17 mean, there's still a great deal of hope that this
18 project can be online by June 1st of '07. But if
19 it's not, it is completely uneconomic to take the
20 type of rates that Mr. Griswold has presented as the
21 avoided cost post June 1st. So if there is
22 substantial completion, whatever it may be, but there
23 has to be some sort of assurance or there is no
24 project.

25 So it's an extension of the online date,
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1 no cliff as of the 2nd of June, with the
2 understanding that there still is a possibility of
3 getting the thing online by then, but also
4 understanding you've seen the evidence in this case
5 with a term sheet of June 21st. If we had been able
6 to resolve it then two and-a-half months ago we
7 wouldn't have our backs up against the wall with this
8 June 1, but that's where we are. And then an
9 extension of the contract for an additional year.

10 Well, and you know, actually I forgot to
11 say, if the Commission concludes, wrongly, in my
12 opinion, that there is no force majeure, this
13 Commission has general powers and jurisdiction;
14 public interest, public convenience and necessity. I
15 think there are public interest considerations that
16 the Commission can take to conclude that this plant
17 still is in the public interest.

18 It's factored already in the future of
19 requirements of PacifiCorp. It's well on its way.
20 It has already provided power in this state. It
21 provides at least some smidgin of diversity of
22 resources in this state which we don't really have.
23 It presents the possibility of maybe a little bit of
24 competition. It is, from an economic development
25 standpoint, I think quite important, and it's located
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1 geographically well at the end of a radial line, as
2 everyone has already said, next to US Magnesium that
3 has a big load, next to a titanium plant that's about
4 to be built there, and in a corridor that the county
5 of Tooele wants to push forward.

6 So I think there are public interest
7 considerations beyond the finding of force majeure
8 that the Commission could use in order to enable this
9 contract to go forward.

10 MR. GINSBERG: Can I make our suggestion?
11 Our suggestion is that the Commission follow the
12 terms of the contract. If that means there was no
13 force majeure then that's what it means. If it means
14 that it is, then to consider what the contract would
15 require as a result of that.

16 And one thing I think we brought up to
17 keep in mind when you're deciding what to do in this
18 contract is that we don't see where a force majeure
19 event changes the terms of the contract at all, but
20 the end date would remain the same end date that
21 originally was agreed to in the contract. It is a
22 19-year contract. It doesn't change the term of the
23 contract at all. The force majeure, if it did occur,
24 could affect the online date.

25 MR. PROCTOR: Mr. Chairman, this will be
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1 my closing argument.

2 Section 21 of the Power Purchase
3 Agreement, in calling for mediation or this
4 Commission's action, permits this Commission to
5 interpret or enforce, and/or enforce provisions of
6 this agreement. It's in the middle of that section.
7 Both of these parties have requested that you do just
8 that.

9 I think PacifiCorp's conclusion that if
10 there's no force majeure then that translates into a
11 breach by Desert Power, which means that the contract
12 may be terminated, just simply doesn't follow from
13 the evidence that has been presented. Whether or not
14 there's a force majeure and whether or not there's a
15 breach, this Commission has been asked to interpret
16 and/or enforce provisions of the agreement.

17 I don't believe that you even have to get
18 to this cliff date of June 2nd, 2007 in order to do
19 that. That's not an issue before the Commission. If
20 this contract is dead, the contract, not the project,
21 but the contract is dead, then you have to determine
22 what would be the appropriate avoided cost. Does the
23 Stipulation carry on and apply to a new agreement or
24 is it the calculated avoided cost according to this
25 Commission 's October 2005 Order?

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1 But this contract is not dead because
2 they've placed it before you for interpretation and
3 enforcement. I think what this Commission can do
4 would be to issue an order that will amend the
5 contract to the extent necessary to provide
6 resolution to the delays. And that's delays on
7 PacifiCorp's part as well as Desert Power because
8 they are mutually responsible for many of the
9 problems that have come -- that we're now facing and
10 about which evidence has been presented.

11 This Commission could then craft an
12 appropriate schedule that the parties are expected to
13 comply with. Now, you do have to pay attention to
14 the fact that there are certain claims that delays
15 caused the project to stop and the Commission can
16 determine whether or not the duration of that
17 stoppage is appropriate. But I don't believe that
18 you need to get to an ultimate issue of if there's a
19 breach and PacifiCorp may terminate the contract at
20 this point. In fact, I don't think that would be
21 appropriate.

22 This is the Committee of Consumer's
23 concern. We represent residential and small
24 commercial consumers. It is our view that as to this
25 dispute, the contract dispute, however resolved, the
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1 ratepayers should be held harmless from any costs or
2 expenses for the legal proceedings and for any
3 consequences from the delays to whomever the
4 Commission may assign responsibility for that delay
5 or attribute the delay, and held harmless from any
6 remedy that the Commission may order these parties to
7 provide in order to complete the project.

8 The Committee of Consumer Services on
9 behalf of the consumers, the ratepayers, agreed with
10 the Stipulation that covered the original megawatt
11 limit and provided a certain price. The Committee
12 also stipulated to the appropriateness of this
13 particular contract. That set a price. That set a
14 terms and conditions when the consumers were expected
15 to receive generation and also to pay for it. The
16 consumers should be assured of the benefit of their
17 bargain.

18 So what we are asking is if in the event
19 there are additional costs over and above those that
20 the contract now places on the ratepayers, those
21 should be borne by the responsible party. That could
22 be Desert Power, that could be PacifiCorp.

23 That is the position of the Committee of
24 Consumer Services. That's why we're here. I hope
25 we've been helpful as to the other issues, but this
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1 is our primary reason for being here.

2 COMMISSIONER CAMPBELL: Thank you for that
3 statement.

4 Mr. Ginsberg, do you have a final
5 statement?

6 I think in the spirit of what Mr. Proctor
7 has made, hopefully this discussion has shortened our
8 final statements. I think no is okay.

9 MR. GINSBERG: No.

10 MR. ELMONT: If I could, Mr. Chairman? In
11 fact, I think if I could just respond briefly to one
12 thing Mr. Proctor said and one thing that Mr. Mecham
13 said, that would eliminate my portion of our close
14 and Mr. Brockbank can do it, and I will act very
15 quickly.

16 I'm not sure I fully gathered everything
17 that Mr. Proctor said, but one thing that I did
18 gather, I believe, is that even in the absence of
19 finding of force majeure and short of finding a
20 breach, you can still somehow determine
21 responsibility for delay. And that absolutely is
22 inconsistent with the Company's view of this case.

23 It has specific provisions within Schedule
24 38, within its OATT procedures, and it has
25 contractual responsibilities within this case. The
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1 only one of those that could even remotely apply in
2 this case is from the Study Agreement wherein the
3 Company made the commitment that it would use
4 commercially reasonable efforts to try to complete
5 the studies. It didn't say what would happen after
6 the studies and it didn't promise it would complete
7 the studies within 120 days, it said it would use
8 commercially reasonable efforts subject to the
9 availability of its resources.

10 When Desert Power's witnesses were on the
11 stand they were given the opportunity to state that
12 PacifiCorp had failed to use commercially reasonable
13 efforts or that it had failed in other respects under
14 some contract provision and they didn't do so with
15 the specific opportunity to do so. That is the end
16 of the story as far as the Company is concerned under
17 its obligations for any sort of timing. There's no
18 nebulous timing thing that exists outside the law,
19 the tariffs, the contract.

20 And I gathered, at least, that Mr. Proctor
21 was saying somehow the Commission could sort of
22 ascribe responsibility for delays. They don't --
23 there's no duty outside the scope of those
24 provisions. So that's one point.

25 The second one is to Mr. Mecham, and
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1 that's the notion of even if the Commission
2 determines not to address or doesn't find force
3 majeure, that it still could find the public interest
4 being served by allowing the project to go forward,
5 extending the date, and not making a pricing
6 determination as to what happens in the very
7 reasonable circumstance, the very reasonable
8 contingency at this late hour that that plant is not
9 in commercial operation as of June 1 of '07.

10 Public interest determinations by the
11 Commission necessarily have to include pricing. I
12 mean, really, if you don't include the pricing
13 aspects, what they're saying is is they want you to
14 find it's in the public interest to have this power
15 at any cost. If they're not saying that, if the
16 Commission is not willing to do that, then it has to
17 consider pricing.

18 And what I see is the insistence on not
19 having a Commission Order now as to what would happen
20 in the very real prospect of the thing not being
21 ready on June 1, '07, if it weren't real the lenders
22 wouldn't consider it a big enough risk to not give
23 them the financing, frankly. What I see is an
24 attempt by Desert Power to shift the risk to the
25 Company and the ratepayers in a circumstance where
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1 there was no force majeure, in a circumstance where
2 there is no indication by other witnesses that the
3 Company was in breach.

4 Nonetheless, don't answer that now, leave
5 open the prospect that they still might get
6 Stipulation pricing after the expiration of the
7 Stipulation date. We just don't believe that's
8 appropriate, we don't believe that's acceptable, and
9 we don't think that the extension should take place
10 in the absence of a force majeure finding. But even
11 if the extension takes place, we think it's important
12 that the Commission address as part of that public
13 interest what the pricing ought to be.

14 Thank you. That's all I have for my part
15 of the closing.

16 COMMISSIONER CAMPBELL: Mr. Brockbank?

17 MR. BROCKBANK: I would like to take just
18 a few minutes. I will be very brief.

19 COMMISSIONER CAMPBELL: You've got, at
20 maximum, five.

21 MR. BROCKBANK: Okay. Thank you.

22 I'm going to speak from over here. I'll
23 try and speak loud. I just want to -- Mr. Elmont is
24 passing out a demonstrative exhibit that shows a
25 timeline here. And I'm just going to refer to the

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1 timeline very briefly and show where we believe
2 Desert Power has asked us to bring this
3 interconnection process in.

4 Here is, right here on June of '04, and
5 this is being demarcated by my green line, this is
6 where the commercial negotiations begin on the Power
7 Purchase Agreement. March of '07 is 633 days after
8 Desert Power made its initial interconnection
9 request. That is the average amount of time
10 currently in PacifiCorp's queue for how long it
11 takes.

12 In an effort to assist Desert Power, and
13 bending over backwards to help them come online under
14 their expedited schedule, PacifiCorp received a
15 request in June of '05 that became -- that the
16 request became finalized. That's when the data was
17 sufficient in their application for interconnection,
18 and they had a requested online date of January of
19 '06.

20 The green numbers here, and I don't know
21 if everybody can see this, the green numbers are
22 basically -- the green lines demonstrate what the
23 Open Access Tariff Provision allows for and the blue
24 is what Desert Power asked us to do.

25 And this is a situation where PacifiCorp
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1 tried, they tried to meet Desert Power's requests,
2 they tried to meet Desert Power's demands, but this
3 is a process of give and take. It's a process of
4 exchanging drafts. It's a process of studies and
5 restudies. It's a process of designs and redesigns.
6 And to hold PacifiCorp accountable because they
7 weren't able to meet that narrow timeline that Desert
8 Power prescribed is not fair and it's beyond the
9 scope of the agreement and it's certainly not force
10 majeure.

11 Desert Power failed to appreciate the
12 magnitude of this process. There was mismanagement,
13 there was underestimation. They've waited nine
14 months to make their interconnection request.
15 They've waited a year to buy their turbine. They
16 waited a year to sign their EPC contract. They still
17 don't have a steam contract with their steam host and
18 they were late in providing data, their gas contract,
19 and they were late in providing evidence of
20 financing, they were late in providing evidence of
21 construction permits.

22 Desert Power is its own worst enemy in
23 this process and PacifiCorp has tried to bend over
24 backwards to help their project work, and
25 unfortunately Desert Power has not been able to make

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1 that happen.

2 Thank you.

3 COMMISSIONER CAMPBELL: Thank you.

4 Mr. Mecham?

5 MR. MECHAM: Thank you, Mr. Chairman.

6 You know, I have to say that really almost
7 every action that I have observed since June 21st,
8 for whatever reason, seems to be an inaction on the
9 part of PacifiCorp to simply snuff out this project.
10 They impose assurances that they know Desert Power
11 can't provide. Desert Power told them so. And I
12 can't ascribe it to one thing or the other, I don't
13 know what their motives are.

14 As I stated before, this is a project that
15 scratched and clawed to get itself built in 2001.
16 It's been a viable project. It's got a \$70 million
17 investment price tag, plus commitments of \$10 million
18 beyond that. The conversion process from 65
19 megawatts to 95 megawatts was the result of having
20 gained a contract September 24th of '04. You know, I
21 don't think -- Desert Power didn't come in here
22 necessarily pointing fingers, but they have had a few
23 fingers pointed at them.

24 And in fact, as I listened to even the
25 closing arguments and the number of months just jumps

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1 around, it's five months, it's six months, it's nine
2 months. Well, you know, you can make any -- the
3 worst case you can, I suppose, and that's all part of
4 advocacy, but the fallacy of all that is to say,
5 okay, they didn't apply for an Interconnection
6 Agreement until February 22nd.

7 Well, you know, that's like having a
8 fender-bender on February 22nd and you go down the
9 highway further and you're driving in October and on
10 October 20th you total your car. Suddenly the
11 fender-bender doesn't matter so much anymore.

12 Mr. Houston referred to the scheduling and
13 the averages and the schedule that this project was
14 on. Maybe not so much the schedule that this was on,
15 but my recollection is that he said even the schedule
16 this was on was like a train wreck or could be a
17 train wreck - not achievable.

18 To say that these are events -- yeah, I
19 mean, could Desert Power control certain things?
20 Yes. But could they control the redesign? No. And
21 could they control the lead times? No. And that's
22 what it boiled down to here, was the redesign in
23 October of '05, and the engineering, procurement lead
24 times for things that still aren't in.

25 So to say that somehow the force majeure
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1 that according to PacifiCorp didn't occur, but
2 according to us it did, it's still ongoing. We don't
3 have a fourth pole there yet. And that change
4 cascaded into a series of events, as I've said
5 before, that resulted in no financing, which of
6 course resulted in no ability to provide assurances,
7 and now you've got a situation where you've got
8 someone interested in buying the plant and someone
9 negotiating right now even as we speak to buy the
10 plant and finish it up, and PacifiCorp doesn't want
11 that. You'll have to ask them as to why.

12 Because in the end if this Commission
13 approves such a thing and allows that deal to go
14 forward by ensuring that -- by at least not deciding
15 that there's a cliff on June 2nd, preferably ensuring
16 that the PPA can be held in place, you've got a
17 viable project. And without it, taking their
18 position means that this issue will have to be
19 resolved elsewhere. Because if, indeed, it's a
20 breach and there are damages, there are other
21 jurisdictions that take care of that. But I can tell
22 you that's a bad result because that takes years to
23 resolve and leaves a pile of rust sitting out in
24 Tooele County. That's not a good outcome.

25 I believe that the Commission can solve
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1 this today or at least shortly. And as I said, there
2 are public interest considerations with or without
3 the force majeure claim which we stand by that would
4 justify keeping this project viable and allowing it
5 to provide power to the people of Utah. It's needed.

6 Thank you.

7 COMMISSIONER CAMPBELL: All right. We
8 would like to thank all the parties for your
9 participation. We'll take the matter under
10 advisement and adjourn.

11 (The taking of the deposition was
12 concluded at 4:55 p.m.)

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STATE OF UTAH)

: ss.

COUNTY OF SALT LAKE)

I, LANETTE SHINDURLING, a Registered Professional Reporter, Certified Realtime Reporter and Notary Public in and for the State of Utah, residing at Salt Lake City, Utah hereby certify;

That the foregoing proceeding was taken before me at the time and place herein set forth, and was taken down by me in stenotype and thereafter transcribed into typewriting;

That pages 1 through 299, contain a full, true and correct transcription of my stenotype notes so taken.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND and official seal at Salt Lake City, Utah, this 29th day of September, 2006.

LANETTE SHINDURLING, RPR, CRR
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