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E-MAILED ONLY

April 20, 2012

Douglas V. Fant
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Re: Hoover Allocation Process; issues facing the Commission

Dear Doug:

When I wrote to you on February 16th, a question had arisen concerning the ongoing applicability, or lack thereof, of the decisions of the Commission in 1985, compiled in what is commonly called the "Red Book" (after its cover). I have since heard indirectly that some are questioning the conclusion that I reached in that letter that the Commission was required to give ongoing deference to its predecessor's interpretation of applicable law. Apparently, some have concluded that I meant that the Commission was powerless to reexamine its prior interpretations. That, of course, is not the law. Rather, the courts have consistently held that an agency undertaking such a reanalysis after a significant passage of time bears a much heavier burden to supply support for any such change than it had in the first instance in making the determination. I reached my conclusion on the basis that the original analysis was correct, had stood the test of time and been relied on, and the statutory authority had not changed. Thus, the heavier burden standard could not be met. I should have said so explicitly.

That being said, what discussing this issue has brought to mind is the nature and schedule of the process the Commission is faced with establishing and implementing. Having listened to a number of conversations on the subject, I thought it might be useful to mention some of the issues and concerns being discussed. Doing so might help the Commission identify the questions that have to be answered and the decisions that have to be made.

The comments I've heard most relevant to the Commission's task concern the status of the Red Book, Eligibility for Allocations, Marketing Criteria, Applicant Profile Data, Schedule and Process, and, finally, Allocation Types and Amounts.

RED BOOK

While much has been said, and will be said, about the status of the Red Book in the upcoming process, there is a lingering question about the Red Book's status in the history of Commission actions. The

Commission may wish to consider whether it is helpful to acknowledge that the Red Book is the decision document in the 1985 final allocation action so that the dialogue can focus on whether and to what extent it is relevant today, not what it is.

ELIGIBILITY FOR ALLOCATIONS

This is, of course, the \$64 question and the current focus of the most controversy and speculation. One thought that has been expressed is that it might be useful to the Commission to consider making this determination relatively soon because this is the decision that is most likely to foster disagreement and even litigation. Should litigation occur, it could proceed in parallel with other aspects of the process.

In addressing the eligibility issue, the Commission has a second task, presented to it by the passage of the federal legislation last year, to-wit: How does the Commission deal with Hoover D? Congress has directed that Hoover D go to new entrants. Assuming agreement can be reached on what that category entails, several additional eligibility issues arise. May the Commission safely allocate the portion of Hoover D directly allocated to it (the so-called D-2) before Western allocates the bulk of Hoover D (D-1) it must allocate? If an Arizona entity receives a direct Hoover D allocation from Western, is it no longer a new entrant for purposes of D-2? Is its status as a new entrant dependent on the qualification requirements of Title 30 and Title 45?

Perhaps most perplexing regarding Hoover D are the questions: What is it? Where did it come from? Before the uprates, Hoover was Hoover. After the uprates, Hoover became A and B (and C energy when available). Hoover A is governed by Title 30. Hoover B is governed by Title 45. The resource the federal legislation defines as Hoover D is not contemplated by our laws. Just as importantly, the capacity in question is either a result of the uprating or not. Most likely, it is some of both: (a) unmarketed uprating capacity plus some currently marketed Hoover B; and (b) pre-uprating and ongoing reserve capacity the new federal law requires be allocated plus some currently marketed Hoover A. Thus, a careful analysis may cause both D-1 and D-2 to be administered by the Commission under the differing eligibility standards of Title 30 and Title 45.

Finally, the Commission must confront the possibility of a Western D-1 allocation to an Arizona non-Indian entity that meets neither the eligibility requirements of Title 30 nor Title 45. The Commission needs to consult with Western concerning Western's eligibility requirements as they could apply in this situation given the expectation that the resulting allocation will be sent to the Commission for contracting.

To some, this series of important decisions that must be made lends credence to a strategic decision that these decisions be faced early and independently in the process.

MARKETING CRITERIA

Here again, the Red Book may constitute a basis for focusing on this issue. The Commission's decisions on criteria will be preceded by discussions of the role of other customer resources, especially other federal hydropower, matching the federal term of contract, the marketing area, and other factors. These decisions may, in turn, affect decisions of potential applicants as to whether to apply or which resource or resources to apply for.

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APPLICANT PROFILE DATA

How much information will the Commission request? Will there be a single submission? Will there be one for eligibility and then a second, more detailed submission if found eligible? Would such bifurcating of the application process be more efficient for the Commission and less costly and cumbersome for potential allottees?

SCHEDULE AND PROCESS

The Commission staff has already floated a chart showing the official process embodied in statute and regulation. The formal process is relatively short and the chart wisely leaves room for informal discussions ahead of time. Some have suggested that more detail be added to the chart and more upfront dialogue be planned for these more detailed subjects. A discussion about doing so may be worth considering.

ALLOCATION TYPES AND AMOUNTS

It is no secret that many, if not all, of your current customers supported the Commission in its efforts to get the federal legislation passed in the expectation that they would get new allocations and contracts that represented, on a percentage basis, their current allocations minus around 5%, the nominal rationale for the allocations in the federal legislation. There are policy rationales and equitable issues embodied in this expectation that may be valuable for the Commission to explore.

I don't envy you, the rest of the staff, or the Commission the task ahead. I hope these thoughts are helpful. Please let me know how else we can help.

Sincerely,

/s/

Robert S. Lynch
Counsel and Assistant Secretary/Treasurer

RSL:psr

cc: APA Commission
Joe Mulholland, Executive Director