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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	<p style="text-align: center;">DOCKET NO. 04-035-04</p> Position Statement of Desert Power on the Effect of Commission Orders in this Docket Dated September 20, 2006, October 2, 2006, and November 8, 2006
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Desert Power, L.P. (“Desert Power”), by and through counsel, submits the following position statement on the effect of the Public Service Commission’s (“Commission”) orders in this Docket dated September 20, 2006, October 2, 2006, and November 8, 2006 (“Three Orders”):

Introduction

On October 23, 2006, Desert Power had to seek bankruptcy protection in the Bankruptcy Court for the District of Nevada (“Court”) to prevent PacifiCorp from terminating the Power Purchase Agreement between the two parties dated September 24, 2004 and approved by this Commission on October 7, 2004 (“PPA”). Desert Power is assiduously working to reorganize under Chapter 11 of the Bankruptcy Code in order to complete the conversion of its 65 MW single-cycle generation plant to an approximately 95 MW combined-cycle combustion turbine generator. As part of that effort, Desert Power entered into a new financing agreement with Morgan Stanley Senior Funding, Inc.

(“Morgan Stanley”). On December 19, 2006, the Court approved \$2 million in interim financing and scheduled a hearing to consider approval of the entire Morgan Stanley funding package of \$30 million. With that new financing in place, Desert Power will be able to reorganize successfully, complete the plant conversion, and provide needed power to PacifiCorp in 2007 in accordance with the terms of the PPA. Without it, Desert Power will have few alternatives other than liquidation.

One of the provisions of Desert Power’s agreement with Morgan Stanley requires that Desert Power obtain an order from the Court or the Commission by January 18, 2007 that Sections 2.4 and 11.1.4 of the PPA have not been affected by the Three Orders and remain in effect. Before the Court, Desert Power has represented that this was precisely the Commission’s intent in the Three Orders taken together, but PacifiCorp has strongly expressed its disagreement. Because of this dispute, there is a need for an explanatory statement from this Commission in order for the Court to make an informed decision on the funding package pending before it. Under the current schedule, the hearing on the final funding package is set for January 23, 2007.

The Effect of the Three Orders on Sections 2.4 and 11.1.4

The Three Orders extended the Scheduled Commercial Operation Date¹ and the Commercial Operation Date², removed any implication that the Desert Power plant had to meet “production requirements,” by June 1, 2007,³ and left all other provisions of the PPA intact.⁴ The only fair and rational reading of the Three Orders that gives any meaning to Sections 2.4 and 11.1.4 of the PPA must leave the PPA pricing established in

¹ October 2, 2006 Order, p. 2.

² September 20, 2006 Order, p.7.

³ November 8, 2006 Order, p. 2.

⁴ October 2, 2006 Order, p. 2.

Docket No. 03-035-14 in place during the operation of those sections. Otherwise, there is no purpose for the Commission to have kept the other provisions of the PPA intact.

Without the PPA Stipulation pricing, the PPA has no value.

Section 2.4 of the PPA states:

Seller shall cause the Facility to achieve the Commercial Operation Date on or before the Scheduled Commercial Operation Date. If the Commercial Operation Date occurs one (1) or more days after the Scheduled Commercial Operation Date (the "Delay Period"), PacifiCorp shall not pay the Seller the Scheduled Deliveries Payment as defined in Section 5.1 for any days during the Delay Period and the Fixed Capacity Payment shall be prorated for the month in which the Commercial Operation Date occurs. Seller shall pay PacifiCorp Delay Damages, equal to the positive difference, if any, obtained by subtracting the Contract Price from the Replacement Price for any power that PacifiCorp would have scheduled from the Facility and not delivered, by the Seller, had the Commercial Operation Date occurred on or before the Scheduled Commercial Operation Date, up to a total of 120 days, subject to extension pursuant to the provisions of Section 11.1.4.

Section 11.1.4 follows:

Seller's failure to cause the Facility to achieve a Commercial Operation Date on or before the date that occurs 120 days after the Scheduled Commercial Operation Date. If the Commercial Operation Date has not occurred ninety (90) days after the Scheduled Commercial Operation Date and Seller reasonably believes that it cannot cause the Facility to achieve the Commercial Operation Date within the 120-day period, Seller shall have the option to deposit an additional \$120,000 in the Project Development Security account, in which event Seller shall have an additional thirty (30) days beyond the 120-day period to achieve the Commercial Operation Date.

These two provisions are straightforward and intact pursuant to the Commission's Three Orders. Desert Power carefully negotiated them to preserve the PPA's Stipulation pricing in the event the project was delayed and that has proven to be prescient. These sections allow Desert Power to achieve commercial operation up to 150 days after the Scheduled Commercial Operation Date; with the way this case has proceeded, those sections may well be triggered and, if so, would take effect for at least some period. Nevertheless, PacifiCorp's customers would be held harmless and treated as though the

plant were fully operational because of the requirement in Section 2.4 that Desert Power pay PacifiCorp Delay Damages.

PacifiCorp maintains that PPA pricing changes June 2, 2007 if Desert Power has not achieved commercial operation by June 1, 2007 even though PacifiCorp and PacifiCorp's ratepayers are fully protected throughout the period allowed for completion after the Scheduled Commercial Operation Date under the terms of the PPA. PacifiCorp continues to seek the amendment to the PPA the Commission would not order in its Three Orders, effectively eliminating Sections 2.4 and 11.1.4 from the PPA.

Indeed, PacifiCorp's interpretation of the Three Orders – as compared to Desert Power's – subjects its customers to risk (which it claims to seek to avoid) and strips Sections 2.4 and 11.1.4 of their meaning and purpose. A Commission decision in favor of PacifiCorp virtually ensures that the Desert Power plant conversion will not be completed, which will subject customers to the market and market prices for the 95 MWs Desert Power was to provide to PacifiCorp. Without question, there will be many times during the next 19 years when market prices exceed prices in the PPA. Even worse, the time may come in this region when the lost Desert Power 95 MW increment of power is not available on the market to the significant detriment of some customers and their service. Not only is PacifiCorp's interpretation of the Three Orders wrong, it flies in the face of the public interest and PacifiCorp's ostensible efforts to protect its customers by opposing Desert Power. Thus Desert Power submits that its interpretation is fully consonant with the express terms of the Three Orders and the public interest.

In the alternative, the Commission's order and the parties' stipulation in Docket No. 03-035-14 require that power from the project be available to PacifiCorp by

June 1, 2007. The Desert Power plant has already provided power to PacifiCorp and will be able to provide up to 65 MW's again before June 1, 2007. The Commission's elimination of the phrase "not meeting production requirements" in the November 8, 2006 order makes it clear that Desert Power continues to qualify for Stipulation pricing in the PPA by providing power to PacifiCorp by June 1, 2007 even if it has not yet achieved full commercial operation. Under Sections 2.4 and 11.1.4 of the PPA, Desert Power has up to 150 days following the June 1, 2007 Scheduled Commercial Operation Date to achieve full commercial operation.

PacifiCorp's interpretation of the Three Orders renders meaningless the Commission's elimination of the "meeting production requirements" language, and once again strips the meaning and purpose of Sections 2.4 and 11.1.4, sections which the Commission did not change.

Conclusion

Desert Power strongly encourages the Commission to issue an explanation of its Three Orders that allows Sections 2.4 and 11.1.4 to take effect, which means that Desert Power has up to 150 days following the Scheduled Commercial Operation Date to achieve full commercial operation and retains PPA Stipulation Pricing for all 19 years of the agreement. In the alternative, Desert Power urges the Commission to determine that Desert Power meets the requirements for Docket No. 03-035-14 Stipulation pricing by providing power to PacifiCorp by June 1, 2007 and reaching full commercial operation within 150 days of the Scheduled Commercial Operation Date.

Desert Power requests that the Commission make clear in its explanation that Sections 2.4 and 11.1.4 of the PPA allow Desert Power to retain PPA Stipulation pricing

as long as the Desert Power plant achieves commercial operation within 150 days of the Scheduled Commercial Operation Date. Alternatively, Desert Power requests that the Commission make clear that Sections 2.4 and 11.1.4 of the PPA allow Desert Power to retain PPA Stipulation pricing as long as Desert Power provides some power to PacifiCorp before June 1, 2007 and becomes commercially operational within 150 days of the Scheduled Commercial Operation Date. Without one or the other explanation, Desert Power will not be able to reorganize and will likely be forced to liquidate. PacifiCorp's customers will be at risk for Desert Power's 95 MW increment of power, both in respect to market price and availability in the market, and long-term independent power will remain virtually nonexistent in Utah.

Respectfully submitted this 8th day of January, 2007.

Callister Nebeker & McCullough

Stephen F. Mecham

Certificate of Service

I certify that on January 8, 2007 I emailed a true and correct copy of the foregoing Position Statement of Desert Power on the Effect of Commission Orders in this Docket Dated September 20, 2006, October 2, 2006, and November 8, 2006 to the following:

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