



YAVAPAI-APACHE NATION

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January 10, 2013

Darrick Moe
Desert Southwest Regional Manager
Western Area Power Administration
PO Box 6457
Phoenix, AZ 85005-6457

Submitted electronically to Post2017BCP@wapa.gov

Re: October 30, 2012 Notice of Proposed Marketing Criteria Boulder Canyon Project – Post 2017 Resource Pool

Dear Mr. Moe:

The Yavapai-Apache Nation (YAN) provides the following comments in response to Western's proposed Boulder Canyon Project (BCP) power allocation criteria as announced in the Federal Register Notice (FRN) of October 30, 2012.

1. Tribal Priority

YAN supports Western's proposal to provide tribes a first priority in the allocation of BCP power. Such first priority participation will help redress the historic lack of tribal access to project benefits and it represents the most effective means of including the more than 50 tribes in the project service area. This recognition of tribal priority by Western is consistent with the Hoover Power Allocation Act of 2011 (the "Act") and underlying Congressional intent as evidenced in the House of Representatives Report referencing tribes as "contracting directly with Western" and "develop[ing] allocation criteria in direct consultation with Western." No other group of eligible power allocation participants is so referenced therein. See Hoover Power Allocation Act of 2011, House Report 112-159(I) dated July 20, 2011. Western's action is also consistent with the Act's directive that Western "fairly and equitably determine allocations from the new power pool." See July 20, 2011 House Report.

2. Utility Status

YAN supports Western's continued adherence to its historic policy of allocating Hoover power to new tribal customers without regard to their "electric utility status". This approach works to accomplish broad inclusion of new tribal customers in the project service area, almost all of whom lack electric utility status at present. Furthermore, nothing in the legislation or legislative record contradicts Western's adherence to this practice with respect to the Hoover allocation.

3. Prohibition of Less than 1 MW Allocation Without an Aggregation Arrangement

- a. Western has not demonstrated sufficient justification to require the proposed minimum 1 MW allocation criteria or to require new customers to enter into an “aggregation arrangement” in order to satisfy the requirement. Western has offered no justification for the minimum allocation criteria other than for its own convenience, which, by itself, is not a justification. This requirement penalizes the smallest scale new customers, a group consisting overwhelmingly of small tribes in the service area.
- b. The aggregation concept is vague as defined. For example, Western does not specify how it will treat any customer that loses its aggregation arrangement before the end of the contract term. Customers participating in an aggregation arrangement could potentially lose their less than 1 MW allocation if the aggregation arrangement fails for any reason, including the loss of allocation eligibility by one of the participants in the arrangement, or for any other reason that causes the contractual arrangement to lapse or become unenforceable.
- c. Western should utilize the aggregation concept consistent with its historic allowance for aggregation on a voluntary basis in arranging for allocation scheduling and/or delivery. Currently almost all tribal customers seek benefit arrangements rather than direct delivery and as such, an aggregation requirement lacks a sound basis.
- d. Finally, Western can appropriately address its asserted allocation “rounding” concerns solely through operating protocols. The BCP power is contingent capacity and associated energy. This means that if an allocation is made for 1 MW, operationally based upon water conditions, the customer will most likely receive something less than 1 MW. Western deals with this issue of reductions in allocations on a routine basis through operational protocols.

4. State Allocations to Eligible Applicants

The proposed criteria are silent as to how Western will treat customers eligible for/receiving Hoover allocations through the States of Nevada or Arizona. Unless Western will complete a supplemental public process encompassing this issue prior to the allocation process, the matter must be addressed in the scope of the establishment of these allocation criteria. To ignore this issue as outside the scope of Western’s authority or role would be inconsistent with Congressional intent behind the 2011 Hoover Act, in particular the directive that Western “fairly and equitably” allocate the resource. See July 2011 House Report.

5. EPAMP

Western has stated in its FRN that it will “consider” an applicant’s existing federal power resource allocation in determining the applicant’s BCP Hoover allocation. The FRN does not specify what such consideration will entail or what its effect will be. Western withdrew its proposed application of the Energy Planning and Management Program (EPAMP) in relation to the process by Federal Register Notice on December 28, 2011. Congressional intent behind the governing legislation requires that Western follow only “federal preference standards.” Even if Western interprets this proviso as encompassing deductions to the allocations of new BCP applicants on the basis of other hydro resources available for their use and/or benefit, in this instance, existing customers are receiving renewed contracts with a 5% share reduction; no consideration of their other federal resource availability has been made by statute or proposed by Western. As such, Western should, in this instance only impose a maximum equivalent 5% reduction on new tribal customers receiving the benefit of other federal hydro resources. Such

an approach displays consistency by Western across its management of Hoover power output and harmonizes Western's action on this point with Congressional directives as well as Western's own withdrawal of EPAMP application in this instance.

Public Process

Western has stated that it will review all comments and issue final marketing criteria as a result of this single step process. But Western's identified procedure to address the allocation of the Schedule D resource is vague. Western's response to issues and concerns being raised with respect to matters omitted from the criteria proposed will accordingly constitute new agency action. Western must therefore provide a supplemental opportunity to address any new criteria created as part of this public comment process prior to making any allocations. A failure by Western to clarify its proposal and provide additional public comment opportunity will contravene established principles of administrative law and also defy relevant legislative intent for an "open, thorough and transparent assessment" in making new customer allocations. See House Report, July 20, 2011.

Thank you for your thorough consideration of these comments. The Yavapai-Apache Nation looks forward to further engagement with Western in the process of allocating BCP Hoover power resources.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Jackson, SR.", written over a horizontal line.

Robert Jackson, SR.
Vice-Chairman