Arizona G&T Cooperatives
Touchstone Energy® Cooperatives

June 12, 2023

VIA EMAIL TO SPP-COMMENTS@WAPA.GOV

Ms. Rebecca Johnson
Advisor
Transmission and Power Markets Advisor
Western Area Power Administration,
12155 West Alameda Parkway
Lakewood, CO 80228–8213.

RE: Recommendation for the Western Area Power Administration's Rocky Mountain Region and Colorado River Storage Project Management Center to Pursue Final Negotiations Regarding Membership in the Southwest Power Pool Regional Transmission Organization, and for the Upper Great Plains Region to Expand its Participation ("Public Notice")

Dear Ms. Johnson:

On behalf of Arizona Electric Power Cooperative ("AEPCO"), I am offering comments in response to the Western Area Power Administration's ("WAPA") Federal Register notice on pursuing final negotiations with the Southwest Power Pool ("SPP") for membership for the Rocky Mountain Region ("RMR") and Colorado River Storage Project ("CRSP").[1] As a longtime WAPA customer for generation and transmission services provided by CRSP, AEPCO has a vested interest in the development of a decisional document outlining a process to move forward with final negotiations. As discussed below, AEPCO believes that any decisional document confirming an intent to proceed must include certain mandatory conditions which must be met to finalize membership in SPP for the CRSP region.[2]

At the outset, we believe that WAPA must reconcile the legal authorities under which it intends to act with the contractual obligations that it has with individual preference customers. As explained below, WAPA's ability to execute a membership agreement with SPP, or any other Regional Transmission Organization ("RTO") is limited and does not provide for unilateral abrogation of existing Firm Electric Service ("FES") contracts. Accordingly, any decision to move forward with final negotiations with SPP must be predicated on the preservation of existing contractual rights. Indeed, the preservation of contractual rights for preference customers must be criteria that WAPA

---

[1] Federal Register, Volume 88, Number 82 at 26298, published April 28, 2023.
[2] The comments contained herein are limited to the CRSP resources and should not be construed to inform any decisions which WAPA may otherwise make in evaluating the suitability of moving forward with final negotiations for the RMR.

Arizona Electric Power Cooperative, Inc. • Sierra Southwest Cooperative Services, Inc.
P.O. Box 670 • 1000 S. Highway 80 • Benson, Arizona 85602 • (520) 586-3631 Phone • www.azgt.coop

shall meet in evaluating whether negotiations have been successful warranting membership in SPP for CRSP.[3]

In Part I of the letter below, we discuss the fundamental legal construct and the limitations therein which must be acknowledged in making a determination on moving forward with negotiations with SPP. In Part II, we review technical solutions which have been previewed with CRSP personnel and would provide a basis by which WAPA could proceed with membership in SPP. In Part III, we highlight matters related to transparency in the event that WAPA does move forward with final negotiations. A document outlining technical solutions which was co-drafted with CRSP personnel is found at Appendix A. Additional concerns with underlying legal compliance which are not addressed in the body of this letter are listed in Appendix B.

PART I – Legal Authorities

The Public Notice specifically declares that "[s]ection 1232(b) of the Energy Policy Act of 2005 authorizes the appropriate Federal regulatory authority to enter into a contract, agreement, or other arrangement transferring control and use of all or part of the transmission system of a Federal utility to a Transmission Organization (42 U.S.C. 16431(b))." No other legal authority is referenced or cited for the proposed action. As such, Section 1232(b) provides the basis for WAPA to execute a final membership agreement and provides the contours for negotiations that WAPA may have with SPP representatives.

In reviewing the actual language of Section 1232(b), AEPCO notes that the authorities provided thereunder are limited. Notably, Section 1232(b) declares that "[t]he appropriate Federal regulatory authority may enter into a contract, agreement, or other arrangement transferring control and use of all or part of the ***transmission system*** of a Federal utility to a Transmission Organization."[4] Further, in section 1232(c), which limits the exercise of Section 1232(b), Congress declared that:

> The contract, agreement, or arrangement shall include—
> (1) performance standards for operation and use of the transmission system that the head of the Federal utility determines are necessary or appropriate, including standards that ensure—
>
> (A) recovery of all of the costs and expenses of the Federal utility related to the transmission facilities that are the subject of the contract, agreement, or other arrangement;
> (B) consistency with existing contracts and third-party financing arrangements; and
> (C) consistency with the statutory authorities, obligations, and limitations of the Federal utility;[5]

[3] "If the decision is made by WAPA to move forward with final negotiations with SPP, and those negotiations are successful, WAPA-RM and WAPA-CRSP would then execute SPP membership agreements and WAPA-UGP would expand its participation in SPP." *See* Public Notice at 26299.
[4] 42 U.S.C. 16431(b) (Emphasis added)
[5] 42 U.S.C. 16431(c).

Moreover, in Section 1232(e), Congress specifically protected existing contracts stating that:

> This subsection does not—
>
> (A) suspend, or exempt any Federal utility from, any provision of Federal law in effect on the date of enactment of this Act, including any requirement or direction relating to the use of the transmission system of the Federal utility, environmental protection, fish and wildlife protection, flood control, navigation, water delivery, or recreation; or
> (B) ***authorize abrogation of any contract*** or treaty obligation.[6]

The legal authorities therefore provide the basis upon which WAPA may act and must set the contours of the negotiations. Any final decisional document providing notice to proceed with final negotiations must reference this authority to set forth the limits of WAPA's authorities and ensure negotiations are not conducted in an *ultra vires* manner.

In this context, we note that the plain language of Section 1232 speaks to the authority of WAPA to transfer control all or part of the transmission system but is silent with regard to the ability to transfer generation assets or output from those assets. Indeed, subsequent limitations and clarifications of this language in the statute clearly delineate the boundaries of WAPA's authority to convey control and use of transmission facilities.[7] In a plain reading of the statute, Congress has not authorized WAPA to transfer generation output to an RTO. Furthermore, any doubt as to the ability of WAPA to transfer generation output under contract to a preference customer is further dispelled by the plain language of Section 1232 and the express direction not to abrogate contracts.

In determining whether to move forward or not with SPP, WAPA must acknowledge and recognize that it cannot participate in the same form or fashion as load serving utility joining SPP. The control or operation of assets which may be available to convey to SPP will be limited to transmission facilities as set forth in Section 1232, and any contractual rights to transmission service over those facilities may not be abrogated by WAPA. While we recognize that these limitations may appear incongruous with WAPA's existing engagement with SPP in other regions, the precedent set by actions in other marketing areas cannot and does not fill in the text missing from Section 1232 which would otherwise deprive an existing customer of its contractual rights.

Part II - Path Forward

WAPA has a long and fruitful history working with preference customers. AEPCO has and continues to enjoy a successful partnership with WAPA. We have seen this most recently with the migration of the resources in the Desert Southwest ("DSW") to the Energy Imbalance Market. Together we can be solution oriented.

---

[6] 42 U.S.C. 16431(e) (Emphasis added).

[7] Notably, Congress expressly instructed a power marketing administration that any membership agreement with an RTO must be consistent with existing contracts and authorities which would include those legal authorities utilized by WAPA in executing contracts with CRSP customers.

The Recommendation Report identifies a need to address Resource Adequacy (RA) as a risk mitigation measure or justification for joining SPP.[8] Noting that insufficient RA encourages membership in SPP, WAPA acknowledges a fundamental concern for customers outside of the projected SPP footprint. Recognizing that RA is an "acute" problem in the West, WAPA asserts that the RTO can assure the adequacy of resources within the footprint.[9] In this context, WAPA highlights the fundamental value of RA and how those customers in the footprint will be best served by the RTO.

For customers outside of the RTO footprint, WAPA's optimism wanes slightly. WAPA recognizes that it needs to "work with our customers both in and out of the proposed RTO-West footprint to ensure their needs are addressed, and we continue to preserve the value of hydropower to our customers ***as much as possible***."[10] In reviewing this statement, it appears that WAPA envisions a future in which customers will be treated differently and those within the footprint will be afforded full benefits of assured resource adequacy while customers outside of the footprint can anticipate less than the full benefit of the contracted hydropower benefits. Given that the overwhelming majority of the CRSP resource would be delivered outside of the CRSP zone,[11] the negotiations with SPP must do more than provide as much of the hydropower benefit "as much as possible" but assure the full delivery of the contracted capacity and energy.

AEPCO believes that this can be accomplished with efforts to provide the dynamic signal to adjacent balancing areas or secure a pseudo-tie to a balancing area outside the RTO footprint. The SPP tariff anticipates these arrangements and the concept of power deliveries to balancing areas outside of an RTO is not a unique concept.[12] Indeed, these solutions are not overly complex and have been previewed with WAPA staff prior to the issuance of the Public Notice. The one-page document attached at Appendix A reflects the collaborative drafting exercise with WAPA staff to identify this path forward.

The Recommendation Report explains that WAPA will join SPP if negotiations are "successful."[13] Undoubtedly, success will be defined by several factors and the anticipated delivery of benefits to preference customers. For the CRSP customers located outside of the SPP footprint success cannot be defined in partial terms or "as much as possible." Customers outside the footprint today are contractually entitled to capacity and energy and membership in SPP cannot abrogate or diminish that responsibility. WAPA can and should pursue the technical solutions at hand to protect contractual rights. Moreover, WAPA must declare to SPP as a condition of entering into final negotiations that meeting the contractual obligations for customers outside of the footprint must be accomplished as a condition precedent to executing a membership agreement. The final decisional document must reflect this condition and expected commitment from SPP.

---

[8] Recommendation Report at 3.
[9] Id at 15.
[10] Id. (Emphasis added)
[11] "Unique among potential RTO-West participants, most of the load CRSP serves would fall outside its prospective SPP zone. In fact, only about 12 percent of CRSP resource would be delivered inside CRSP's prospective SPP zone." Recommendation Report at 38.
[12] AEPCO understands that the Southwestern Power Administration ("SWPA") utilizes a dynamic signal with SPP to meet contractual obligations with preference customers served in the SWPA marketing area.
[13] Id at 58.

Importantly, WAPA must resist the temptation to accept a promise from SPP to address this matter in the future as a condition of executing a membership agreement. Without assurances that the capacity, energy and transmission service afforded by the FES contracts will be fully protected on day one of CRSP participating in the SPP market, outside customers effectively lose a resource which in many instances is listed as a resource that assures reliability standards are being met. Indeed, customers will have no means of enforcing such promise and may need to resort to enforcing contractual rights at the outset.

PART III - Transparency

AEPCO appreciates the efforts to date by WAPA personnel to brief customers on the preliminary discussions with SPP. While more details on the content of discussions would help our efforts to collaborate with WAPA, we have understood the confidential nature of the interactions with SPP have limited the disclosure of deliberations. This veil of secrecy must adjust as WAPA enters final negotiations, however. The implementation of technical solutions requires coordination which cannot be effectively accomplished if there are barriers to communication.

Accordingly, AEPCO recommends that WAPA require SPP to allow for the execution of a Non-Disclosure Agreement ("NDA") with customers and their representatives for the express purpose of securing needed solutions to facilitate the entry of CRSP into SPP. This NDA would not convey any rights of a customer to negotiate but would allow for WAPA to engage more fully with customers for the purposes of achieving successful negotiations.

Conclusion

While we anticipate that WAPA will hear laudatory comments and strong encouragement from customers who be located inside the CRSP footprint, we hope WAPA will recognize the obligation of all CRSP customers, the overwhelming majority of which reside outside the expected footprint. AEPCO and its members are focused on developing a solution that is beneficial to all customers. Indeed, we spent considerable time and effort developing a proposed technical solution in advance of the FRN to avert the concerns raised by customers outside the CRSP footprint, to facilitate the SPP membership option. AEPCO remains committed to working with WAPA to pursue this or other solutions that allow negotiations to move forward.

Thank you for your consideration,

Patrick F. Ledger
Executive VP & CEO

Appendix A

Colorado River Storage Project Bifurcation – Principles

Executive Summary

The Colorado River Storage Project (CRSP) has provided long-term energy and resource adequacy (RA) benefits equitably to both Upper and Lower Basin regions. Western Area Power Administration (WAPA) CRSP's consideration to join the Southwest Power Pool Regional Transmission Organization (SPP RTO) should ensure that the attributes of the CRSP resources are preserved for all customers. WAPA must negotiate the necessary terms to provide for a "bifurcation" of the CRSP resources so that customers outside the SPP RTO footprint are assured the same attributes of the CRSP resources that will be provided to the customers located inside the SPP RTO footprint.

Principles

- Joining an organized market should not make a WAPA provided resource less valuable for a customer who is located outside of a market footprint.
- WAPA must negotiate with an organized market to ensure the benefits provided under the Firm Electric Service (FES) contracts are delivered regardless of the customer's location.
- Securing Dynamic Transfer of Southern Customers' allocations into WALC is a solution that could be used with hydroelectric projects use and RTO seams.
- CRSP Dynamic Transfer would be accordance with terms of the NERC dynamic transfer electronic signal and integration guidelines. Dynamic Transfer Reference Document Terms[1]:
    - Dynamic Transfer Signal (DTS): The electronic signal used to implement a Pseudo-Tie or Dynamic Schedule using either a metered value or a calculated value.
    - Integration: Dynamic Schedule and Pseudo-Tie above means the value could be mathematically calculated or determined mechanically with a metering device and incorporated into the associated ACE calculations for the Attaining and Native BA.
- The Dynamic Transfer would split/bifurcate CRSP resource deliveries between WACM and WALC.
- The Dynamic Transfer would be calculated in accordance with the capabilities and limitations of the CRSP resources and Southern Customers' FES contractual allocations.
- The bifurcation would not allow for a customer to control or dictate project operations, WAPA in coordination with Reclamation would have ultimate control of the generations.
- Customers shall continue to communicate, submit, and make schedule changes in accordance with the CRSP Scheduling, Accounting, and Billing Procedures (SABP).
- CRSP may choose to de-rate real-time parameters to satisfy operations, including the modifications to ramp rates and capacity schedules set forth in pre-defined system operating procedures.
- The Dynamic Transfer bifurcation solution will require communication connectivity, unit testing, integrations, and reporting.
- The bifurcation solution shall not delay Upper Basin entities potential of future SPP RTO participation and shall be transitioned in a manner that allows for proper testing, tuning, and system operating procedure development.

APPENDIX B – Additional Legal Compliance Concerns

As noted in the letter, AEPCO believes that the partnership with WAPA can yield a collaborative solution. Nonetheless, because AEPCO has a fiduciary duty to its members which includes defending contractual obligations in a litigated setting as needed, AEPCO enumerates the following concerns with the proposal to move forward with final negotiations for membership in SPP. In listing such issues, AEPCO expressly reserves the right to assert any and all of the following issues in the interest of preserving existing contractual benefits.

Actions Proposed are Ultra Vires

The proposed actions justifying membership in the SPP RTO do not comply with the limitations provided by Section 1232 of the Energy Policy Act of 2005. WAPA cannot unilaterally reduce contractual entitlements to capacity, energy or transmission service through the authority granted by Congress under Section 1232.

Denial of Due Process

The Public Notice provides minimal information regarding the proposed course of action. Reference to a web page containing additional details regarding discussions regarding membership in SPP fails to delineate which documents will and will not be included in the record, depriving the customer and public at large with the appropriate specificity regarding documents to which a customer may respond.

Failure to Comply with NEPA

The NEPA categorical exemption is based on actions which are not authorized by the authority cited by WAPA in the Public Notice for the basis upon which to proceed to final negotiations. Notably, the categorical exemption posted to WAPA's website explains that the proposed action is "[p]ower marketing services and power management activities (including, but not limited to, storage, load shaping and balancing, seasonal exchanges, and other similar activities), provided that the operations of generating projects would remain within normal operating limits." The categorical exemption makes no reference to the actions authorized by Section 1232, which is the legal authority invoked in the Public Notice.

Insufficiency of Record Evidence to Support Agency Action

The record evidence offered in support of the decision to move forward is based on actions which do not correspond to the legal authority cited in the Public Notice. Further, the evaluation of benefits does not specify any additional costs associated with the transmission of power outside of the SPP footprint. The lack of evaluation of this facet of the potential membership of SPP fails to justify negotiations in SPP.

Preemptory Abrogation of FES Contracts

The Recommendation Report indicates that hydropower benefits will be delivered to customers outside of the footprint "as much as possible."[1] Publication of such intent reveals plans by WAPA to deliver less than contracted capacity, energy and associated transmission service for customers located outside of the SPP footprint.

Discriminatory Treatment of Preference Customers

Actions taken to provide benefits to preference customers located inside the SPP footprint of unequal or disparate value contradicts established marketing policies without appropriate due process and in contravention of existing contracts.

Arbitrary and Capricious Evaluation of Benefits

The Recommendation Report fails to isolate sufficiently the costs and benefits of the proposed action to allow for consideration of the inclusion of selected marketing areas in SPP. The benefits provided to the RMR or Upper Great Plains ("UGP") region cannot justify the inclusion of the CRSP resources in the SPP membership agreement. Reliance on the benefits for regions which do not provide power to CRSP customers is arbitrary and capricious.

Furthermore, citations to and reliance on state level requirements for renewable resources for the justification of membership in SPP does not comport with WAPA statutory mission. Inclusion of such benefits as a justification of WAPA's membership for CRSP in SPP is arbitrary and capricious.

Failure to Comply with the Anti-Deficiency Act

Failure to identify sources of funds for expenditures associated with execution of membership agreements absent express authorization from Congress violates 31 U.S.C. § 1341.

Denial of Due Process Set forth in Executed FES Agreements

Alteration of FES benefits in a process inconsistent with FES agreements constitutes a breach of contractual duties and obligations owed to preference customers.

Failure to Ensure Reliable Operation of the Transmission Grid

In the absence of assuring contractual benefits upon executing membership with SPP, WAPA improperly deprives preference customers of resources and contractual assets needed to assure reliable operation of the grid, including but not limited to compliance with relevant NERC and WECC standards.

Reservation of Rights

Actions taken by WAPA with the decisional document that will be issued upon the consideration of comments submitted in response to the Public Notice may give rise to additional concerns not listed above. AEPCO reserves the right to assert further claims based on additional actions which WAPA may or may not take in consideration and execution of negotiations with SPP.

[1] Recommendation Report at 15.