

**From:** DSW-PowerMarketing

**Sent:** Tuesday, May 17, 2016 11:22 AM

**To:** Buck, Darren; Easton, Robert; Gallardo, Sylvia; Hansen, Gregory; Henry, Troy; Kendrick, Jimmy; Kral, John; Marianito, Linda; Mathieu, Leonard; Moulton, Ronald; Murray, Jack; Paulsen, John; Redhair, Ethel; DSW-G6100Group; Camp, Anthony; Redhair, Ethel; Ramsey, Christina; Young, Brian; Simonton, Michael

**Subject:** Boulder Canyon Project FY17 Base Charge

Dear Boulder Canyon Project Contractors and Interested Parties,

During the Public Information Forum on April 27, 2016, there were two inquiries that Western was unable to respond to; both inquiries related to the collection of post-retirement benefits (PRB).

The first inquiry was whether Western's portion of the PRB is included in amounts the Bureau of Reclamation retains in the Colorado River Dam Fund. Western has confirmed that PRB collected through the base charge are transferred to the Bureau of Reclamation and retained in the Colorado River Dam Fund.

The second inquiry was a request for the legal support behind the collection of PRB. This legal support was later identified as a memorandum from a Deputy General Counsel at the Department of Energy dated January 13, 1998. A copy of the memorandum is attached.

As a reminder, the Public Comment Forum will be held on May 25, 2016 at 10:30am MST at the Desert Southwest Regional Office located at 615 S 43<sup>rd</sup> Ave, Phoenix, AZ.

Sincerely,

**Jack D. Murray | Vice President of Power Marketing**

Western Area Power Administration | Desert Southwest Region

(O) 602.605.2442 | [jmurray@wapa.gov](mailto:jmurray@wapa.gov)



**Department of Energy**

Washington, DC 20585

January 13, 1998

**MEMORANDUM FOR ELIZABETH A. MOLER  
DEPUTY SECRETARY**

**FROM:**

**MARY ANNE SULLIVAN** *mas*  
**DEPUTY GENERAL COUNSEL  
ENVIRONMENT AND CIVILIAN  
AND DEFENSE NUCLEAR PROGRAMS**

**SUBJECT:**

**PMA AUTHORITY TO COLLECT IN RATES, AND  
REIMBURSE TO TREASURY, GOVERNMENT'S FULL  
COSTS OF POST-RETIREMENT BENEFITS**

This memorandum responds to your request for the Office of General Counsel's legal opinion on the authority of the Power Marketing Administrations (PMAs) to collect in rates an amount that would offset the Government's full costs of post-retirement employee benefits.<sup>1</sup>

The Administration's FY 1998 budget documentation states that, starting in FY 1998, the Southeastern Power Administration (SEPA), the Southwestern Power Administration (SWPA), and the Western Area Power Administration (WAPA) "will set rates, consistent with current law, to begin to recover the full cost of the Civil Service Retirement System and Post-Retirement Health Benefits for its employees that have not been recovered in the past." Appendix, Budget of the United States Government for Fiscal Year 1998 at 478, 479, 480. It also provides that "[s]tarting in FY 1998 BPA [Bonneville Power Administration] will begin to fully recover, from the sale of electric power and transmission, funds sufficient to cover the full cost of Civil Service Retirement System and Post-Retirement Benefits for their employees." *Id.* at 483. In FY 1998 the incremental costs to SEPA, SWPA, WAPA and BPA to cover fully the Government's share of

---

<sup>1</sup> The elements of the historically undercollected amounts are approximately 11 percent of salary for CSRS employees (cost of approximately 25 percent of salary less the 7 percent employee contribution and the 7 percent agency contribution), plus the FY 1998 accrual for the Government's share of post-retirement health and life insurance benefits for current employees. These future costs are allocated over the working years of employees. See Testimony of William E. Flynn, Associate Director for Retirement and Insurance of the Office of Personnel Management Before the Senate Committee on Governmental Affairs, Subcommittee on Post Office and Civil Service (May 15, 1995).



post-retirement benefits is \$3 million, \$2 million, \$8 million, and \$2.2 million<sup>2</sup> respectively. Id. at 478, 479, 480; DOE, FY 1998 Congressional Budget Justification at 448, set forth in House FY 1998 Energy & Water Appropriations Hearings, 105th Cong., 1st Sess., at 1649.

This memorandum reviews the statutory framework to determine whether (1) these four PMAs may, under current law, collect in rates the costs of post-retirement benefits, and (2) pay these rate revenues into a non-revolving Treasury account as an effective offset to appropriations into the OPM funds. We conclude that the PMAs have sufficient statutory authority to include these costs in their rates and can deposit such funds into an appropriate Treasury account so as to effectively offset the appropriations made to the OPM funds from which these post-retirement costs are paid to retirees.

## I. Background

The Civil Service Retirement Act provides retirement and disability benefits for federal employees. The employing agency deducts a percentage of an employee's basic pay, combines it with an equal amount contributed by the appropriate governmental agency, and deposits it in the Treasury to the credit of the Civil Service Retirement and Disability Fund (Retirement Fund). Clark v. United States, 691 F.2d 837, 841 (7th Cir. 1982), citing 5 U.S.C. § 8334. Prior to 1969, however, the Retirement Fund had an unfunded deficit created "by the Government's failure to contribute sufficient funds, the gradual increase in liability caused by past increased retirement benefits, and salary increases." S. Rep. No. 91-339, 91st Cong., 1st Sess., reprinted in 1969 U.S. Code Cong. & Admin. News 1168, 1169.

In 1969, Congress addressed the problem of potential shortfalls in the sufficiency of funding for retiree benefits by authorizing a permanent indefinite appropriation for transfer of general funds from the Treasury. Clark v. United States, 691 F.2d at 841. The statute authorizes appropriations to the Retirement Fund to finance the unfunded liability created by new or liberalized benefits payable from the Fund, extension of the coverage of the Fund to new groups of employees, or increases in pay on which benefits are computed. 5 U.S.C. § 8348(f). The cost of CSRS retirement benefits is approximately 25 percent of the annual salary, while the combined agency and employee contributions are only 14 percent.

The Employees' Life Insurance Fund (Insurance Fund) consists of funds withheld from employees plus specified contributions by the employing agencies. 5 U.S.C. §§ 8707, 8708, 8714. There is no statutory provision relating to authorizing appropriations for unfunded liability. OPM staff explained that the Government continues to pay a share of life insurance for retirees and, although agencies do not fund these post-retirement payments, these anticipated future costs are now allocated to agencies for accounting purposes, over the working lives of employees. The Government's actual costs of the post-retirement coverage is funded by annual appropriations to

---

<sup>2</sup> The BPA obligation would grow modestly through 2001, when the current BPA rates expire, and then grow to \$55.2 million in 2002.

the OPM fund. Similarly, the Employees' Health Benefits Fund (Health Fund) consists of funds withheld from employees plus specified contributions by the employing agencies. 5 U.S.C. §§ 8906, 8909. The Government's post-retirement liability to contribute to these benefits is allocated over the working life of employees for accounting purposes, but agencies make no payment to the fund for this liability, and the necessary funding comes from annual appropriations to the Health Fund.

The statute establishing the Civil Service Retirement and Disability Fund provides that government contributions for an employee shall be "contributed from the appropriation or fund used to pay the employee," 5 U.S.C. § 8334(a)(1), and the statutes creating the Insurance and Health Funds contain similar language. 5 U.S.C. §§ 8708(a), 8906(f)(1). With respect to Bureau of Reclamation (Bureau) and Corps of Engineers (Corps) employees that are involved in power operations and maintenance, the Bureau and Corps make the agency contributions to the OPM Funds directly.

## **II. Authority to Collect in Rates the Government's Full Costs Related to Post-Retirement Benefits**

### **A. Statutory Framework for PMA Rate Setting**

#### **1. SEPA, SWPA, AND WAPA: The Flood Control Act and the Reclamation Project Act**

SEPA, SWPA, and WAPA are required to set rates for electric power that cover costs, but the relevant statutes leave considerable discretion to the PMAs in applying this standard. The Flood Control Act of 1944, which applies to projects built by the Army Corps of Engineers, provides that the rates shall be set "having regard to the recovery ... of the cost of producing and transmitting such electric energy." 16 U.S.C. § 825s. The Reclamation Project Act of 1939, which provides direction with respect to some projects constructed by the Bureau of Reclamation, provides that the rates for the sale of electric power shall "cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment..., and such other fixed charges as the Secretary deems proper." 43 U.S.C. § 485h(c). The rate provisions applicable to the other Bureau projects are the same or similar. See 43 U.S.C. § 617c(b) (revenues from Hoover Dam must be adequate to ensure payment of all operations and maintenance expenses and repayment of capital and interest); 43 U.S.C. § 620c (the Colorado River storage projects governed by Federal reclamation laws); 43 U.S.C. § 1554 (Lower Colorado River Basin projects governed by Federal reclamation laws, except as otherwise specifically provided).

#### **2. BPA: The Northwest Power Act**

Section 7(a)(1) of the Northwest Electric Power Planning and Conservation Act (the Northwest Power Act) provides that the Administrator shall set, and revise, rates "to recover, in accordance

with sound business principles, the costs associated with the acquisition, conservation and transmission of electric power." 16 U.S.C. § 839e(a)(1); see 16 U.S.C. § 838g (Federal Columbia River Transmission System Act provides similar cost principle).<sup>3</sup> The Northwest Power Act "sets forth directives, stressing cost recoupment, for the Administrator [of the BPA] to follow in establishing rates both for electric energy sales and for the transmission of non-federal power." Central Lincoln Peoples' Utility Dist. v. Johnson, 735 F.2d 1101, 1107 (9th Cir. 1984). The provisions of the Northwest Power Act reflect the concern that BPA's customers pay all costs necessary to the production of the power they consume. Id. at 1115.

#### B. Reasonable Interpretation of "Cost"

DOE and FERC ratemaking policy and limited PMA precedent indicate that it is reasonable to interpret the term "cost" in the organic statutes to include the total costs to the Government of post-retirement benefits for PMA-related employees. And courts accord considerable weight to an executive department's "construction of a statutory scheme it is entrusted to administer." Chevron v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984). In reviewing actions of the PMAs, courts give substantial deference to PMA interpretations of their organic statutes. E.g., Department of Water & Power of the City of Los Angeles v. Bonneville Power Admin., 759 F.2d 684, 690-91 (9th Cir. 1985). The courts need not find that an agency's interpretation of its organic statutes "is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings." ALCOA v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389 (1984) (quoting American Paper Inst. V. American Elec. Power Service Corp., 461 U.S. 402, 423 (1983)). The court need only conclude that the interpretation is a reasonable one. See Chevron v. Natural Resources Defense Council, 467 U.S. at 845.

Given the PMAs' previous failure to seek recovery in rates of the unfunded portion of employee retirement benefits, it may be argued that the PMAs' inclusions of such costs would represent a change in agency interpretation. However, an agency "is not locked into the first interpretation it espouses." Sacred Heart Medical Center v. Sullivan, 958 F.2d 537, 544 (3d Cir. 1992) "[A]n agency's reinterpretation of statutory language is ... entitled to deference, so long as the agency acknowledges and explains the departure from its prior views." Mobil Oil Corp. v. E.P.A., 871 F.2d 149, 152 (D.C.Cir. 1989).

---

<sup>3</sup> This statutory requirement is coupled with an obligation to keep overall rates as low as possible, consistent with sound business principles, and to set rates that encourage the most widespread use of electric power. 16 U.S.C. §§ 825s, 838g, 839e(a)(1).

## 1. DOE and FERC Policy on Ratemaking

The Department of Energy provides that rates for a power system are adequate if, and only if, a power repayment study indicates that expected revenues are at least sufficient to recover, inter alia, "[a]ll costs of operating and maintaining the power system during the year in which such costs are incurred." DOE Order No. RA 6120.2 § 12. This DOE Order further requires the PMAs to use accounting practices consistent with the principles prescribed by the Financial Accounting Standards Board.<sup>4</sup> Id. § 6. The requirement to set rates consistent with this DOE order has been judicially recognized. E.g., Overton Power Dist. No. 5 v. Watkins, 829 F.Supp. 1523, 1530 n.5 (D.Nev. 1993).

On a practical, common sense level, there seems little room to dispute that the full amount of the retiree benefits is a "cost" of hiring the employees to operate and maintain the PMA power systems. Thus, recovering those costs in rates is entirely consistent with the Congressional objective that the PMAs operate on a fiscally self-supporting basis. See Department of Water & Power v. BPA, 759 F.2d at 695. Similarly, FERC has recognized that the obligation for such retiree benefits is legitimately treated as a cost. For example, FERC recognizes, as a component of cost-based rates, allowances for prudently incurred costs of post-retirement benefits other than pensions (PBOPs) that are consistent with the accounting principals set forth in FASB Statement No. 106. 61 FERC ¶ 61,330, at 62,200 (1992). FERC interpreted the FASB statement to find "that PBOP plans are deferred compensation arrangements whereby an employer promises to exchange future benefits for employees' current service and that their cost should be recognized over the employees' service periods for financial accounting and reporting purposes." Id. at 62,199. FERC accordingly reached the following conclusion:

---

<sup>4</sup> The Financial Accounting Standards Board (FASB) has issued rules and audit procedures for pensions. FASB Statement No. 87. These rules provide for recognition as a cost in any period of "the actuarial present value of benefits attributed by the pension benefit formula to employee service during that period." Id. at 87.21; see id. at 87.20, 87.40. FASB 87 recognizes that unfunded pensions promised to current and retired employees are actual liabilities. Mano, "Fairly Presented, in Accordance with GAAP: What does it Really Mean," Management Accounting (July, 1996). In addition, the FASB has recognized post-retirement benefits to be broader than simply pensions, issuing in December 1990 standards regarding post-retirement benefits other than pensions. FASB Statement No. 106 at 106.518; see id. at 106.06 (post-retirement benefits include post-retirement health care and life insurance provided outside a pension plan to retirees). The FASB stated that "[a] post-retirement benefit is part of the compensation paid to an employee for services rendered." Id. at 106.18. "Because the obligation to provide benefits arises as employees render services . . . , the [FASB] believes that the cost of providing the benefits should be recognized over those employee service periods." Id. at 106.03; see id. at 106.45.











