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Phoenix, AZ
January 29, 2010

Re: Boulder Canyon Project – Post-2017 Application of the Energy Planning and Management Program Power Marketing Initiative 74 Fed. Reg. 60256-7

Dear Mr. Moe:

The Arizona Power Authority (“Power Authority”) respectfully submits the following comments on the Post-2017 remarketing effort for the Boulder Canyon Project (“BCP”) as initiated by the Western Area Power Administration (“Western”):

1) **Legislative Effort to Address Issues in BCP Marketing and Allocation Process.** The existing Hoover power contractors including the Power Authority have jointly developed a legislative proposal, the Hoover Power Allocation Act of 2009, introduced the proposal in Congress in December 2009 via Majority Leader Harry Reid (D-NV) and House Water and Power Subcommittee Chairwoman Grace Napolitano (D-CA) along with numerous cosponsors.

The legislation will protect the economic health of vast numbers of ultimate power consumers within the states of Arizona, California and Nevada who rely on the hydro-power output of the Hoover Dam, and will also ensure reliable water delivery in these three states. The Power Authority supports the efforts to have the legislation passed and enacted into law, and note, if enacted would impact the current Western marketing and allocation process.

2) **Law Governing the Hoover Post-2017 Marketing and Allocation Process.** As noted in section 105(g) of the Hoover Power Plant Act of 1984 Congress reserved the right to allocate capacity and energy under section 5 of the Boulder Canyon Project Act of 1928. 43 U.S.C. §619a(g). Section 5 of the Boulder Canyon Project Act establishes the statutory requirements applicable to allocation of Hoover power:

“The Secretary of the Interior is hereby authorized under such general regulations as he may prescribe, to contract for...generation of electrical energy and delivery at the switchboard to states, municipal corporations, political subdivisions, and private corporations of electrical energy at said dam.

“General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under Subsection (6) of this section, and in making such contracts, the following shall govern:

...

(c) “Applicants for purchase of water and electrical energy; preferences.

“Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefore who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Power Act (16 U.S.C. 791a *et seq.*) as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant shall be given, **first, to a state for the generation or purchase of electric energy for use in the state, and the states of Arizona, California and Nevada shall be given equal opportunity** as such applicants”. 43 U.S.C. §617d(c).

Section 5 of the Boulder Canyon Project Act of 1928 thus governs allocation of power from Hoover Dam. The first priority to that power goes in equal opportunity to the states of Arizona, California, and Nevada. Subsequently the power may be further allocated within the Marketing Area primarily pursuant to priorities developed by the Solicitor of the U.S. Department of the Interior in the 1930’s. See Finney Solicitor Opinion dated January 1, 1930.

3) **Application of PMI to Marketing and Allocation Process.** Western adopted the Project Marketing Initiative (PMI) of the Energy Planning and Management Program in 1995. (See 10 CFR Part 905.) Western now proposes to apply the PMI to the post-2017 Hoover marketing and allocation process.

PMI cannot be read to apply in order to extend a federal power contract that expires on a date specific by force of federal law. The current contracts expire by federal law on September 30, 2017 pursuant to Section 105(a)(1)(C)(4)(A) of the Hoover Power Plant Act of 1984. The Department of Energy’s Energy Planning and Management Program Power Marketing Initiative regulations only apply to “existing customers with long-term firm power contracts...” 10 CFR 905.32.

Section 5 of the Boulder Canyon Project Act of 1928 and the associated Conformed Marketing Criteria govern the marketing and allocation process. The Conformed Marketing Criteria contain “...the principles and guidelines for the marketing of power from the Boulder Canyon Project, Parker-Davis Project, and the United States entitlement in the Navajo Generating Station...” 49 Fed. Reg 50582 (December 28, 1984). Subsection C of the Conformed Marketing Criteria details the regulatory requirements applicable to the Boulder City Area Projects in including Hoover Dam. The Criteria also

“... serve as the regulations for contract renewal and for the sale of power from the Boulder Canyon Project”. *Id.* at 50584.

To the extent Western disagrees with the above analysis, the Power Authority recommends that Western initially address the issue of whether the PMI process applies to marketing and allocation of Hoover power prior to initiating the process. Indeed this is in accord with the commitment Western made when it originally published the EPAMP regulations in 1995: “Finally, Western also proposed to evaluate the application of the PMI to Parker-Davis and the Boulder Canyon Project no sooner than 10 years before existing contracts expire”. 60 Fed. Reg. 54157 (October 20, 1995).

A decision concerning the use of the PMI program should be made in advance of any other decisions in the administrative process. It is a threshold matter that should be resolved before anything else is done. If there are substantial disagreements, then those need to be resolved at the outset. If for some reason there is no legislation and the administrative process goes forward, it would be helpful, if not necessary, to avoid litigation during the administrative process. Sorting out the nature of the process and its essential elements is a precondition to achieving that result.

4) **Reclamation Law is Not Applicable to Allocation Process.**

The Department of Energy Organization Act of 1977 established the Western Area Power Administration. 42 U.S. Code [USC] §§ 7101 *et seq.* (DOE Act). This legislation transferred Federal power marketing and power transmission functions from the Secretary of the Interior through the Bureau of Reclamation to the Secretary of Energy, acting through Western's Administrator. Western performs these functions in 15 western states: Arizona, California, Colorado, Iowa, Kansas, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah, and Wyoming. Western conducts its functions in conformance with certain laws, primarily the DOE Act, Section 5 of the Flood Control Act of 1944 (16 USC § 825s) for Department of Army projects, Section 9(c) of the Reclamation Project Act of 1939 (43 USC § 485h(c)) for Bureau of Reclamation projects, and, for Glen Canyon Dam, the Colorado River Storage Project (CRSP) Act (43 USC §§ 620-620o). While Western took over the power marketing activities, Reclamation retained irrigation, water supply, and dam-operation functions at Federal water projects constructed by Reclamation.

Western's power marketing responsibility begins at the switchyard of Federal hydroelectric power facilities and includes the Federal transmission system to interconnected utility systems. In marketing power in excess of project-use needs, Western sells both long-term and short-term firm power. This power is first offered for sale to what are known as "preference customers." This designation originates from the Reclamation Project Act of 1939, which requires Western to give preference in the sale of Federal power to municipalities, nonprofit corporations or agencies, cooperatives, and other nonprofit organizations financed under the Rural Electrification Act of 1936 (17 USC §§ 901 *et seq.*).

The Boulder Canyon Project Act of 1928 (BCPA) authorized the construction and operation of Hoover Dam 43 U.S.C. 617 et seq. Section 18 of the Reclamation Project Act of 1939 excluded the Hoover Dam from the Act's applicability: "[n]othing in this Act shall be construed to amend the Boulder Canyon Project Act of 1928 (45 Stat. 1057), as amended." See footnote 43 U.S.C. §485j.

The BCPA by its own terms did authorize application of reclamation law to the Hoover Dam in certain limited situations, but in any case not when reclamation law would be inconsistent with the terms of the BCPA itself: "[t]his subchapter shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided".

That is, reclamation law governs the BOR's water works operational issues at Hoover Dam. However reclamation law and its specific priorities do not apply to the power allocation process. Indeed the BCPA itself establishes specific power allocation and customer priorities and these statutory requirements, instead, govern the allocation process.

Reclamation law including the preference provisions contained in 43 U.S.C. §485h, is therefore not applicable to the allocation process under the Boulder Canyon Project Act of 1928.

5) **Proposed Marketable Resource and Amount Retained by Current Contractors.** The Western Area Power Administration (Western) proposes to market 2,044 MW of contingent capacity with an associated 4,116,000 MWh of annual firm energy. Hoover's contingent capacity rating is currently limited by contract to 1,951 MW, and similarly the current energy amount is 4,527,001 MWh.

Western should allocate all of the 2074 MW nameplate capacity at Hoover. However Western's proposed reduction in firm energy from current energy amount of 4,527,001 MWh to 4,116,000 MWh as a result of hydrology studies is fine. Under section 5(c) of the Boulder Canyon Project Act of 1928 Western lacks the statutory authority to withhold capacity and associated energy in order create a resource pool.

6) **Proper Marketing Area.** The marketing area for Hoover Dam power is established by Western's Conformed General Consolidated Marketing Criteria or Regulations for Boulder City Area Projects (Conformed Marketing Criteria). 49 Fed. Reg. 50582. The Conformed Marketing Criteria and marketing area have been ratified by law by Section 105(a)(1)(C)(4)(C) of the Hoover Power Plant Act of 1984.

The Boulder City Marketing Area is established by federal law. Boulder Canyon Project power must be marketed within the marketing area.

7) **Term of Contract.** Western proposes to extend current contractors' contracts for 30 years commencing on the day after the expiration date of the current contracts, or October 1, 2017.

The original 1930's power contracts let by the Bureau of Reclamation at Hoover Dam were 50-year term contracts. The 30-year term of the existing contract that expires in 2017 was a political compromise written into the Hoover Power Plant Act of 1984. However when those contracts expire in 2017, it is reasonable to go back to the original 50-year terms, and nothing in the Marketing Criteria would prevent that approach. Indeed Western's Resource Adequacy Planning requirements encourage such an approach (and EPAMP program contract limitations also do not apply).

8) **Repayable Advances.**

Western is already committed per the terms of the Implementation Agreement to recover the outstanding capital advances incurred by existing contractors on or before September 30, 2017 during the following five-year period. The Power Authority recommends that Western clarify this Implementation Agreement obligation by putting a term referencing and committing any new power contract holder to this obligation.

9) **Treatment of Schedule C Excess Energy.** Current law includes a Schedule C that prescribes treatment of excess energy at Hoover Dam. Western's re-marketing proposal does not address this issue.

The Power Authority recommends that Western include existing Schedule C provisions in its proposal, and also maintain the existing A,B, and C classifications of power for purposes of the Hoover Post-2017 allocation process and then apply the classifications to and in conjunction with the revised firm energy criteria.

10) **Recognition of Role of APA/CRC.** By statute the Arizona Power Authority has exclusive authority to purchase power from Hoover Dam within the State of Arizona, and the Colorado River Commission of Nevada similarly has exclusive authority to purchase power from Hoover Dam within the State of Nevada. 43 U.S.C. 619a(a).

Under the Boulder Canyon Project Act of 1928, the Arizona Power Authority and the Colorado River Commission of Nevada each respectively receive their power allocations as agents of a state in its sovereign capacity.

11) **No Environmental Impact Statement Necessary.** Does the Post-2017 Hoover Marketing Process require preparation of an environmental impact statement (EIS) pursuant to the National Environmental Policy Act of 1969 (NEPA)? NEPA requires government agencies to consider the impacts to the human environment of all proposals for "major federal action." Council on Environmental Quality (CEQA) regulations implement NEPA's general agency planning requirements. 42 U.S.C. §§4321-4347 and 40 CFR Parts 1500-1508; *see also* 10 CFR Part 1021.

Traditionally the CEQA guidelines as well as the Department of Energy's own internal NEPA Implementing Procedures help DOE agencies to integrate the NEPA process into its early project planning in order to identify environmental issues and consider the impacts of its proposed actions.

The agency usually issues a Notice of Intent or NOI to announce that it is conducting an environmental assessment for a proposed action in order to determine the potential environmental effects thereof. The proposed assessment is prepared in compliance with NEPA, the CEQA regulations, and often the agency's internal environmental impact analysis process, if any.

The agency usually also analyzes multiple alternatives for its action.

Western previously concluded that the 1980's Boulder Canyon Project marketing process was not a major federal action which required preparation of an environmental impact statement. See Part IV.B, Regulatory Procedural Requirements of the Conformed General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects. 49 Fed. Reg. 50584 (1984).

Specifically in 1983 Western conducted an Environmental Assessment in the development and publication of General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects in order to determine whether the 1980's Boulder Canyon Project marketing process constituted a major federal action requiring preparation of an EIS. 48 Fed. Reg. 20872 (May 9, 1983) et seq.

In its 1983 Environmental Assessment (EA) Western reviewed four alternatives in the remarketing of Hoover capacity and energy. To wit:

- “1. No action, essentially renewal in kind of existing Boulder Canyon Project capacity and offer from allocation of offer form allocation of Parker-Davis Project capacity and energy.
2. One-third split of Boulder Canyon Project power and offer for allocation of Parker-Davis Project power.
3. Renewal of firm power to existing contractors and allocation of additional firm power and peaking power to existing and new customers.
4. Renewal of nameplate capacity and one-third split of additional up-rated operating capacity of the Boulder Canyon Project power, offer for allocation of Parker-Davis Project power, and allocation of additional power as firm and peaking power.

The impact analysis deals with the effect these alternatives will have on the existing electrical system as well as the effect of the alternatives on the physical, natural, and social/economic environments.

Western has made a determination based upon environmental considerations of these final Criteria that this action is not a significant action in the context of the National Environmental Policy Act, and that it will not lead to any significant environmental impacts. A Finding of No Significant Impact has been prepared. Copies of the EA and FONSI are available from the Boulder City Area Offices.” 48 Fed. Reg. 20881 (May 9, 1983).

Judging from the wide range of the four alternatives considered, Western apparently did not view the power allocation process in and of itself as triggering any physical activities at the Dam. The Conformed Marketing Criteria published subsequent to the passage of

the Hoover Power Plant Act of 1984 affirmed and adopted Western's May 1983 FONSI determination. 49 Fed. Reg. 50584 (December 28, 1984)

Therefore Western's consideration of a range of marketing and allocation alternatives in 2017 should similarly create no significant environmental impacts.

12) **No Waiver of Rights.** The Hoover Power Plant Act of 1984 contained a provision which expressly preserved rights of parties under the 1928 Act:

“Except as amended by this Act, the Boulder Canyon Project Act of 1928 (45 Stat 1057, as amended, 43 U.S.C. §617 et seq.) as amended and supplemented, shall remain in full force and effect”. Section 103(b) Hoover Power Plant Act of 1984; 98 Stat. 1333.

The Power Authority appreciates this opportunity to provide comments on Western's Post-2017 remarketing initiative, and reserves the right to submit further comments and otherwise participate in this proceeding.

Respectfully Submitted,

Douglas V. Fant
For Arizona Power Authority

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