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Editorial Comments on the Arizona Power Authority Public Information and Comment Draft Plan for the Hoover Power Allocation Post-2017
April 28, 2014

The following editorial comments are provided separately for your consideration.

In the Introduction, you may wish to change the reference to the spreadsheets from "draft proposals" to examples because they have been subsequently described as merely examples. Once an agreed-upon methodology for making the calculations in the spreadsheets has been developed, then reruns would provide examples of how that methodology makes changes to the draft spreadsheets and might render them "draft proposals". This would create examples of what draft allocations in spreadsheets might look like but still not be Commission proposed allocations. To clarify this point might very well be helpful.

It is also possible that, in addition to the various informal workshops and conferences that the Commission is holding, the Commission might decide to either continue its public information conference or continue its public comment conference in lieu of calling other separate conferences after these are initially scheduled. That is an option we have discussed with Stu Somach and might very well be worth flagging in the third paragraph of the Introduction.

On page 3 in the first paragraph of item #2, the word "the" should be inserted after the word "of" on line 6. On line 9 after the word "recapture", you should insert "a portion of". Not all of Schedule B was ultimately deemed recapturable as the supplemental proceeding after the publication of the Red Book confirms. In the same sentence, it might be helpful to add the word "supplemental" after the word "a".

The discussion of the status of the Red Book will be addressed in our memorandum on legal issues.

On page 4 in the last sentence on the page after the word "power", you might wish to consider inserting "federally allocated to Arizona "new allottees"". You might also wish to substitute the word "contracted" for the word "offered". The extent of the Authority's role in this contracting effort is still being developed and examined.

On page 5 in the first full paragraph on line 3, we suggest changing the word "made" to "confirmed". It is our position that the allocation was made by Congress and Western is directed to execute it through issuance of a supplemental marketing criteria. The publication of the conformed criteria was, at least to the extent of the amounts reflected as allocations, a ministerial act.

On page 6, the sentence in paragraph 3 acknowledging that the power purchase certificate requirement is limited to Schedule A power is clearly correct. It might be helpful to make that distinction also on page 12 in the bottom paragraph.

On page 7, we note the statement "Schedule D power does not fit neatly into the Arizona regulatory structure." We certainly agree with that statement. However, the document does not apply that observation to Schedule D-1 power allocated by Western to an Arizona allottee and then presented to the Authority for contracting. Thus, Schedule D-2 power, based on what we now know, must be split between A and B for purposes of showing the legal basis for the Authority to allocate; then must not contracting for Schedule D-1 power be similarly analyzed?

On pages 9 and 10, in the discussion of Ex Parte Policy, it is clear that the Commission intends to impose ex parte communication limitations on itself at the beginning of the formal process. In the first full paragraph on page 10, the paper should be amended to reflect that the resolution to that effect has already been adopted. At the Commission meeting at which this occurred, I asked a couple of questions for the record about the breadth of this policy. It is our understanding from responses to those questions that the policy in no way inhibits general public communication with the Commission during the formal process, preferably in writing except during actual public meetings, but does not inhibit communication with staff. This paper should confirm those details. Also, in the last sentence on this subject, it might be helpful to clarify that a disclosed ex parte communication includes not only the fact that it happened but the actual communication itself.

On page 11, in the middle paragraph, there is a citation to an allocation criterion found in Title 30. It is stated as if it is viewed as a matter of general applicability, which means it would affect both allocations of Hoover A and Hoover B power. If it is the Commission's view that there are certain provisions in Title 30 that apply across the board, then the statement beginning at the bottom of page 15 about Title 45 continuing over to the top of page 16 needs to be revised.

Indeed, it might helpful to catalog those specific statutory provisions in Title 30 that the Commission believes are of general application to the overall process, thus differentiating those that are separately applicable only to Hoover A allocations. That would clarify the relationship between the Authority's mandates under Title 30 and those under Title 45.

On page 13 in the first paragraph under Application Requirements, we find the sentence "The Authority will not accept joint applications from multiple prospective purchasers." There have been several discussions about that sentence. Several people have observed that a Joint Powers Authority under Arizona law would be a single entity made up of other entities. However, a power pooling association would not be. We are given to understand that your legal consultant has further analysis of this issue which might be worthy of exploring in a fashion not to compromise attorney/client privilege.

On the same page, in discussing the requirements for an application, we would note that there has been considerable discussion of item #4 concerning "in lieu water". As it turns out, to the best of our understanding, there are three (3) types of water that some of your current contractors receive under different requirements and restrictions. The future availability of each of those is subject to different rules. All three appear to be legitimate factors to consider. We anticipate that several people will try to assist the Authority in further exploring this subject.

We have also had a number of discussions very recently about the spreadsheets and the data on them. It has been pointed out at Commission meetings that the data provided to Mike Powell from various potential applicants was not data measured in a consistent fashion from a common data point. K.R. Saline and Associates has prepared a brief comment on how the spreadsheets have to be adjusted so that all of the data that the Commission has received and will receive will be useful toward developing a common yardstick. This is a critical subject in this process. We look forward to the engineers working this out.

One of these criteria that also has received a great deal of comment is what the term "agriculture" means in terms of loads being served. That has been flagged as an item for ongoing dialogue because we have heard a number of different ways of defining that term and are not in possession of sufficient information at this point to suggest a definition.

We also note on page 14 the item #7 reference to CAP water. That has a bearing on the discussion of in lieu water, some of which goes to Arizona irrigation districts from the Central Arizona Project and other types of water that may involve water transmitted through the Central Arizona Project facilities. We are also of a mind that further third party water supplies exist which are not mentioned in this description. Further dialogue on this subject seems warranted.

We previously commented that the last example under item #8 on page 14 is, in our view, inappropriate as a way of demonstrating use of Hoover power.

In sum, the factors that the Commission intends to consider seem still being formed and clarified. Continuing that dialogue is extraordinarily helpful. At recent meetings with Commission consultants, we queried whether there are other criteria and arguments that the Commission would consider if made. We were advised that such were certainly items that the Commission would consider. It would be helpful in a revised version of this document to confirm that the Commission will entertain whatever arguments precede and/or accompany applications.

In the middle paragraph on page 14, the time for attempting to cure deficiencies is given as seven calendar days. If it were to happen over an extended holiday, smaller applicants might very well not have the time to marshal resources and add necessary information to their applications. We suggest two ways to avoid this problem. First, make the time period seven Commission work days, and second, indicate that the Commission will hold a workshop on how to prepare an application in order to help educate potential applicants and avoid these problems.

We previously noted the discussion at the bottom of page 15 about the "exclusive" nature of the statutes in Title 45 and will merely flag that again for your consideration and amendment.

We also note on page 16 that this would be an appropriate place to further address the issue of the D-1 power that may be allocated to an Arizona allottee and referred to the Commission for contracting.

On page 18, in a discussion of what is included in the definition of "district", the statement is made that the term "includes only those entities formed under a governing act that has been, *or will be*, included in Titles 30 or 45. We note that the concept of "will be" relates to chapters that might be added to Title 45 and Title 30, not to "entities formed." That is a not unmeaningful distinction, as noted on pp. 19-20. We note the more specific definition of "district" in Title 45.

There, the projection into the future is as to "districts formed." Additionally, the regulations define "district" much more broadly than either Title 30 or Title 45. Obviously, the statutory definitions control and such should be noted in the paper.

On page 21 at the bottom of the page, the paper references cooperatives and on page 22 makes the point that the qualification "serving its own members only" only applies to cooperatives and not to cities and towns. An unanswered question is whether or not "serving its own members only" means retail customers or can also mean a G&T cooperative buying the resource at wholesale to be redistributed to its member distribution cooperatives and then to their customers. We note that the Arizona Electric Power Cooperative, a G&T, was given a Hoover B allocation in 1985. Thus, the Commission at the time must have believed that it could make such an allocation. Since the preference statute in Title 30 will likely cause the Commission to allocate its full Hoover A allocation to districts, this distinction likely will not be relevant to that decision. However, should the G&T in Arizona be given a D-1 allocation, adopting the view that a G&T as well as a distribution cooperative is legally authorized to have an allocation of Hoover power would remove one eligibility stumbling block to any question about whether the Commission can sign a D-1 contract with a cooperative.

We also note that, on page 22, the paper lists resources that are taken into account when applying the limitation on allocations to cities, towns and cooperatives in the statute. For consistency purposes, it would probably be better to list the specific resources as the Boulder Canyon Project, the Parker-Davis Project and the Colorado River Storage Project.

At the bottom of that same page, we notice the reference to the term "equable" as quoted in A.R.S. Section 30-124(B) and the use of the term "equitably" as used in reference to Commission regulation AAC R12-14-201(J). The former is an archaic word seldom used today whose most common meaning is "uniform".[1] Thus, the statute is calling for a uniform process. Here again, the question arises as to whether this statute applies to Hoover B allocations. The discussion in the paper does not directly address that issue but it implies that the standard quoted is of general application. This point deserves further amplification. Likewise, the use of the term "equitably" in the regulation appears to be of general application. We are not sure what that term means nor how much of an umbrella that term is for more specific discussions that follow such as the "needs of the entities" and "the type of use of long term power". The quoted rule appears to apply to the preference statutes for both Hoover A and B power. Revisions in the discussion in the paper should signal that fact.

On page 22, we note the statement that the Authority would like to provide the benefit of Hoover power to the extent possible in geographic areas of the state and entities that do not receive similar benefits from other at cost resources. Except for loads in the state in portions of the service areas of private utilities served exclusively by them, we are not aware of areas in the state that do not receive the benefit of federal hydropower. Since this parameter is not found in Title 30 nor in the regulations, and new allottees are specifically provided for in Schedule D allocations, we question the usefulness of that statement here.

At the bottom of page 23, the paper begins to discuss the eligibility for Hoover B. This is a legal issue we will discuss in our other memorandum.

[1] Webster's New World Dictionary, College Edition (1953), p. 490. The term is used also in A.R.S. Section 30-123.

On page 24, the citation in #2 needs to be corrected.

On page 25, the draft Plan continues the discussion on the Water and Power Plan and the projects authorized for construction under it. We note that the Hoover power plant modifications and the Montezuma pumped storage power project, while listed, have never been built.

Beginning at the bottom of page 25 and continuing over to the top of page 26, the draft Plan notes that many of the Commission's customers are irrigation and electrical districts. The Commission also has contracted with a power district and an agricultural improvement district. The intent of the sentence seems to be that the Commission has contracted with many districts that serve irrigated agriculture. Rephrasing this sentence could make the comment more complete.

In the middle paragraph on page 26, the draft Plan makes a statement "The Authority must procure purchasers for power before it may obligate itself by contract or agreement to purchase the power." It cites to the provision that forbids the Authority in Title 30-122(C) from creating any mortgage lien upon its operating property or facilities, or imposing any debt, or suffering or creating any financial obligation whatever upon the state or any of its subdivisions. Were that provision to apply to contracting for Hoover power, then the Authority could not enter into a contract with the United States because it is a "take or pay" contract. Obviously, the provision is not intended to affect contracting. This is followed by a reference to Section 30-222(A) concerning issuing revenue bonds. We note that that statute was amended in 2010 and no longer has subsections. The quoted provision remains. Clearly, this provision intends that the Authority will have contracts in place before it issues revenue bonds. The question posed by the above quoted sentence is whether or not the Authority must have signed contracts for the post-2017 Hoover resources before it can sign the federal contract. We cannot read the statutory authority that way but this matter needs to be clarified.

At the bottom of the same page, the draft Plan asks for comments on allocation of excess energy. We specifically had asked about the timing of such a process. This energy has seldom been available in the current contract period. If it becomes available, the seminal question is: "How much time will the Authority have to react to a federal notice of availability?" If there will be a considerable period of time, then a subsequent allocation process might be feasible. However, if time is in the least a problem, then any timing problem militates toward addressing issues related to allocating excess energy in this process.

Page 27 begins a discussion of the application of federal law and general principles of federal preemption. This will also be discussed separately in the legal memo.

At the bottom of page 28, the draft Plan infers that receiving an allocation of D-1 prevents "double dipping" for D-2. This issue is discussed further in the legal memo regarding federal preemption, which also affects the concept of switching from D-1 to D-2.

On page 29, the federal process paragraph needs updating.

On the top of page 30, the draft Plan quotes the "within each class of preference" rule again without making it clear that this is a rule that applies to allocations of Hoover A and B power.

On page 30 there is a discussion that carries over to page 31 on the appropriate term for a power sales contract. At the work session held after the IEDA meeting on April 15th, there was considerable discussion of the resource exchange and seasonal exchange programs that the Power Authority operate currently. The engineers in the room were uniform in their opinion that these programs gave the Authority sufficient flexibility to deal with any necessary adjustments in Hoover use, such as increased availability of CAP water, occasional and monthly load adjustment, etc. When asked directly, one of the engineers replied "no" when asked whether these tools were in any way inadequate to allow the Commission to make future adjustments as necessary to actual use without reallocating the Hoover resource. Thus, future uncertainties need not weigh heavily in any discussion of the term of customer contracts. Moreover, the Authority's bond rating is predicated not only on its long term contract with the United States but its long term contracts with its customers and the significant track record of financial stability that this relationship has created. This factor should be considered as this issue is debated further.

On page 31, there is a brief discussion of whether or not the Commission should establish a minimum allocation requirement. What is missing is the question of whether or not, as to D-1 and D-2, there should be a maximum allocation requirement. We believe that the issue needs to be focused on discussions related to D-1 and D-2 and federal preemption and separated from discussions about allocations of Hoover A and Hoover B. The federal minimum and maximum criteria only apply to Hoover D-1 and in part D-2.

We will not discuss the paper's articulation of the alternatives (qua "examples") in the spreadsheets because of the foregoing discussion and the white paper from the engineers that points out that spreadsheets need to be run as examples using common data and common data points, i.e., comparing apples to apples. Further revision of this paper can easily accommodate that exercise and, at that point, our comments on the alternatives can focus on the results of analyzing consistently measured data.