

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

-----  
In The Matter of the Petition of Spring )  
Canyon LLC for Approval of a Contract )  
For the Sale of Capacity and Energy )  
From Its Proposed of Facilities )

DOCKET NO. 05-035-08

REPORT AND ORDER

-----  
ISSUED: August 19, 2005

By the Commission:

PROCEDURAL HISTORY

On February 9, 2005, Spring Canyon Energy, LLC (“Spring Canyon”) filed its “Petition for Expedited Approval of QF Contract” with the Utah Public Service Commission (“Commission”) under Docket No. 05-035-08 seeking a Qualifying Facility (“QF”) contract with PacifiCorp. We consolidated Docket No. 05-035-08 with Docket Nos. 03-035-14 and 05-035-09. By Report and Order issued April 1, 2005 for the three consolidated dockets  we determined that QF pricing contained in the Stipulation approved in Docket No. 03-035-14 may be used for negotiating a QF contract between PacifiCorp and Spring Canyon. The Commission also determined, pursuant to the Stipulation, 100 MW of QF capacity remains available for such a contract. The Commission directed PacifiCorp and Spring Canyon to negotiate a contract consistent with that Report and Order.

In response to a request by Spring Canyon, the Commission on August 9, 2005 issued a notice of hearing scheduled for August 16, 2005 to consider the QF contract between Spring Canyon and PacifiCorp and to resolve any remaining disputed issues between these two parties. On August 11, 2005, Spring Canyon filed with the Commission a copy of a redlined version of the disputed Power Purchase Agreement (“Agreement”) between Spring Canyon and PacifiCorp. On August 12, 2005, PacifiCorp filed its “Motion to Exclude Issues and Emergency Request for Hearing” requesting the Commission hear this motion on August 12, 2005. At a meeting on August 12, 2005, parties agreed to exclude, from the August 16, 2005

hearing, issues relating to the pricing and sale of an additional 160 megawatts. Also on August 12, 2005, Spring Canyon filed with the Commission its “Motion to Extend June 1, 2007 Deadline and Notice of Hearing August 17, 2005, 3:00 p.m.” On August 15, 2005, PacifiCorp filed a joint exhibit on behalf of itself and Spring Canyon to serve as a list of disputed issues which a panel of PacifiCorp and Spring Canyon witnesses would address in the hearing scheduled for August 16, 2005. Pursuant to notice, a hearing was held on August 16, 2005. At the hearing, PacifiCorp appeared through counsel Edward A. Hunter and Jennifer H. Martin, of Stoel Rives LLP; the Utah Division of Public Utilities (“Division”) appeared through Assistant Attorney General Michael Ginsberg; the Utah Committee of Consumer Services (“Committee”) appeared through Assistant Attorney General Paul Proctor; Spring Canyon appeared through counsel Stephen F. Mecham, Callister Nebeker & McCullough; and ExxonMobil (“Exxon”) appeared through counsel Thorvald Nelson, Holland & Hart. Witnesses for PacifiCorp, Spring Canyon and the Division provided sworn testimony. At the hearing, the Commission reaffirmed the 3:00 p.m., August 17, 2005 time to hear Spring Canyon’s motion to extend the June 1, 2007 deadline for delivery of the QF power established in the Stipulation in Docket No. 03-035-14.

On August 17, 2005, a hearing was held on Spring Canyon’s motion with participation by the same parties in the August 16, 2005 hearing. Testimony was presented by PacifiCorp and Spring Canyon witnesses, followed by cross examination by parties and questions from the Commission.

#### DISCUSSION AND FINDINGS

At the hearing, PacifiCorp stated that five of the nineteen issues contained in the joint exhibit of the list of disputed issues had been removed. The removed issues were Transmission-Reference to Network Resource (Section 1.68 of Spring Canyon’s filed redlined draft contract), Cross-Agreement Offset (Spring Canyon Section 10.2), Default under Credit Agreement (PacifiCorp Section 11.1.4), Lender Consent (Spring Canyon Section 11.6) and Force Majeure (Spring Canyon Section 13.1).

The remaining fourteen disputed issues were individually presented by PacifiCorp followed by a response by Spring Canyon, comments by other parties, and questions from the Commission.

### **Spring Canyon Section 11.8, Financing Out**

Spring Canyon proposes in Financing Out (Section 11.8) if it determines within six months of the date the contract becomes effective (the “Financing Date”) that its facility cannot be financed on acceptable terms, then Spring Canyon has the right to terminate the contract. PacifiCorp did not initially include this section in its proposal.

PacifiCorp maintains that if Spring Canyon has this right to terminate the contract, then PacifiCorp needs Development Security in order to replace the power which otherwise would be forthcoming from Spring Canyon. As a compromise, PacifiCorp states that if the Financing Date is four months rather than six months from the date the contract becomes effective, and if it has \$2 million in Development Security, then it is comfortable with Spring Canyon’s proposal.

Because of the exigencies of time, the Commission finds that three months for the period from the contract effective date to the Financing Date is a reasonable period by which seller must exercise its Financial Out. Since the parties agree on a \$2 million Letter of Credit in Development Security (see Section 8.1), the Commission accepts the position of Spring Canyon, but with the Financing Date specified as three months rather than six months.

### **Section 2.3.4, Financing Out**

Financing Out (Section 2.3.4) is a milestone for construction financing, in which Spring Canyon is to provide evidence acceptable to PacifiCorp that construction financing for Spring Canyon’s facility has been obtained. From the date the contract becomes effective, Spring Canyon proposes six months to provide the evidence of financing, while PacifiCorp proposes two months. The Commission finds three months to be appropriate for such notification.

### **Section 8.1, Development Security**

Development Security provides PacifiCorp the ability to acquire replacement power in the event there is a delay on the part of Spring Canyon in meeting the scheduled June 1, 2007 commercial operating date. For planning purposes, PacifiCorp is relying on Spring Canyon’s 100 megawatt firm resource as available on June 1, 2007. In Development Security (Section 8.1), PacifiCorp proposes Spring Canyon supply a \$2 million Letter of Credit to PacifiCorp with the additional requirement that this security amount be restored if draws upon it are needed, but in no event will the cumulative amount provided by seller exceed \$4 million. In the event of a delay in the scheduled commercial operations

of Spring Canyon's facility, and Spring Canyon fails to pay PacifiCorp Delay Damages, PacifiCorp is entitled to draw an amount equal to the unpaid Delay Damages. Spring Canyon originally proposed a Letter of Credit in the amount of \$1.8 million, but states it will agree to \$2 million, although it does not support the cumulative \$4 million amount. The Commission accepts Spring Canyon's position and finds a \$2 million Letter of Credit appropriate.

### **Section 2.6, Cap on Development Security**

The only difference between the two parties in Cap on Development Security (Section 2.6) is the reference to the amount of Development Security. PacifiCorp proposes language identifying the amount provided in Section 8.1 previously discussed. Spring Canyon originally proposed a \$1.8 million cap which it initially provides in Section 8.1, but during the hearing changed to \$2 million. The Commission finds it appropriate to use here the reference to Section 8.1 as PacifiCorp proposes.

### **Section 2.3.1, Development Security - Timing**

In Development Security - Timing (Section 2.3.1), Spring Canyon proposes the \$2 million Letter of Credit for Development Security specified in Section 8.1 be made available to PacifiCorp at the earliest of either the date Spring Canyon obtains construction financing or within six months of the date the contract becomes effective. PacifiCorp proposes the Letter of Credit be made available when the contract becomes effective. As a compromise, PacifiCorp stated at the hearing that it can agree to \$1 million being provided on the effective date of the contract, and \$1 million on the Financing Date. The Commission finds reasonable the compromise with a Financing Date of three months from the effective date of the contract.

### **Section 2.5, Accounting Treatment**

The issue of Accounting Treatment (Section 2.5) involves how, if at all, a separate QF power purchase agreement would impact the Agreement, including accounting adjustments as a result of capital lease treatment under FASB-13 or consolidation required by FIN-46. PacifiCorp wants a written agreement regarding this impact as a condition precedent to entering any separate QF power purchase agreement. Spring Canyon wants to allow parties to seek to renegotiate any impact. We find Spring Canyon's language on this issue reasonable and accept it.

### **PacifiCorp Section 5.5, Accounting Treatment**

The issue of Accounting Treatment (PacifiCorp Section 5.5) involves the same impacts described above under Section 2.5, but with PacifiCorp seeking a monthly debt-related cost adjustment of its payment to the seller over the term of the Agreement. Spring Canyon opposes such adjustments. The issue of debt-related cost adjustments to QF power purchase payments is an issue that affects all large QF projects, needs a broader debate and will be dealt with in the large QF Docket No. 03-035-14. For the purposes of this case, we accept Spring Canyon's position to not include Section 5.5.

### **PacifiCorp Section 5.3, Cap on Replacement Energy**

The issue of a Cap on Replacement Energy (PacifiCorp Section 5.3) relates to whether there is a cap on the cost of replacement power to be borne by the seller in the event the seller fails for any reason other than Force Majeure or the occurrence of a Scheduled Maintenance Period to deliver Scheduled Deliveries from its Facility. PacifiCorp wants no cap, while Spring Canyon seeks a cap of \$3,870,000 in any Contract Year. The Division supports no cap as a protection to ratepayers. We find this risk properly belongs to the seller and accept PacifiCorp's position.

### **Section 8.2, Default Security**

The issue of Default Security (Section 8.2) relates to the amount of a letter of credit to the benefit of PacifiCorp established by the seller to provide security in the event of default beginning on the Commercial Operation Date and over the duration of the Agreement. PacifiCorp and Spring Canyon propose different varying annual amounts over the term of the Agreement with PacifiCorp proposing significantly higher amounts. Both parties indicate their proposals are based on the default security provisions in the previously approved Desert Power contract. We find Spring Canyon's proposed default security amounts more closely align with the Desert Power contract and accept them.

### **PacifiCorp Section 5.4, Change in Law**

The Change in Law issue (PacifiCorp Section 5.4) relates to the conditions under which parties may reopen the Agreement to negotiate how, if at all, and if so, at what level new costs related to emissions or air quality should be included. The specific area of dispute involves Spring Canyon's proposal to allow a reopening of the Agreement if the

seller is required to make capital investments in the Facility to comply with changes in applicable laws associated with emissions or air quality. PacifiCorp opposes this language. We find PacifiCorp's proposed language adequately addresses the issue, find it reasonable and accept it.

### **Section 11.1.5, Material Adverse Change**

The Material Adverse Change issue (Section 11.1.5) relates to the definition for the event of a Material Adverse Change combined with a failure to provide reasonable performance assurances. This event is one of several events that constitute Events of Default under the Agreement. PacifiCorp's proposal for no additional default security for this event is conditioned on its proposed total amount of security in the Agreement. Spring Canyon's proposed definition includes only the failure of the seller to provide a letter reaffirming its intent to be bound by the Agreement. Since both parties previously cited the Desert Power contract provisions, we reviewed the Desert Power provision on this topic and find it reasonable. Following is the Desert Power contract provision on this issue that we accept for the Agreement in this case:

A Material Adverse Change has occurred with respect to Seller and Seller fails to provide such performance assurances as are reasonably requested by PacifiCorp, including without limitation the posting of additional Default Security or the maintenance or renewal of Default Security pursuant to Section 8.2, within (15) days from the date of such request.

### **Section 12.5.3, Commercial Liability Insurance**

The only difference between PacifiCorp and Spring Canyon on the issue of Commercial General Liability Insurance (Section 12.5.3) involved PacifiCorp's addition of cross liability coverage so that the insurance applies separately to each insured against whom a claim is made. At the hearing Spring Canyon, while not opposed to the proposal, questioned the availability of such insurance and offered to further discuss this insurance with PacifiCorp. Absent further information on this issue, we find PacifiCorp's proposal reasonable.

### **Section 13.5, Force Majeure**

The issue of Force Majeure (Section 13.5) relates to the time period the seller has to remedy its inability to perform due to a Force Majeure event. PacifiCorp proposes a maximum of eighteen months from the date of the occurrence of the event for the seller to remedy its inability to perform. Spring Canyon proposes twenty-four months

citing possible long lead times for repair of turbines, steam generators or step-up transformers. Once again we cite the Desert Power contract which allows only eighteen months for the remedy time period. We find the eighteen months allowed in the Desert Power contract reasonable and accept it for this Agreement.

### **PacifiCorp Section 22.2, Waiver of Claims**

The issue of Waiver of Claims (PacifiCorp Section 22.2) involves the release, as a condition of the Agreement, of each party from claims, known or unknown, that may have arisen prior to the Effective Date with respect to the Facility and any predecessor facility proposed to have been constructed on the site of the facility. PacifiCorp proposes such releases, while Spring Canyon opposes them. The previously approved Desert Power contract has the same language on this issue as proposed by PacifiCorp for this Agreement. The Division and Committee also support this language. We find PacifiCorp's proposed language reasonable and accept it for this Agreement.

In conclusion, we find the above decisions reasonably balance the interests of ratepayer neutrality and encouragement of QF projects.

Spring Canyon's motion to extend the June 1, 2007 deadline for delivery of the QF power established in the Stipulation in Docket No. 03-035-14 is denied. We found the evidence insufficient to depart from our decision on this same issue in our April 1, 2005 Order. In that Order, we stated, "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."

Near the end of the August 17<sup>th</sup> hearing, Exxon moved for the Commission to set deadlines for Spring Canyon to submit to the Commission a signed Agreement with PacifiCorp and to obtain project financing. Due to the limited time in the hearing and short notice, this issue was not fully vetted in the hearing. Should parties supportive of Commission-imposed deadlines wish to file a specific motion requesting such relief, the Commission will handle such a motion on an expedited basis.

### **ORDER**

1. Wherefore, pursuant to our discussion, findings and conclusions made herein, any Qualifying Facility

contract between PacifiCorp and Spring Canyon submitted to this Commission for approval shall contain the accepted provisions described above.

2. Spring Canyon's motion to extend the June 1, 2007 deadline established in the Stipulation in Docket No. 03-035-14 for delivery of the QF power is denied.

Pursuant to Utah Code 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 19<sup>th</sup> day of August, 2005.

/s / Ric Campbell, Chairman

/s / Ted Boyer, Commissioner

/s / Ron Allen, Commissioner

Attest:

/s / Julie Orchard  
Commission Secretary  
G#45523