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ASSOCIATION OF ARIZONA**

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E-MAILED ONLY
(Post2017BCP@wapa.gov)

January 29, 2010

Mr. Darrick Moe
Western Area Power Administration
Desert Southwest Regional Manager
P.O. Box 6457
Phoenix, Arizona 85005-6457

Re: Written Comments of Robert S. Lynch, Counsel and Assistant Secretary/Treasurer, Irrigation & Electrical Districts Association of Arizona concerning Western's proposal to apply the Power Marketing Initiative of the Energy Planning and Management Program and to make other decisions concerning reallocation of Boulder Canyon Project Power Post-2017

Dear Darrick:

In its November 20, 2009 Federal Register notice¹, the Western Area Power Administration (Western) asked a series of questions. These comments are intended to respond to those questions and important related subjects. These responses and analyses of the situation follow and expand on our filed and oral comments submitted and made at the Phoenix Public Comment Forum on January 20, 2010.

Applicability of the PMI to the BCP

The first question Western posed was whether the Power Marketing Initiative (PMI)² of the Energy Planning and Management Program (EPAMP)³ applies or may be applied to the reallocation of power pursuant to the Boulder Canyon Project Act⁴. In short, it can't.

The PMI, by definition, reserves a portion of a resource allocated under it for "new entrants". 10 C.F.R. 905.32. Section 5 of the Boulder Canyon Project Act (43 U.S.C. § 617d) provides a renewal right to existing contractors, which Congress preserved in the Hoover Power Plant Act of 1984. 43 USC § 619, et seq. There is no mention in the 1928 Act of providing for new entrants in a renewal of contracts, whether by extension or reallocation. In the 1984 Act, Congress specifically provided both existing Hoover (Hoover A) and power from uprating the Hoover Power Plant (Hoover B) to the states of Arizona and Nevada and provided for six specific new Hoover B entrants in California.

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¹ 74 Fed.Reg. 60256-7.

² 10 C.F.R. 905.30-905.37.

³ 10 C.F.R. Part 905, 60 Fed.Reg. 54151, et seq. (October 20, 1995)

⁴ 43 U.S.C. § 617, et seq. In the 1995 establishment of EPAMP, Western postponed consideration of the applicability of the PMI to the Boulder Canyon Project. 60 Fed.Reg. at 54157.

43 U.S.C. § 619a. By doing so, Congress reaffirmed its original offer in the 1928 Act that the first preference for Hoover power would go to states in their sovereign capacity if they chose to take it. Both Arizona and Nevada made that choice and Congress in 1984 reaffirmed that state primacy as a continuing policy of Congress. Congress also specifically provided that the Hoover Power Plant Act of 1984 in no way diminished the renewal rights of contractors under the 1928 Act. 43 U.S.C. § 619a(b). These principles, state primacy and the right to renew, are inconsistent with the constructs in the PMI portion of EPAMP. Thus, PMI does not apply and the reserve pool contemplated in the Federal Register notice has no legal foundation.

There is yet a second reason that the PMI program cannot apply. The 1983 marketing criteria established ongoing principles for marketing power from the Boulder Canyon Project (BCP). 48 Fed. Reg. 20871, 20872. The 1984 Conformed Criteria, adjusting the rules as required by the 1984 Act, are likewise still applicable to the Boulder Canyon Project. 49 Fed.Reg. 50582, 50583 (December 28, 1984). Western has acknowledged that fact by referencing the marketing area articulated in the 1984 Conformed Criteria in its November 20, 2009 notice announcing the remarketing process for contracts post-2017. The Conformed Criteria were a decision collectively made under the Administrative Procedure Act and authorities relevant to the resource. Western cannot selectively continue to apply one aspect of the Conformed Criteria, marketing area, and not apply the remainder of the applicable portions of those criteria. Those criteria repeat and confirm the Congressional finding that Hoover power would continue to be offered to the states of Arizona and Nevada. 49 Fed.Reg. at 50583. Thus, a reserve pool, at least as it applies to the states of Arizona and Nevada, is not authorized. The existing authorities under which Western must act are inconsistent with the PMI program and are controlling.

Quantity of Resources to be Extended to Existing Contractors

Because the 1984 Conformed Criteria are still in effect, Western has no choice but to reallocate the capacity and energy to the existing contractors as allocated in 1984, and in 1985 as to uprating power. Even if it modifies or replaces those criteria, Western is, in our view, bound by its prior interpretations of the law as to preference and renewal.

It is common knowledge that Western left at least 75 megawatts on the table during that allocation process. More is available now. We think that the 1984 Conformed Criteria need to be modified to provide that the maximum capacity and energy available under optimum water conditions should be allocated. After all, the contractors are paying for that capability, whether it can be fully utilized under current water conditions or not.

We recognize that the fully allocated capacity and energy of the power plant will not initially be available to allottees. What will be available are the bills to allottees to pay for the whole plant. Since we are paying for the plant, we should get its output. If and when the lake fills, we who have paid for the previously unavailable power are entitled to get it. That is only fair.

The Size of the Resource Pool

Because existing law and regulation do not allow Western to reserve a resource pool for new entrants, we will not comment on the size of the pool proposed in the Federal Register notice. We do, however, wish to repeat our comments about new customers. Section 5 of the Boulder Canyon Project Act gives first preference to states (subsection 5(c)) and second preference to municipalities, if those municipalities are within a state that does not exercise its first priority, by virtue of the incorporation of the policies of the 1920 Federal Water Power Act. 50 Fed.Reg. at 47832; 53 I.D. 1, 13 (1930). The latter state obviously is California and the former obviously are Arizona and Nevada. This preference is accompanied by a right to renew “under then existing law and regulation.” Subsection 5(b). That these provisions of the 1928 Act remain applicable law is confirmed by the savings clause of the 1984 Hoover Power Plant Act. 43 U.S.C. § 619a(b). The 1984 Conformed Criteria and 1985 allocation action confirm Western’s then interpretation of the applicable law. 49 Fed.Reg. at 50583; 50 Fed.Reg. at 47833, 47834. The resource pool as envisioned in the Federal Register notice is contrary to law.

Excess Energy Provisions

Western’s Federal Register notice does not discuss the current distinction between Hoover A and Hoover B and only tangentially discusses Hoover C (excess energy) by asking a question about it. We believe that the resource should be reallocated using the same distinctions made in the Hoover Power Plant Act of 1984 and in the 1984-1985 allocation actions. Lumping Hoover A and Hoover B together effectively penalizes Hoover A contractors as to load factor. The contract renewal provision of the 1928 Act conflicts with that outcome. The wisest course of action would be to propose to maintain the distinctions among Hoover A, Hoover B and Hoover C as articulated in the 1984 and 1985 Western allocation decisions.

Term of Contract

Western proposes a 30-year contract term. The PMI regulations apply a 20-year contract term to other resources but not the BCP, proposing to face that decision at a future time. That time is now. We believe that Western would have no choice but to offer a 30-year contract under the existing Conformed Criteria. We believe the Conformed Criteria should be amended to offer a 50-year contract. Western acknowledges that the current BCP Implementation Agreement requires any new contractors or contractors who receive an increased allocation to reimburse existing BCP contractors for replacement capital advances. Western also needs to require any new contractors to obligate themselves to participate in the power revenue support program for the Multi-Species Conservation Program (MSCP). All Hoover power allottees need to participate in this program. Their participation, tied to the time line of MSCP, militates toward a longer contract term. A 50-year term would be consistent with the initial contract term offered to Hoover allottees and would ensure that the 50-year MSCP program burden would be matched by an equivalent benefit to the power contractors who have shouldered that burden.

The Role of the APA and the CRC in Western's Allocation Process

The final question that Western proposes in its Federal Register notice relates to the role of the two state agencies in the allocation process. It is preceded in the notice by an acknowledgement that the two state agencies have been designated agents of their respective states for acquiring and remarketing BCP power. By doing so, Western acknowledges that the two states have accepted the offer Congress made to receive the allocation for power to be utilized in their respective states and that each agency is acting in the sovereign capacity of its state. See 50 Fed.Reg. at 47832. The notice fails to mention that Congress, in passing the 1984 Act, recognized that this had happened in the original allocation process and not only acknowledged that the states had acquired the resource in their respective sovereign capacities but that the agencies in question were acting as the agents of the states in that regard. The states, having accepted the offer in the 1928 Act, and Congress, having confirmed the arrangement in 1984, Western is without authority to deal in Arizona and Nevada with anyone but the respective state agencies. That requirement is also acknowledged in the Conformed Criteria, 49 Fed.Reg. at 50583, 50588, and in the 1985 allocations, 50 Fed.Reg. at 47832.

Timing and Process

While Western did not ask for comments on these subjects, we believe it is necessary to offer them in any event.

As to timing, we believe that Western should postpone moving forward with any action designed to implement a process affecting post-2017 Hoover power until the end of this Congressional session. As Western knows, bills have been introduced that would have Congress reallocate Hoover power, just as Congress stepped in to do in 1984. Those bills address the issue of broadening the potential beneficiaries of Hoover power.

We believe it would be prudent for Western to stay its hand until it sees whether the current Congress is willing to follow the same path as Congress did in 1984 and make this a Congressional decision. If Congress does, it will give Western further direction. If it does, it will likely give Western additional authority we believe it cannot exercise under existing law. Indeed, that was a prime motivating factor for introducing the legislation. Moreover, to the extent that Congressional direction varies from the course Western's notice suggests, both time and money will be saved by waiting.

Whatever timeframe Western adopts, we believe that the process should be split in two. Western has put forward in its Federal Register notice a proposal to use the PMI program. That is the main thrust of the Federal Register notice. We believe that a decision concerning the PMI program should be made in advance of any other decisions. We firmly believe that the PMI program is not applicable here and others appear to agree. In any event, it is a threshold matter that must be resolved before anything else is done. If there are substantial disagreements, those need to be resolved at the outset. If for some reason there is no legislation and the administrative process goes forward, the timeline is such that it would be helpful, if not totally necessary, to avoid litigation

during the process. Sorting out the nature of the process and its essential elements is, in our view, critical in attempting to achieve that result.

The Legal Effect of Past Actions

Finally, we suggest that Western must, as a preliminary matter, address the question of whether, and to what extent, its prior interpretations of existing law affecting Hoover power allocations, made some quarter century ago, bind it to the course of action we suggest. Alternatively, Western must evaluate the risk to its decision making process that attempting to change course here represents. The prior interpretations with regard to preference and renewal, published in final actions in the Federal Register, carry the force of law and are thus entitled to what is known as Chevron deference. Conversely, an agency may change course, but “an agency changing course must supply a reasoned analysis.”⁵ Here, Western, in our view, must evaluate these principles as they apply to its proposal to reallocate post-2017 Hoover power. This analysis marries with that of the applicability of the PMI and, in our view, defines the near-term actions which Western must undertake.

Thank you for the opportunity to comment on this important undertaking.

Sincerely,

/s/

Robert S. Lynch
Counsel and Assistant Secretary/Treasurer

RSL:psr

cc: Tim Meeks, Administrator, Western
Joe Mulholland, Executive Director, Arizona Power Authority
IEDA Members

⁵ Motor Vehicle Mfrs. Ass’n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). See also River Runners for Wilderness v. Martin, 574 F.3d 723, 737 (9th Cir. 2009); Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 687-88 (9th Cir. 2007); Grand Canyon Trust v. Bureau of Reclamation, 623 F. Supp. 2d 1015, 1034 (D. Ariz. 2009).