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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition of Desert Power,
L.P. for Approval of a Contract for the Sale of
Capacity and Energy from its Proposed QF
Facilities

Docket No. 04-035-04
**POSITION STATEMENT OF ROCKY
MOUNTAIN POWER**

Pursuant to the Commission's Notice of Hearing issued in this matter on December 29, 2006, PacifiCorp, d/b/a Rocky Mountain Power (the "Company" or "PacifiCorp"), hereby respectfully submits this position statement in response to the Petition for Explanatory Statement of Prior Orders and Petition for Hearing ("Petition") filed on December 26, 2006 by Desert Power, L.P. ("Desert Power"). For the reasons set forth below, Desert Power should be granted an explanation but should be denied the particular explanation it seeks.

INTRODUCTION

PacifiCorp does not believe that the Commission's Orders of September 20, 2006, October 2, 2006, and November 8, 2006 require further explanation. Again and again throughout this emergency proceeding Desert Power has asked in various ways that it receive a

continuation of Stipulation-based pricing beyond June 1, 2007. Again and again the Commission has denied the request, in very clear terms. Yet now, before a bankruptcy court in Nevada and evidently in its dealings with third parties, Desert Power is interpreting the meaning of the Commission's November 8 Order as allowing Desert Power to receive Stipulation pricing even if its Facility is not fully operational and reliable by June 1, 2007 (i.e., even if Desert Power has failed to meet the Commercial Operation Date) (*see, e.g.*, Petition at 2). There is simply no basis for this interpretation. However, given that Desert Power has apparently attempted to convince a prospective lender that Stipulation pricing will continue to be available even if Desert Power fails to meet the June 1, 2007 Commercial Operation Date, and to avoid any uncertainty that a lack of further explanation might cause, the Company agrees that an explanatory statement may be useful. As set forth below, both on the merits and in order to avoid jurisdictional problems, such a statement should be consistent with the Commission's prior Orders—it should reiterate that Desert Power will not receive Stipulation pricing if it fails to meet the June 1, 2007 Commercial Operation Date.

ARGUMENT

A. Any Explanatory Statement Should Be Consistent With The Commission's Prior Orders.

Desert Power has placed the Commission in a potentially awkward procedural position by requesting further Commission action in a case that Desert Power has already appealed to the Utah Supreme Court. Typically, the filing of an appeal divests the lower tribunal of jurisdiction over a matter during the pendency of the appeal. *See, e.g., State v. Brown*, 856 P.2d 358, 362 (Utah Ct. App. 1993). When only certain aspects of a case have been decided and appealed, only those portions of the case that are on appeal are removed from the lower tribunal's jurisdiction

while the appeal is pending. *See, e.g., Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *Barker v. Pub. Serv. Comm'n*, 970 P.2d 702, 705-06 (Utah 1998).

In this case, PacifiCorp does not believe any diminution of the Utah Supreme Court's jurisdiction would result from an explanatory statement reiterating what the Commission already found in its Orders. Such a statement would be nothing more than a confirmation of the Commission's prior Orders, would not delay the appeal or seemingly otherwise affect the issues before the Utah Supreme Court, and would have the virtue of removing any uncertainty about the Commission's Orders that Desert Power may have caused with lenders or others. Such a statement would also preserve the Commission's ability to explain its own Orders rather than inviting the Nevada bankruptcy court to provide such an explanation.

However, as argued below, the Commission's Orders were so clear on the fact that Stipulation pricing will not be available in the event Desert Power fails to meet the June 1, 2007 Commercial Operation Date that any statement by the Commission in favor of Desert Power's interpretation would not merely be an explanation, it would be a reversal of the prior Commission Orders. That, in turn, in addition to being wrong on the merits, would amount to a re-visitation of an issue that is currently on appeal, and would exceed the Commission's jurisdiction. Put differently, a request for an "explanation" that is contrary to the prior Orders is in reality a request for reconsideration, when the time for such a request has long past and when no jurisdiction remains for the request to be entertained. In order to ensure that it acts within the scope of its jurisdiction, therefore, the Commission should ensure that any explanatory statement remains consistent with the prior Orders. To accomplish that, the Commission must reject any interpretation that would allow Desert Power to receive Stipulation pricing in the event it fails to meet the June 1, 2007 Commercial Operation Date.

B. The Commission's September 20 and October 2 Orders Clearly Rejected Desert Power's Attempt To Receive Stipulation Pricing Post-June 1, 2007.

From the outset of this dispute, when Desert Power filed its emergency petition in August 2006, post-June 1, 2007 pricing has been squarely at issue. The Emergency Petition originally sought to avoid a Commission determination that would force Desert Power to “agree to amend the PPA to accept avoided cost rates in effect June 2, 2007 if the Desert Power plant is not on line by June 1, 2007”. (*See* Emergency Petition at 2.)

The Commission nominally granted Desert Power's request to avoid a finding on the avoided cost rates effective June 2, 2007, but the Commission was very clear about what granting that request meant—it meant the Commission was deferring the calculation of avoided cost pricing that would take effect in the event Desert Power failed to meet the Commercial Operation Date. The Commission did not, however, defer the separate question of whether Desert Power might still be entitled to Stipulation pricing if it failed to meet the new Commercial Operation Date. This was clear from the Commission's September 20 Order, where it stated:

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

While information is available, from which an indication of what avoided costs for energy and capacity may be, for projects that come online after June 1, 2007, a sufficient record of evidence admitted in this docket does not exist for a Commission determination of what those prices precisely are. And, **given Desert Power's willingness to proceed, even with this post June 1, 2007, pricing lacuna in its PPA, we need not derive the specific price terms that PacifiCorp's requested amendment would require. We need, however, to reiterate that our intent, in approving the Docket No. 03-035-14 stipulated pricing and our subsequent proceedings establishing an indicative pricing methodology, is to limit the applicability of Docket No. 03-035-14**

pricing terms to projects that are contracted for under the stipulation and order terms and which are online on or before June 1, 2007, only.

(See September 20, 2006 Order at 3-4, emphasis added.)

After the issuance of the September 20 Order, Desert Power sought clarification on whether the Commission intended “that the Scheduled Commercial Operation date remain May 9, 2006”; whether the Commission intended that the September 20, 2006 order “settle globally all disputes between the parties by extending the Commercial Operation Date”; and whether the Commission intended “that the PPA term be twenty years”. (See Emergency Petition for Expedited Clarification at 4-5.)

In response to Desert Power’s request for clarification, the Commission granted an extension of the Scheduled Commercial Operation Date, but was again emphatically clear about post-June 1, 2007 pricing, stating in its October 2 Order: “our extension of the Scheduled Commercial Operation date will not permit Desert Power to have any expectation of receiving Docket No. 03-035-14 Stipulation based pricing for electrical output if the plant is not meeting production requirements on or before June 1, 2007. **Our intent should not be misconstrued, if Desert Power’s QF does not meet the June 1, 2007, date, it will not be eligible for Docket No. 03-035-14 Stipulation based pricing for electrical generation provided to Pacificorp.**”

(See October 2, 2006 Order at 2, emphasis added.)

C. The Commission’s November 8 Order Continued To Reject Desert Power’s Attempt To Continue Stipulation Pricing Post-June 1, 2007.

Having already been told no twice, Desert Power tried yet again to get an extension of Stipulation pricing in its Petition for Expedited Reconsideration, Review, or Rehearing filed on October 20, 2006 (“Petition for Reconsideration”). In this petition, Desert Power had no illusions as to the impact of the October 2, 2006 Order, variously referring to the Commission’s action as “punitive”, “patently unfair”, “unsupportable”, “facile”, “unlawful”, and an “abuse of

discretion”, among other things. (*See, e.g.*, Petition for Reconsideration at 3, 6, 10.) Moreover, Desert Power argued in considerable detail about how it thought the Commission’s action was inconsistent with sections 2.4 and 11.1.4 of the PPA, concluding: “the Commission’s Clarification Order eviscerates Sections 2.4 and 11.1.4 of the PPA” (*See id.* at 5.) Thus, there could be no doubt that (1) Desert Power knew (as it admitted in the Petition for Reconsideration) the Commission’s action nullified Desert Power’s hoped-for interpretation of sections 2.4 and 11.1.4, and (2) by virtue of the Petition for Reconsideration, the Commission was fully aware of Desert Power’s (now openly stated) desire to use sections 2.4 and 11.1.4 as loopholes to the requirement that Desert Power meet the June 1, 2007 Commercial Operation Date in order to receive Stipulation pricing.

PacifiCorp further ensured that Desert Power’s attempted bootstrapping of sections 2.4 and 11.1.4 into a pricing extension was squarely and openly before the Commission on reconsideration, stating:

While it is odd that Desert Power would consider the Clarification Order an “inexplicable reversal” given the prior language of the Order, it is now very clear why the issue is so important to Desert Power and the Commission need not wonder any longer about “what activity, milestone, or term of the PPA would be extended under Desert Power’s request” to extend the contract term one year. (*See* Order at 5).

Desert Power seeks to avoid any Commission direction on post-June 1, 2007 pricing so that, in conjunction with its request for a general contract extension, it can claim that in the event it misses its new Commercial Operation Date, under section 2.4 of the (extended) PPA, Desert Power will continue to receive Stipulation pricing. (*See* Petition at 3-5). In other words, Desert Power seeks not merely to preserve as an open issue the question of what pricing will apply in the event it fails to meet the June 1, 2007 Commercial Operation Date. It seeks to affirmatively receive the benefits of continued Stipulation pricing even if it misses the new Commercial Operation Date, by virtue of extending the terms of section 2.4, in conjunction with section 11.1.4. It seeks not only to leave the question unaddressed and thereby avoid presenting to a potential lender the negative prospect of losing Stipulation pricing in the event the Commercial Operation Date is missed, as it originally suggested in this

matter,¹ but to receive the affirmative result that through a general contract extension, including the original terms concerning remedies for a missed Commercial Operation Date (terms originally put in place when the prospect of running into the June 1, 2007 Stipulation pricing deadline was not a concern), Desert Power will continue to have Stipulation pricing available for up to 150 days following a missed Commercial Operation Date. (*See* Petition at 4-5).

The revelation of Desert Power's intent is clear and, frankly, stunning; and it strikes PacifiCorp as being more than a little audacious for Desert Power to complain that the Commission is "modifying the terms of its PPA Approval Order" (*See* Petition at 4) by not giving Desert Power the benefit of an extra 150 days beyond June 1, 2007 to achieve commercial operation without losing Stipulation pricing. In reality, Desert Power should not be entitled to any contract extension and the Commission has already been more than accommodating in extending the Commercial Operation Date and Scheduled Commercial Operation Date.

(*See* Response to Petition for Reconsideration at 4-5.)

These, then, were the background and circumstances at the time the Commission entered its November 8 Order. The Commission had already twice rejected, in unmistakable language, any extension of Stipulation pricing beyond June 1, 2007.² Desert Power had acknowledged the impact of the Commission's action and had complained of the Commission's "eviscerat[ion]" of

¹ *See, e.g.*, Darling Testimony (Aug. 18, 2006) at 4 ("Q. What happens if you don't make it [by the June 1, 2007 Commercial Operation Date]? A. We will have to come back before the Commission, but at this point, that is still a hypothetical issue."); Tech. Conf. Tr. 8/31/06 (rough draft) at 21, ln. 4-16 ("MS. COON: . . . What specific decision is the PSC being asked to make in this docket? MR. MECHAM: . . . We would like the commercial operation date delayed until June 1st of '07. And with respect to the issue of what avoided cost rates apply post that time, we would ask the Commission not to take action on that at this time.").

² In addition to doing so twice in this proceeding, the Commission had of course already rejected an extension of Stipulation pricing in the Spring Canyon proceeding. *See Re Spring Canyon LLC*, Docket Nos. 05-035-08, 05-035-09, 03-035-14, 2005 WL 994730, *4 (Utah P.S.C. Apr. 1, 2005) ("We agree with the parties that the Stipulation prices remain reasonable and in the public interest, and find accordingly, but only to the extent that the megawatt cap and online deadline remain unchanged. . . . We . . . conclude extending the Stipulation's June 1, 2007, online date would not be in the public interest. It is clear this date was chosen to ensure that any QF receiving the benefit of Stipulation pricing would be online and providing electricity to PacifiCorp prior to the anticipated peak capacity deficit of the summer of 2007. Extending this deadline would necessarily disregard the central determination of the parties to the Stipulation that the public interest is best served by requiring QFs enjoying Stipulation pricing to be online prior to this date. We therefore deny Spring Canyon's Motion to Increase 275 MW Cap and Motion to Extend June 1, 2007 Deadline.").

any ability to extend the use of sections 2.4 and 11.1.4 of the PPA in Desert Power's desired fashion. And PacifiCorp, in response to the Petition for Reconsideration, had warned that Desert Power's previously opaque request for a general one-year contract extension had now been clearly revealed as an attempt to bootstrap from the wording of sections 2.4 and 11.1.4 of the PPA an additional 150 days onto the Commission's deadline for Stipulation pricing (which, in turn, could cause the Company and its customers to pay Desert Power amounts significantly in excess of June 2, 2007 avoided costs for the next 20 years, notwithstanding Desert Power's failure to meet the June 1, 2007 Stipulation deadline).

In such circumstances, it strikes PacifiCorp as implausible, to say the least, that a Commission reversal of its prior position on the June 1, 2007 deadline would be anything less than clear and direct. It likewise seems implausible that the Commission could have intended to grant Desert Power a pricing extension in silence—never mentioning in the November 8 Order, despite a huge potential ratepayer impact, that it was now reviving contract provisions it had just finished “eviscerating” in its prior Orders. Indeed, for Desert Power's interpretation to have any potential merit, the Commission would have needed to eliminate the statement that the Order “will not permit Desert Power to have any expectation of receiving . . . Stipulation based pricing” if it fails to meet the new June 1, 2007 Scheduled Commercial Operation Date and Commercial Operation Date, and replace it with a statement that, contrary to the Commission's prior orders in this and other dockets, the Order will permit Desert Power to have the expectation of receiving Stipulation pricing beyond June 1, 2007 as long as Desert Power pays delay damages and additional project security pursuant to sections 2.4 and 11.1.4 of the PPA (contract provisions put in place when there was absolutely no prospect of running up against the June 1,

2007 Stipulation pricing deadline).³ That is not, however, what the November 8 Order said. Rather, consistent with its prior Orders the Commission continued to refuse to permit any expectation of Stipulation pricing beyond June 1, 2007. (*See* November 8, 2006 Order at 2.)

The only change in the November 8 Order to the language of the October 2 Order was the replacement of the requirement that Desert Power be “meeting production requirements” by June 1, 2007 with the requirement that Desert Power meet the new Scheduled Commercial Operation Date and Commercial Operation Date (which remained June 1, 2007 as per the earlier Orders). (*See id.*) This clearly dealt with a separate concern expressed in the Petition for Reconsideration that by requiring Desert Power to meet “production requirements” in the October 2 Order the Commission may have imposed a higher requirement for being in commercial operation than previously contemplated under the PPA or the Stipulation in Docket O3-035-14. (*See id.* at 1-2.) Under the PPA, the Commercial Operation Date “means the date that the Facility is deemed to be fully operational and reliable” (with specified requirements such as prior start-up testing and certificates from a licensed professional engineer that the facility is able to reliably generate power in the amounts required by the PPA and that interconnection is complete—*see* PPA § 1.3). Eliminating the language about “production requirements” in order to avoid potential additional requirements beyond the scope of the PPA has nothing to do with evading the June 1, 2007

³ Incidentally, Desert Power’s argument fails as a matter of contract interpretation even apart from being inconsistent with the clear pricing deadline of June 1, 2007 contained in the Commission’s Orders. Sections 2.4 and 11.1.4 of the PPA merely allowed Desert Power to achieve a Commercial Operation Date up to 150 days after the Scheduled Commercial Operation Date, as long as it paid delay damages and additional project development security. In other words, these contract provisions merely avoided setting a firm Commercial Operation Date (contrary to what the Commission has now done in setting a fixed and firm Commercial Operation Date of June 1, 2007). For Desert Power’s argument to have any possible merit as a matter of contract interpretation, the Commission would have been required to set only a new Scheduled Commercial Operation Date and to have continued to leave the Commercial Operation Date achievable within 150 days after that new Scheduled Commercial Operation Date. The Commission has not done that, however, and the new Commercial Operation Date is fixed at June 1, 2006. Nothing in the PPA allows delay beyond the Commercial Operation Date.

Commercial Operation Date, however, and the Commission said nothing on reconsideration to undermine its conclusion from the original September 20 Order that “We have concluded that the Commercial Operation Date may be extended to on or before June 1, 2007, but have an insufficient basis to extend any other term.” (See September 20, 2006 Order at 5, emphasis added.)

In sum, there is no basis for interpreting the Commission’s Orders in a way that would allow Desert Power to claim an entitlement to Stipulation pricing if it fails to achieve a Commercial Operation Date of June 1, 2007. The Commission could not have been more clear on this point. In light of Desert Power’s baseless interpretation of the Orders before the Nevada bankruptcy court and to third parties, the Commission should explain that the June 1, 2007 deadline remains intact.

CONCLUSION

For the reasons set forth above, PacifiCorp respectfully requests that the Commission provide the explanation that Desert Power must meet the Commercial Operation Date of June 1, 2007 (i.e., it must have a fully operational and reliable Facility) if it is to receive Stipulation pricing, and that Desert Power is not entitled to any extension, whether under section 2.4 or 11.1.4 of the PPA, or otherwise, to that June 1, 2007 deadline.

RESPECTFULLY SUBMITTED: January 8, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **POSITION STATEMENT OF ROCKY MOUNTAIN POWER** was sent by electronic mail to the following on January 8, 2007:

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