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Mr. Stuart Somach
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Sacramento, CA 95814

RE: Comments on Draft Plan

Dear Mr. Somach;

On behalf of Arizona Electric Power Cooperative ("AEPCO"), I am providing the following comments in response to the Public Information and Draft Comment Plan ("Draft Plan"). As we highlighted at the public workshop convened on April 7th, AEPCO recognizes that several of the conclusions reached in the Draft Plan could lead the Arizona Power Authority ("Power Authority" or "Commission") to needlessly foreclose opportunities to distribute Arizona's share of Hoover power in as widespread manner as possible. While there are clear restrictions in Titles 30 and 45 and the Arizona Administrative Code, the Commission need not agree with all of the positions presented in the Draft Plan in order to preserve the greatest autonomy and discretion in developing an allocation plan for post 2017.

The Arizona Cooperatives believe that the resource provided by Federal Law to the Power Authority is a state-wide resource and should be allocated with this fundamental premise in mind. While there are impassioned arguments to maintain the status quo for allocations, population growth and changing economics within the State encourage a creative analysis to share the benefits of the Hoover power throughout the State. Indeed, there are farms, industries, and consumers located throughout the State who have not seen the benefit of Hoover power or Central Arizona Project water. The challenge for the Commission is to read the law as broadly as possible to find the opportunities to share the Hoover resource for such electric customers.

As discussed below, we have addressed several key points including:

- Eligibility of "New Allottees" for Schedules A, B and D-2 Power;
- Timing for developing a proposed plan;
- The proposed sub-division of Schedule D;
- Restrictions in existing law; and
- Questions for the technical consultant to inform the Power Authority's development of a plan.

At the outset of our discussion, we note that underlying the Power Authority's process is a tension between the Hoover Power Allocation Act of 2011 ("HPAA") and the authorities that govern the process that the Commission will follow in developing a proposal. While it remains clear that State law and regulations will guide the Power Authority, it is also evident that the existing State regulatory structure and state of law does not cleanly contemplate the allocation of Schedule D power. Here the Draft Plan has endeavored to negotiate questions of Federal Supremacy, i.e., those instances when the HPAA directs particular outcomes that would otherwise bind the Commission. In consideration of the Schedule D power, the HPAA supplies important guidance that Arizona statutes and regulations do not otherwise provide.

Eligibility of "New Allottees"

The Draft Comment plan raises a question that has vexed the planning process for the Commission since the passage of the HPAA. Specifically, who is a "new allottee" for purposes of determining eligibility for Schedule D power? Not surprisingly, this question on eligibility has influenced the planning for the development of a plan.

The Draft Plan looks to the HPAA for guidance on determining who may be a "new allottee" explaining that a "new allottee" is an entity that is not receiving contingent capacity and firm energy under Schedules A and B in the HPAA.[1] While this definition appears sufficient for purposes of creating a Schedule D pool of power, it is not completely illuminating for purposes of determining who is precisely a "new allottee". Taken verbatim, "new allottee" excludes all entities "receiving contingent capacity and firm energy under subparagraphs (A) and (B) of paragraphs (1)" from receiving Schedule D power.[2]

However, subparagraph (a)(2)(B) also indicates that Schedule D power is to be offered to entities, "for delivery commencing October 1, 2017." This clause creates confusion because it is not facially clear whether the term, "for delivery commencing October 1, 2017" refers to the Schedule D power and the Schedule A and B allocations. Parsing the language, it appears clear that the temporal direction in this clause refers solely to the Schedule D power rather than the Schedules A and B recipients. Indeed, we cannot reconcile the language, "for delivery commencing October 1, 2017" as

[1] Draft Plan at 28.

[2] See 43 U.S.C. § 619a(a)(2)(B). Taken to an extreme interpretation any existing recipient of Schedule A or B power administered by the Commission could be eligible as the Power Authority is the only named entity for Schedule A and the State is the only named entity for Schedule B.

consistent with the defining term "not receiving" which accompanies the description of Schedule A and B recipients and is found earlier in Subparagraph (a)(2)(B). Given the ongoing debate over this provision, it is evident that the statutory language of the HPAA has not yielded an unequivocal definition of a "new allottee".

When faced with questions on the actual intent of legislation, courts will turn to the legislative history to develop a clear understanding of what Congress intended.[3] In this context, the Committee report accompanying the HPAA provides clarification on this point. In the section by section explanation, the House Resources Committee stated:

> Section 2(d) amends HPPA by directing the Secretary of Energy to create a new Schedule D from the apportioned allocation equal to 5% of Schedules A and B of contingent capacity and firm energy after October 1, 2017. This power will be made available to new allottees that do not ***already*** receive Schedule A or B contingent capacity and firm energy.[4]

By using the term "already" Congress signaled that the class of potential customers eligible for Schedule D power would be those who were not receiving the benefits of Hoover power under Schedule A or B at the time of the enactment of the statute.[5] Indeed, the class of excluded parties was set in 2011 and is not subject to further action by the Power Authority or the Western Area Power Administration ("Western"). However, the Draft Plan invites a new interpretation of "new allottee" which is subject to definition by subsequent action.

For purposes of a post-2017 allocation, the definition of "new allottee" should be read to include an entity that does not currently or ***already*** receive an allocation pursuant to Schedule A or B of the 1984 Act.[6] Conversely, the class of entities that are not eligible for Schedule D power was defined at the time of the passage of the HPAA and is not subject to further revision or interpretation. Therefore, an entity receiving an allocation of power under Schedule D pursuant to either the Power Authority or Western allocation process does not lose its eligibility for Schedule D power if it receives an allocation of power under Schedules A or B post 2017. Moreover, an entity that does not ***already*** receive Hoover power under Schedule A or B remains eligible for power under Schedules A, B, or D post-2017. There is no need to wait on Western or sequence the allocation process to determine who is or who is not a new allottee.

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[3] *See Thunder Basin Coal Co. v. Reich* 510 U.S. 200, 20 (1994)("The legislative history of the Mine Act confirms this interpretation".)

[4] House Report 112-159 at p. 3.(Emphasis added)

[5] If Congress had intended to define "new allottee" in a manner as suggested in the Draft Plan, this sentence in the House report should have read [t]his power will be made available to new allottees that ***will not*** receive Schedule A or B contingent capacity and firm energy.

[6] Underlying the Power Authority's process is a tension between the HPAA and the organic authorities that govern the process that the Commission will follow in developing a proposal. While it remains clear that State law and regulations will govern

Timing for a Proposed Plan

Since the passage of the HPAA, the Commission has wrestled with the timing for the allocation process. Commissioner Brophy's Qualitative Principles first addressed this question in 2012.[7] In particular, the timing conundrum has centered on the question of who is a "new allottee." As postulated, whenever any entity received an allocation, either from the Western process or through the APA, they would lose status as a "new allottee". For obvious reasons, this created significant concern as to how to plan for a process that would accommodate the timing of the Western process and the Power Authority's own internal process ***within*** the time frame allotted under the HPAA.

If the interpretation of "new allottee" is given the meaning as prescribed by Congress and explained above, the sequencing of process becomes entirely linear and many potential disqualifying conditions are eliminated. The Commission may move forward with its allocation process independent of the Western process and release a plan that proposes an allocation of long term power available under Schedules A, B, and D without concern for an entity's eligibility to be determined by subsequent events.

The advantages of this approach are multi-fold. First, the Commission is able to entertain any and all applications from new entrants without regard to eligibility as a "new allottee." Only the Power Authority's existing customers for Hoover power are excluded from applying for Schedule D power. Second, the question of timing and eligibility is greatly simplified and less susceptible to litigation challenging the Commission's interpretation and/or process. Third, the timing and development of a plan may proceed without sequencing of conditions subsequent to ascertain eligibility. In simple terms, it will make the Power Authority's task that much easier.

If the Commission adopts the definition of "new allottee" as contemplated by Congress, the application process may continue apace with the development and release of a plan by the end of the current calendar year. Calls for power could occur as soon as this fall with fewer questions regarding eligibility and no need to wait for the Western process to proceed. As to the precise dates to follow for the Power Authority's process, the Copper Book clearly delineates the sequencing for publication and comments.[8]

Allocating Schedule D under State Law

The creation of a new schedule of Hoover power presents a dilemma for the Power Authority as current state law does not immediately contemplate an allocation of a new class of Hoover power. The challenge for the Commission is to determine a legally defensible and factually sound basis to allocate the contingent capacity and energy under existing authorities. As set forth below, Title 45 provides an unassailable foundation from which the Commission may allocate the Hoover schedule D power.

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[7] *See* Proposal for Establishing Qualitative Principles for the APA Process for Allocating Hoover Post 2017 Power, May 31, 2012, pp. 5-6.

[8] *See* RS12-14-201. Additionally, there will likely be some discussion on the timing for appeals including interlocutory challenges. We have not endeavored to answer those questions in this document.

The draft comment plan declares that the capacity and energy in Schedule D "are directly traceable to the amounts in Schedule A and Schedule B that were reduced to created (sic) the new resource pool for new allottees".[9] Presumably, this conclusion is reached by referencing the HPAA which directly addresses the creation of Schedule D from the "apportioned allocation of contingent capacity and firm energy adjusted from the amounts authorized in this Act in 1984 to the amounts shown in Schedule A and Schedule B as modified by the [HPAA] a resource pool equal to 5 percent of the full rated capacity of 2,074,000 kilowatts…".[10]

It is important to note that before Congress created the 5 percent pool of Schedule D power, it allocated the total amount of capacity and energy available from the Hoover project. Specifically, the HPAA increased the total amount of capacity and energy by 6 percent before creating a 5 percent pool for Schedule D.[11] This action sets the foundation for the threshold question: how did Congress increase the amount of power available from the Hoover project? The answer to this question requires an examination of the Hoover Power Plant Act of 1984[12] ("1984 Act") which set forth the allocation amounts for Schedule A and created a new Schedule B.

Under the 1984 Act, Congress created the new Schedule B would account for power that would be made available pursuant to the uprating program at Hoover Dam. This effort increased the amount of available capacity from the project. As set forth in correspondence between Western and the APA in 2008, the original nameplate capacity of the Hoover project was 1,340 MW.[13] The uprating raised the nameplate capacity to 2,074 MW. Thus, Congress added 734 MW in nameplate capacity to Hoover Dam with the 1984 Act. Yet, Congress did not fully distribute the entire nameplate capacity and allocations only totaled 1,951 MW. 123 MW of "new" nameplate capacity remained unallocated after the 1984 Act. Notably, Schedule D sets aside roughly 104 MW for the new allottees.

Title 45 specifically addresses the capacity and energy made available pursuant to the uprating program. As set forth in Title 45, the water and power plan for the state shall include, "[t]he authority's interest in or rights to capacity and any associated energy of the Hoover power plant uprating program consisting of an increase in the capacity of existing generating units at Hoover Dam and power plant as a result of replacement and improvement of equipment for such units".[14] Furthermore, the "[p]ower and energy of the authority from the Hoover power plant modifications project and the Hoover power plant

[9] Draft Plan at 7.
[10] 43 U.S.C. §618(a)(2)(A).
[11] The machination of increasing the total amount of capacity and energy before creating a new pool of capacity and energy reflects a political sensitivity associated with the passage of the HPAA rather than a true accounting of capacity and energy associated with the actual Hoover project. A party that believes that its total pool of power is increasing will object less when power is taken away.
[12] Public Law 98-381.
[13] *See* Attachment, Correspondence between APA Executive Director Joseph Mulholland and Western Regional Director Tyler Carlson.
[14] §45-1703

uprating project shall be sold by the authority pursuant to this article".[15] At bottom, power associated with the uprating is to be sold pursuant to Section 45.[16]

There is a temptation, in part suggested by the HPAA, to believe that a portion of Schedule A was depleted to create Schedule D. Because Schedule A is administered under Title 30, logic may suggest that part of Schedule D must be allocated under Title 30. Yet, the question for the Commission on the application of Title 30 or Title 45 for the Schedule D power does not pivot around Schedule A, but rather the underlying question of whether additional power made available under the HPAA is traceable to the uprating. Indeed, if the nameplate capacity of the project in 1984 was 1,340 MW and Congress allocated 1,448 MW under Schedule A, there is no reserve or additional capacity that can be traced to the original project.[17] Or in other words, no amount of capacity marketed under Schedule A can be traced to the uprating.[18]

If the Power Authority recognizes that all of the original capacity at Hoover Dam has been captured and marketed under Schedule A, the conclusion remains straightforward to utilize Title 45 as the authority to allocate Schedule D power. This position is defensible both factually and legally. Moreover, the Commission relinquishes no discretion in allocating Schedule D under Title 45. In fact,, because of preference provisions in Title 30, the Power Authority would enhance its discretion by relying on Title 45 instead of Title 30 to allocate Schedule D.

Transparency Requires Adherence to Existing Law and Regulations

While opportunities may exist for the Power Authority to render an interpretation that shifts an emphasis on particular criteria, there are several provisions in the law and regulations that cannot be ignored and should be appropriately highlighted in the next version of the Draft Plan. Indeed, for the sake of transparency and consistency the Power Authority must deliberately adhere to the regulations that govern the information to be provided in applications under RS12-14-202. Furthermore, because of a potential divergence in the approach that Western may take in the marketing of Schedule D-1 power, due care should be taken with Section 30-122 to highlight limitations on allocations that could otherwise appear to fall within the definition of retail wheeling.

The workshop on April 7th raised a significant concern regarding the collection of data and eventual preparation of a proposed allocation. First, the voluntary data collection appeared to ask questions that were inconsistent with RS12-14-202. Second, there appears to be a generalized and

[15] *Id* at subsection C.

[16] The State legislature appeared to set Title 45 up as a "catch-all" provision for additional power in specifically delineating that all power associated with the original contract and original nameplate capacity for Hoover power executed in 1945 was reserved for consideration under Title 30. There can be no question that Title 30 covers the power made available in connection with the original nameplate allocation.

[17] In fact, the HPAA increased the amount of available capacity for Schedule A in excess of the 1984 Act to 1,462 MW.

[18] Relatedly, some portion of Schedule A may be attributed to the uprating. In fact, the argument could be made that a portion of Schedule A power should be marketed pursuant to Title 45 because Schedule A exceeds the amount of original nameplate capacity. Herein lays the uneasy dance between federal supremacy and operation of State law.

imprecise approach to the data collection that, at worst, leads to a reverse engineered outcome. To be fair, the voluntary collection of data provided for a generalized expression of interest. Nonetheless, the actual data collection must adhere to existing requirements in the law in order to assure transparency and compliance with the due process set forth in the regulations.

The Commission's regulations in RS12-14-202 ask for Points of Delivery for Hoover power. More importantly, an application shall include annual energy requirements for each point of delivery and the maximum capacity requirement for each point of delivery during a continuous 12-month period for each point of delivery. This is an important requirement and one that cannot be ignored in light of the fact that delivery points provide insight into transmission and transfer capability. An entity that does not have adequate access for wheeling purposes cannot claim a need for a greater allocation than what it may physically accept. Furthermore, as transmission arrangements evolve, assumptions regarding prior allocations and delivery points merit further refreshing to ensure that the Power Authority is distributing the Hoover resource in a widespread manner.

To ensure a uniform approach to the presentation of data, the Power Authority should also follow the direction provided in RS12-14-202 (A)(5) which requires a statement of the Entity's kilowatt and kilowatt-hour sales during each of the 24 months ***immediately*** before the date the application is filed. While there may be the temptation to consider alternative presentations of this requirement, the basic requirements in the Commission's regulations mandate disclosure of this information from the most recent time period. Indeed, unless every applicant follows this obligation, the Power Authority will be unable to evaluate the data on a comparable basis. If it is perceived that the Commission is reviewing data that does not have common core characteristics, there will be little faith in the ultimate allocation plan.

The marketing criteria promulgated by Western in draft and final form raised an important question regarding the eligibility of a potential applicant. In the draft marketing criteria released in October 2012, Western indicated that a potential recipient was required to demonstrate electric utility type status. This requirement was dropped from the final marketing plan, opening up a larger swath of eligible entities for the Western Schedule D allocations.

Notwithstanding the Western policy, the Title 30 continues to maintain the requirement of a recipient to maintain a utility status as a condition of receiving Hoover power. Notably, in Section 30-122, the Commission is prohibited from engaging in retail distribution of electric energy. While there is a limited exception for entities located adjacent to the Power Authority's transmission lines that may be without adequate electric supply, the language of this section of Title 30 obligates the Power Authority to allocate to entities that are involved in the distribution of electric energy. More specifically, the Commission may not allocate to an entity that is an end use consumer of electricity.

If the language of Section 30-122 fails to supply the proper authority, the Commission should also bear in mind the findings of the Arizona Corporation Commission ("ACC") which do not endorse retail wheeling within the State. In fact, while the potential for retail wheeling had been raised over thirteen years ago, the current ACC revisited this issue last summer, yet concluded not to pursue it. In

light of this, the Power Authority should be careful to avoid allocations which may also contradict legal and policy determinations that have been made by brethren agencies within the State.

Questions that Merit Consideration in Developing an Allocation Plan

As the Commission revisits earlier spread sheets and proposals for the allocation of power, we believe further questions need to be asked to ensure that the process is entirely fair and will allow the Power Authority to meet its obligation to distribute this resource in a wide-spread and uniform manner.[19] In particular, we would invite the consultant to ask:

1. What is the applicant's kilowatt and kilowatt-hour sales during each of the 24 months prior to the date of the application;
2. How much power has ***not*** been used by an existing allottee, if any? If energy has not been utilized at all hours when available, what periods of time has power not been used by a current recipient? Please provide a spread sheet with days and hours when energy has been available but not used.
3. What transmission arrangements will a recipient rely for the designated points of delivery? Please provide copies of existing transmission agreements or proposed transmission paths.

The questions above will elicit practical information that is required in part by the Commission's regulations, but also encouraged by the statutory edicts set forth in Titles 30 and 45. Failure to ask these basic but vitally important questions would create a significant shortcoming in the Power Authority's due diligence in preparing a proposed allocation plan.

[19] Commission regulations require distribution of power with equitable considerations while language in Title 30 suggests that the Power Authority dispose of the power in an "equable manner". While the regulations invoke themes of fairness, State law also mandates a uniform process.

Conclusion

We greatly appreciate the opportunity to present these suggested revisions for the Draft Plan. As noted above, the Commission may, through the adoption of certain legal conclusions, improve the trajectory for the release of a proposed plan. Moreover, with modifications to the Draft Plan, the Commission may be provided with a blueprint that sets a foundation for action that will serve the Power Authority and the eventual process well.

We remain available to answer any questions that you have regarding these topics and would welcome further follow up questions to clarify points raised above.

Sincerely,

/S/

David A. Fitzgerald
Counsel to Arizona Electric Power Cooperative

Attachment