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

Phoenix, AZ.
January 11, 2012

Re: Comments upon Proposed Post-2017 Boulder Canyon Project Marketing Criteria; 77 Fed. Reg. 65681 (October 30, 2012)

Dear Mr. Moe:

The Arizona Power Authority (Authority) submits the following comments upon the above-captioned notice of proposed marketing criteria:

Summary. The proposed Post-2017 Resource Pool Marketing Criteria incorrectly states the statutory authority for allocating Hoover power from Hoover Dam. In addition, the criteria attempts to establish a preference priority for allocating Hoover power, which is contrary to the terms of Section 5 of the Boulder Canyon Project Act of 1928.

1. Reclamation law does not apply to the Hoover allocation process.

The statement contained in Subsection A of the Proposed Post-2017 Resource Pool Marketing Criteria that “(a) allocations of power will be made in amounts determined solely by Western in exercise of its discretion under Reclamation law, including the HPAA” is legally incorrect. Reclamation Law does not apply to the Hoover allocation process.

The Boulder Canyon Project Act of 1928 authorized construction of Hoover Dam. 43 U.S.C. §617 et seq. The authorization occurred prior to the passage of the Reclamation Act of 1939. 43 U.S.C. §§485 et seq.

The Department of Energy Organization Act of 1977 (DOE Act) established the Western Area Power Administration. 42 U.S.C. §§ 7101 et seq. This legislation transferred Federal power marketing and power transmission functions for Western from the Secretary of the Interior through the Bureau of Reclamation to the Secretary of Energy, acting through Western's Administrator. Western performs these functions in 15 western states. Western conducts its functions in conformance with certain laws, primarily the DOE Act, Section 5 of the Flood Control Act of 1944 (16 USC § 825s) for Department of Army projects, Section 9(c) of the Reclamation Project Act of 1939 [43 USC § 485h(c)] for Bureau of Reclamation projects, and, for Glen Canyon Dam, the Colorado River Storage Project (CRSP) Act (43 USC §§ 620-620o). While Western took over the power marketing activities, Reclamation retained irrigation, water supply, and dam-operation functions at Federal water projects constructed by Reclamation.

Western's power marketing responsibility begins at the switchyard of Federal hydroelectric power facilities and includes the Federal transmission system to interconnected utility systems. In marketing power in excess of project-use needs, Western sells both long-term and short-term firm power. This power is first offered for sale to what are known as "preference customers." This designation originates from the Reclamation Project Act of 1939, which requires Western to give preference in the sale of Federal power to municipalities, nonprofit corporations or agencies, cooperatives, and other nonprofit organizations financed under the Rural Electrification Act of 1936 (17 USC - 901 et seq.).

The Boulder Canyon Project Act of 1928 (BCPA) authorized the construction and operation of Hoover Dam 43 U.S.C. 617 et seq. Section 18 of the Reclamation Project Act of 1939 excluded the Hoover Dam from the Act's applicability: "[n]othing in this Act shall be construed to amend the Boulder Canyon Project Act of 1928 (45 Stat. 1057), as amended." See 43 U.S.C. §485j note.

Reclamation law is applicable to Hoover Dam's water works operational issues. 43 U.S.C. §617m. However reclamation law and its particular priorities do not apply to the Hoover power allocation process. Indeed the BCP Act of 1928 establishes specific power allocation and customer priorities, and these statutory requirements govern the Hoover allocation process.

2. Section 5 of the Boulder Canyon Project Act of 1928 governs the allocation of power from Hoover Dam. Amongst Section 5 applicants the States of Arizona, California, and Nevada have first right ("a super-preference") to any power allocated from Hoover Dam.

Section 5 of the Boulder Canyon Project Act of 1928 states in relevant parts:

"The Secretary of the Interior is hereby authorized under such general regulations as he may prescribe, to contract for...generation of electrical energy and delivery at the switchboard to

states, municipal corporations, political subdivisions, and private corporations of electrical energy at said dam.”

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy and for renewals under Subsection (6) of this section, and in making such contracts, the following shall govern:

...

(c) Applicants for purchase of water and electrical energy; preferences.

Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefore who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Power Act (16 U.S.C. 791a et seq.) as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant shall be given, first, to a state for the generation or purchase of electric energy for use in the state, and the states of Arizona, California and Nevada shall be given equal opportunity as such applicants”. 43 U.S.C. 617d(c) (emphasis added).

In the efforts in the 1920’s to pass Boulder Dam legislation, the initial Swing-Johnson bills did not propose that the United States would build the power plant or sell any power. It was nevertheless, expected that significant benefits would inure to the United States in the form of rents from the lease of the “power privilege”. Indeed this was envisioned to be necessary if the United States was to recover its investment.

Meanwhile the States of Arizona and Nevada both asserted that they had the right to expect that the benefits of power generation would inure to them. They contended that the states owned the riverbed on which the dam was to be constructed, and that these interests gave them the right to have a preferred position in contracting for the power and the right to receive revenue derived from the sale of power. California was the State whose irrigation and flood control needs had prompted congressional consideration of Boulder Dam legislation, and was expected to have growing power needs. Consequently, California (as well as all of the members of Congress involved in the legislative debates) expected to receive an allotment of power from Boulder Dam. When the third set of Swing-Johnson bills proposed that the United States would own the power plant as well as the dam, and sell power directly to buyers at the switchyard, the consideration of “states’ right” sharpened. The authority of the Federal Government to sell power

at all, much less at a profit was questioned, and Arizona and Nevada asserted with even more vigor that the states should share in these profits.

The final language of Section 5(c) of the BCPA represented a compromise between these concepts of “states’ rights” and the need for federal development and control of the project. As interpreted by its authors, Section 5(c) recognized the constitutional authority of the United States under the Commerce Clause, to build and operate a dam on a navigable stream for flood control and irrigation, and in a major compromise authorized the United States to generate power to be sold at a profit in order to pay for the dam. *See House Debate on H.R. 5773, 69 Cong Rec. 9652-54 (1928) (remarks of Rep. Winters)*. In recognition of the rights of these states’ valid interests in development of the dam, Section 5(c) gave the three states of Arizona, California, and Nevada the first right, or a super-preference over all other Section 5 applicants, to apply for, obtain and share among themselves in the power generated at the dam. The state’s application takes precedence over any other applicant.

3. The 2011 amendments to Section 5 of the BCPA gave federally recognized Indian tribes a preference on an equal basis with other Section 5 applicants.

If none of the the States of Arizona, California, or Nevada exercises its super-preference rights as noted above and applies for Hoover power under Section 5, then all other Section 5 applicants stand on an equal priority basis in seeking an allocation of Hoover power. Section 2 of the Hoover Power Allocation Act of 2011 created Schedule D-1 power and directed the federal government to allocate the power to “New Allottees”. Section 2 recognizes that the term “new allottees” includes those “...(I) eligible to enter into contracts under section 5 of the Boulder Canyon Project Act (43 U.S. 617d); or (II) federally recognized Indian tribes”. The language does not establish a preference for subsection II entities which is superior to entities listed in Subsection I.

The current 13 Hoover contractors formed a negotiating committee in late 2008. The committee met in Las Vegas frequently over the next two years and developed then- proposed Hoover Power Allocation Act of 2011. The parties at the behest of the State of Arizona agreed to include federally recognized Indian tribes in Section 5. However the amendment making tribes eligible for an allocation of Hoover power was heavily debated. The parties and the states who drafted and offered the Hoover Power Allocation Act of 2011 for passage only intended that federally recognized Indian tribes be considered entity for an allocation of Hoover power on an equal basis with the entities originally designated in the 1928 BCP Act.

4. Allocations of less than one MW plus associated energy to parties located within Arizona.

The Authority encourages Western to consider allocations of less than one MW to entities located within the State of Arizona. The Authority will commit to Western that any such allocation will be dynamically dispatched, scheduled, handled, and billed by the Authority, pursuant to direction by Western.

Thank you for considering these comments.

Sincerely,

A handwritten signature in blue ink that reads "Douglas V. Fant". The signature is written in a cursive style with a large initial "D".

Douglas V. Fant
For Arizona Power Authority