



COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

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January 29, 2010

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

Re: Subject: Boulder Canyon Project Post-2017 Energy Planning and Management Program, 74 Federal Register 60256 (November 20, 2009)

Dear Mr. Moe:

The Colorado River Indian Tribes ("CRIT") is a federally recognized Indian tribe that exercises sovereignty and jurisdiction over a land base that includes trust lands in both Arizona and California. CRIT submits these comments to the Western Area Power Administration ("Western") by the Tribe in response to the above-referenced Notice of Proposal ("Notice"). Particular attention is directed at Western's request for comments regarding: 1) the applicability of the Power Marketing Initiative ("PMI") to the Boulder Canyon Project ("BCP") power resource ("Resource"); 2) the quantity of the Resource to be extended to existing contractors; 3) the size of the proposed resource pool; 4) excess energy provisions; and 5) the term of contracts (collectively "BCP Remarketing Framework").

There are two overall generalized observations that CRIT would like to include in the record. The first observation concerns the substantial and albeit sometime intangible value of the PMI to Indian tribes and within Indian Country. Within a highly industrialized economy there are "entry cost barriers" for all industries. This is especially true with respect to all facets of the electric power industry. The PMI provides a vitally important "entry point" for Indian tribes because it requires only a relatively modest commitment of capital and allows Tribes to retain professional and technical assistance on a graduated basis. Without the PMI many Indian tribes would only interface with the industry through the sometimes adversarial interaction with its local electrical service providers or through rights-of-way negotiations for high voltage transmission projects. The PMI provides Indian tribes with a means to interact with the industry on a more positive basis. Such results are difficult to quantify. Nonetheless PMI has occasioned profound and palpable results by reinforcing Tribal sovereignty, strengthening economic development on and adjacent to reservations, and forging relationships that will certainly make tribes more receptive to energy development and transmission proposals. The latter point is especially significant in light of Congress' unwavering commitment to the bedrock principle that Tribal Governments have exclusive jurisdiction to over the availability of tribal trust lands for such projects.

CRIT's second observation concerns the extraordinary changes in the utility industry in the last fifteen years. Many of these trends, such as renewable energy portfolio standards, could not have been anticipated in 1995. By 2017 the impact of these changes will be even more pronounced and magnitude of these changes must be taken into consideration in contemplating an allocation that will take effect in seven years.

I. Overview

Congress is likely to enact legislation prior to 2017 that will address some or all of the BCP Remarketing Framework issues, as was done in 1984. *See* Public Law 98-381 (Hoover Power Plant Act of 1984 or "HPPA"). Nevertheless, this prospect actually makes it even more important that Western apply the PMI with care and deliberation because Congress will certainly afford due regard to the outcome of this process. And once these results are ensconced as federal law they fall outside the ambit of most judicial review.¹ A statutory allocation is likely to be multi-generational and could become the framework for subsequent legislation. The Tribe recognizes that the Boulder Canyon Project Act ("BCPA") and the HPPA deprived Western of any exercise in allocating the Resource. Yet unless and until Congress exercises its plenary authority Western's discretion is framed by several immutable principles. Fortunately, in publishing the final PMI in 1995 Western identified and described these principles with considerable detail and clarity. *See* 60 Federal Register 54151, October 20, 1995.

The following principles should guided Western's decisions even whether the PMI is formally applied to the BCP or not:

- "Western's existing customers have no equity position in Western's facilities, and they have no right to receive power from Western in the absence of a contract." *Id.* 54159.
- "The proposal of a graduated resource pool available to new customers gives Western the flexibility to allocate power equitably over the term of the contract." *Id.* at 54158.
- "Western agrees that a 20-year contract term is more comparable to those existing between the Tennessee Valley Authority and its customers. Western also agrees with the comments suggesting that a 20 to 25 year contract term is consistent with industry standards for firm sales." *Id.* at 54158.

II. Applicability of the Power Marketing Initiative

The CRIT supports application of the PMI to the Resource as a baseline framework for the remarketing the Resource. Nevertheless, the CRIT notes that the PMI provides sufficient flexibility for Western to take substantial changes over the last fifteen years into account in doing so. Notably in adopting the PMI in 1995 Western express concern that existing customers would resort to thermal generating development in response to reduced access to the hydropower

¹ The authority of Congress over Federal property, including physical structures, is described as "without limitations." *See Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) ("[W]e have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'"). The term "property" under the Property Clause has been broadly defined to include all personal and real property belonging to the United States. *Ashwander v. TVA*, 297 U.S. 288, 331 (1936).

resource. *Id.* 54160. Western expressed particular concern about the economic and environmental implications of such a response. *Id.* Western should take into account the dramatic impact of renewable portfolio standards and federal financial support for renewable energy projects and transmission infrastructure to support new renewable generation. Certainly these developments, exemplified but not limited to the financial support available under the American Recovery and Reinvestment Act of 2009, ("Recovery Act"), could not have been imagined in 1995 when Western presented the final version of the PMI. *See* Notice of Proposed Program and Request for Public Comments, 74 Federal Register 9391, March 4, 2009, (Request for interest under Section 402 of the Recovery Act). Certainly by 2017 several billions dollars worth of infrastructure and new renewable resource --presently under construction and development at taxpayer expense-- will be in place as the remarketing takes effect. Escalated portfolio standards will also be a fundamental factor in the industry's overall resource mix in 2017. By contrast, in 1995 Western faced a landscape where the seeds of this change were only beginning to grow. Fifteen years ago Western was legitimately concerned that a kilowatt-by-kilowatt development of fossil-fuel power as a means of replacing any non-renewed hydropower resources. Western's concern over a decade ago was that such a "flight" to thermal (*i.e.* fossil fuel burning) energy threatened to undermine federal integrated resources planning objectives. Certainly the threat of widespread flight to fossil-fuel-based is not as pronounced today as it was in 1995. And it will be even further diminished in 2017. This provides Western with a basis to be more confident about increasing the size of the resource pool, as well as providing for incremental allocations to the resource pool, with little risk to undermining environmental objectives.

CRIT respectfully submits that the PMI framework is not afforded sufficient prominence in the Proposal and some elements may not be reflected at all. CRIT recognizes that PMI's application to the Resource is, in fact, one of the issues under consideration. Nevertheless, the Proposal relies heavily on the framework imposed by the BCPA and the HPPA. Neither of these statutory frameworks apply to this remarketing effort. By contrast, the PMI reflects a through and deliberative effort to balance a number of complex factors and considerations as reflected in the following excerpt:

Western does not believe that the historic enjoyment of the benefits of Federal hydropower means that a customer has a perpetual right that cannot be diminished. Western's policy of promoting widespread use and the potential allocation of power to new preference customers must be balanced against the fact that existing customers have developed contractual relationships with supplemental suppliers, transmission arrangements with Western or third parties, and in some instances have constructed transmission facilities to receive Federal power. Western believes that this final rule provides for a proper balance among these policy considerations.

Id. at 54161.

To be sure, the PMI reserves Western's flexibility to make appropriate adjustments on a project-specific basis. Nevertheless, the Proposal strays from the PMI and the preference power framework in a number of fundamental respects. *See* GAO, Federal Power: The Evolution of

Preference in Marketing Federal Power, GAO-01-373 (February 2001) ("GAO report") As the GAO report explains, "The notion of providing public bodies and cooperatives with preference for federal hydropower rests on the general philosophy that public resources belong to the nation and their benefits should be distributed directly to the public whenever possible." *Id.* (Emphasis supplied). Therefore preference policy is not achieved simply because an Indian tribe's membership might receive an attenuated benefit by purchasing power at a blended rate from a private utility or an electric co-operative. CRIT acknowledges that the PMI is an overall effort by Western to provide such direct benefits. CRIT's concerns address how this important objective is implemented via the Proposal, and not with Western's overall commitment to either the Tribal sovereignty, the PMI, or preference policy.

The Proposal stops short of limiting the Resource extension to only a "major percentage" of power under contract, and compounds this omission by extending a substantial allocation of the Resource to an entity without preference status. As a consequence, Western has not achieve the requisite degree of confidence that the resource pool will adequately address either current or reasonably anticipated needs of new allottees. Furthermore, the Proposal lacks a means for "meet[ing] future needs that Western cannot currently identify." *Id.* at 54160. These omissions are exacerbated by the proposal to employ a thirty-year contract extension rather than a twenty-year term.

The Proposal appears to be predicated on the premise that legacy contractors hold interests in their respective allotment. Under the Proposal generating capacity is simply reissued to legacy contractors and the resource pool is limited to what remains after doing so. This is not consistent with the philosophy of the PMI as reflected in the following excerpt:

Western believes the public interest is served by having the flexibility to meet a fair share of the needs of new customers from the publicly owned and financed hydroelectric facilities in the West. Western agrees with a comment received that states the Program does not provide its customers with absolute resource certainty.
Id. at 54159

The Proposal also omits the incremental resource pool provided for in the final regulations and discussed extensively in the 1995 Federal Register notice. Specifically, 10 C.F.R. § 905.32 provides for an incremental resource pool of up to 1% of the longer term marketable resource to be allocated at two five year intervals. Western vigorously defended the decision to apply the PMI to the Pick-Sloan and Loveland Area Projects, including the two incremental increases, largely on the basis of its value to Indian tribes. By any measure the PMI has proven to be a very successful program, especially in Indian Country. There is no basis for justifying the absence of the incremental increases from the plan. This can only be viewed as an unwarranted repudiation of the PMI.

Western proposes a 30 year contract to a non-preference entity without a providing for incremental interval increase. This can not be justified. Western should address these concerns by reducing the quantity of the extension, providing for reallocation, and reducing the contract

term to 20 years. All of these are called for under the PMI. Also, CRIT remains confident that these revisions will redound to the benefit of all parties, most notably by helping to ensure that the Proposal can withstand external challenges. This will increase certainty for all concerned, including the public at large.

III. Discretion Concerning Existing Tribal Preference Entities

In 2006 CRIT was denied an allocation from the Parker-Davis ("P-D") resource pool because CRIT has an allocation from another project. CRIT notes that the PD resource pool was miniscule compared to the BCP. Also, in that instance the successful allottees were preference entities, including other Indian tribes securing an initial allotment. It would be fundamentally unfair to preclude CRIT from participating the resource pool on the basis that CRIT has an existing allocation. This remarketing may present the only opportunity for the Tribe to acquire BCP power for more than a 100 year period (1937 to 2047 or beyond), so it would certainly present a hardship to deny the Tribe an opportunity to receive an allocation.

CRIT respectfully requests that the Western confirm that holding an allocation from another project does not automatically disqualify CRIT or any other Indian tribe from seeking or securing a BCP allocation. It is at least arguable that preference laws mandate this result. But it is not necessary for Western to address or decide this issue. Western expressly reserved the flexibility to decide whether to allow existing customers to access a resources pool "on a project-specific basis." 60 FR 54163. Western should employ this discretion in this instance in light of the fact that the CRIT has been precluded from this power under the an eighty year period --1937 to 2017-- covered by the BCPA and the HPPA. Unless Western grants this request it will be another three decades or more before the Tribe will have even an opportunity to access to this power.

Technically CRIT does not view this request as a request for a "waiver" because the PMI leaves Western with discretion to decide on a project-specific basis whether to allow existing customers to access a resource pool. For that matter, it is not certain that the PMI will even be applied to the BCP. Nevertheless, this is matter of paramount importance. Accordingly, in an abundance of caution, CRIT notes that to the extent the PMI is found applicable and if Western should determine that it is generally constrained from granting part of the resource poll to preference customers with an existing allocation, CRIT asserts that Western can and should grant this request pursuant to ¶6 of Executive Order on Consultation and Coordination With Indian Tribal Governments, November 6, 2000, as follows:

¶6 (b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

Certainly in this instance the relevant agency (Western) possesses the authority to grant a waiver. In fact, as noted above, CRIT only includes a petition for a "waiver" to err on the side of caution. Also, it is far more consistent with the overall federal policy to grant CRIT's request than to grant an extension to a non-preference entity.

IV. Tribal Access to Transmission and Generation Assets

CRIT respectfully petitions Western to reaffirm that it recognizes that it remains willing and able to intercede directly in instances where an Indian tribe is denied the full benefit of its allocation because a transmission or distributor is unwilling to accommodate tribal requests for access, service, or to acquire distribution assets for a fair price. CRIT appreciates WAPA's candid assessments of this nettlesome obstacle in the PMI as well as in its recent report to Congress. "In some situations, existing utility providers that previously served the tribe have shown a lack of willingness to enter into sales agreements with tribes for these facilities. Tribal Power Allocation Study: For Section 503(a) of the Energy Policy Act, Department of Energy at 7.

V. The Role of the Arizona Power Authority and the Colorado River Commission

The Obama Administration has made the enhancement and expansion of this policy one of its domestic priorities as reflected in President Obama's November 5, 2009 Memorandum to Heads of Executive Departments and Agencies which is directed at implementing Executive Order 13175 by "*strengthening* the government-to-government relationship between the United States and Indian tribes."

The Notice also makes an open-ended request for comments on the roles of the Arizona Power Authority ("APA") and the Colorado River Commission of Nevada ("CRC") in the allocation process. Once again, it is out of an abundance of caution, that CRIT submits these comments to ensure that the record of this proceeding reflects the transcendent significance of direct government-to-government relationships with Indian tribes. It is of the utmost importance Western confirm that Indian tribes in Arizona and Nevada will not be prejudiced in their access to the Resource nor required to seek such power from a state agency. There is no applicable law or policy that would require Indian tribes in Arizona or Nevada to subcontract through a state agency in order to acquire access to WAPA power. To be sure, both states have laws in place that constrain the activities of entities that are subject to state jurisdiction, but there is basis under federal law for subjecting WAPA to such restrictions, which arises only as a matter of state law. Furthermore, WAPA must be mindful of the intervening laws, such as the 1992 Energy Act, that reinforce tribal jurisdiction over energy development and that direct the DoE to engage directly with Indian tribes:

In implementing the provisions of this Act [Public Law 102-486], the Secretary of Energy shall involve and consult with Indian tribes to the maximum extent possible and where appropriate and shall do so in a manner that is consistent with the Federal trust and the Government-to-Government relationships between Indian tribes and the Federal Government.

25 U.S.C. §3502 (emphasis supplied).

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WAPA should be guided by the overall policy of the government-to-government relationship as reflected in the Executive Order, the 992 Energy Act, and the Indian Tribal Energy Development and Self-Determination Act of 2005, Public Law 109-58.

CRIT appreciates the opportunity to participate in this important process.

Sincerely,

COLORADO RIVER INDIAN TRIBES

Eldred Enas
Tribal Council Chairman