

ARIZONA POWER AUTHORITY

Issue Papers

Hoover Power Allocation

Post-2017

INTRODUCTION

Somach Simmons & Dunn, the Arizona Power Authority's (Authority or APA) legal consultant for the post-2017 Hoover power allocation process, and Mike Powell of UC Synergetic, the Authority's technical consultant for this process (collectively "Consultants"), have reviewed the written comments on the Public Information and Comment Draft Plan (Draft Plan) which were submitted by April 28, 2014, in addition to receiving oral comments on the workshop held on April 7, 2014. This document provides an analysis of the significant, substantive issues raised in the comments. This document does not address the comments that were more editorial in nature, relating to the wording and other corrections in the Draft Plan. These editorial comments will be considered and incorporated as appropriate in the next iteration of the Draft Plan, to be developed and released following the June 30, 2014 workshop.

Each issue is identified in a heading followed by a summary of comments related to the issue, discussion of the comments, and a recommendation to the Authority on how the Authority should proceed during the allocation process. The discussion is intended to identify specific legal requirements that restrict the Authority's discretion. In some cases, the recommendation simply acknowledges that the matter is a policy decision. In other cases, the Consultants recommend that the Authority take a certain action or adopt an interpretation.

At the June 30, 2014 workshop, the Consultants will, in general, not discuss the issues in Section XV related to Data Submission and Standardization. Rather, the Consultants will concentrate on legal and policy issues raised in the comments, and specifically Sections II to VII. Nonetheless, we are interested in the public's written comments on these issues. In this regard, the Consultants will convene a separate workshop at a later date, focusing on data submission, standardization, application requirements, and other technical aspects of the allocation process. In addition to receiving verbal comments on the June 30, 2014 workshop, written comments on these Issue Papers, including the issues dealt with in Section XV, may be submitted to the Authority until July 15, 2014.

Following the June 30, 2014 workshop and after July 15, 2014, the Consultants will review the comments and seek further direction from the Authority. Consistent with the Authority's direction, the Consultants intend to release a revised (redlined) Draft Plan by mid-August 2014. The Consultants do not currently anticipate releasing revised spreadsheets until a later date in the fall of 2014.

I. LENGTH OF CONTRACTS

Comments:

Many commenters support a 50-year term for some or all of the following reasons: the customers' contracts should match the term provided in the federal legislation, which the existing customers supported; the term of the Multi-Species Conservation Program; bonding and rate stability; the recapture provision in the power sales contracts and the Resource Exchange Program provide for redistribution and are appropriate ways to manage the risk of changed circumstances; and supplies of Central Arizona Project (CAP) water available to agriculture will diminish or vanish, and the only dependable source of irrigation water is groundwater pumped using Hoover power.

Current Insight Inc. commented that the term length of the contracts should be 10 years.

The Irrigation and Electrical Districts Association of Arizona (IEDA) did not suggest a specific term, but noted that future uncertainties need not weigh heavily in any discussion of the term of customer contracts because the resource exchange and seasonal exchange programs give the Authority sufficient flexibility to deal with future adjustments in demand. IEDA also noted that the Authority's bond rating depends on a long-term contract with the United States and also with its customers.

Avra Water commented that it is more reasonable to use a term of 25 years to balance the significant changes in the power industry and the changing load base of the customers.

Discussion:

There are two legal requirements that govern the length of the contract term with a power purchaser. First, the contract cannot extend beyond September 30, 2067. 43 U.S.C. § 619a(a)(5). Second, regarding contracts for Schedule A and Schedule D-2/A power, if the contract is made for a period exceeding 20 years, then it must include a provision that the Authority may terminate the contract “upon reasonable notice . . . at any time after the initial twenty year period.” A.R.S. § 30-127. The Authority may also look to what is required to support any future bond issuance and rating. Other than these factors, the contract term length remains a policy decision for the Authority, informed by the points raised in the comments.

Recommendation:

The contract term length remains a policy decision for the Authority, informed by the points raised in the comments.

II. RED BOOK

Comments:

IEDA commented that the Authority made several necessary determinations, which were memorialized in the Red Book, when it allocated post-1987 Hoover power. Thus, the Red Book constitutes a longstanding administrative interpretation. IEDA suggests that in the event of a legal challenge, the Authority’s statutory interpretations will be entitled to deference if its determinations are consistent with the Red Book.

Other commenters agreed that the Red Book is a longstanding administrative interpretation but are satisfied with the approach taken in the Draft Plan to explain when the Authority intends to deviate from the Red Book. These commenters requested that the Authority include the Red Book as part of the administrative record.

Avra Water commented that because there is no statute or regulation that requires the Authority to maintain the Red Book allocation amounts for post-1987 entities, these allocations should not be the starting point for the post-2017 allocation.

Discussion:

An agency's past statutory interpretation is relevant because a court may give an agency's interpretation deference if the agency's interpretation is "longstanding and consistent." *Bridgestone Retail Tire Operations v. Indus. Comm'n of Arizona*, 258 P.3d 271, 273-74 (Ariz. Ct. App. 2011) (*Bridgestone*); *see also E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 79 P.3d 86, 97 (Ariz. Ct. App. 2003); *Better Homes Constr., Inc. v. Goldwater*, 53 P.3d 1139, 1143 (Ariz. Ct. App. 2002). However, a critical element in the determination that an interpretation is "longstanding and consistent" is that the interpretation occurred more than one time.

For example, in *Bridgestone*, the court found it significant that the Industrial Commission of Arizona (ICA) had *consistently* interpreted a statute for at least twenty years. *Bridgestone*, 258 P.3d at 274. Similarly, in *Bergstresser v. Industrial Commission of Arizona*, 474 P.2d 450 (Ariz. Ct. App. 1970), the court looked to the ICA's longstanding administrative interpretation to support its reading of the statute at issue. The ICA had "consistently interpreted" the statute at issue for over 40 years since its enactment, which the court found significant. *Id.* at 451; *see also Long v. Dick*, 347 P.2d 581, 583 (Ariz. 1959) (adopting the "uninterrupted administrative interpretation" by "various superintendents" over a period of 12 years).

Arizona courts do not simply give deference to an interpretation first made many years ago, i.e., "longstanding," but also consider whether the interpretation has been consistently and repeatedly applied in intervening years. The Red Book embodies a single instance of statutory interpretation and the application of that interpretation to certain facts that existed in the 1985 allocation. The Authority would have needed to make consistent, subsequent interpretations of the relevant statutes that the Authority interpreted in the Red Book for a court to draw the conclusion that that interpretation was a "longstanding administrative interpretation."

Recommendation:

Based upon our analysis of relevant case law, the interpretations and determinations contained in Red Book do not qualify as longstanding administrative interpretations, and the Authority would not be entitled to deference in relying on them in allocating post-2017 Hoover power.

The Authority should conclude that the Red Book does not bind the Authority or restrict how the Authority proceeds with the allocation of post-2017 Hoover power. Nonetheless, the Red Book is a relevant historic document that the Authority may rely upon as it proceeds through the current process, and the Authority should include the Red Book in the administrative record.

III. DEFINITION OF “NEW ALLOTTEE”

Comments:

The Arizona Electric Power Cooperative (AEPCO) commented that the interpretation of “new allottee” in the Draft Plan is inconsistent with the legislative history of the Hoover Power Allocation Act of 2011 (2011 Act). AEPCO argues that “new allottee” should be interpreted to mean an entity that does not currently or already receive an allocation of power from Schedule A or Schedule B of the Hoover Power Plant Act of 1984 (1984 Act). Based on this interpretation, an entity receiving an allocation of power under Schedule D does not lose its eligibility for post-2017 Schedule A or B power.

Discussion:

Under the 2011 Act, “[t]he Secretary of Energy shall offer Schedule D contingency capacity and firm energy to entities not receiving contingent capacity and firm energy under subparagraphs (A) and (B) of paragraph (1) (referred to in this section as ‘new allottees’) for delivery commencing October 1, 2017.” 43 U.S.C. § 619a(a)(2)(B). There is nothing ambiguous about this language. Therefore, under most circumstances, it would be appropriate for the Authority to follow the plain meaning of the statute and conclude that an entity that

receives post-2017 Schedule A or B power is not a “new allottee” and does not qualify for Schedule D power.

Where following the plain meaning would be clearly at odds with the legislative purpose, a court may follow legislative intent. *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982). Moreover, a court should not follow a natural reading that would lead to an irrational result. *Ariz. State Bd. For Charter Sch. v. U.S. Dep’t of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Serv.*, 435 F.3d 1140, 1146 (9th Cir. 2006). An analysis of the legislative history of an unambiguous statute is typically not appropriate. A court, however, may analyze legislative history to determine whether there is clearly expressed legislative intention to the contrary. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987).

A plain reading of 43 U.S.C. section 619a(a)(2)(B) would mean that all entities that received post-1987 Hoover A and B power would be eligible for Schedule D power because an entity would not be disqualified for Schedule D power unless and until it receives an allocation of post-2017 Schedule A or B power. This reading generates an illogical result – one that Congress could not have intended. Congress created Schedule D to broaden the availability of Hoover power by allowing new entities to apply and receive a portion of the Hoover resource. It would be nearly impossible to broaden Hoover’s customer base if all of the entities that historically received Schedule A or B power could compete for a relatively small Schedule D power pool. Congress could not have intended the statute to be interpreted in this illogical manner.

The House Report, floor discussion, and the transcript for the committee hearing on H.R. 470 indicate that Congress established Schedule D to provide new purchasers with Hoover power. With the phrase “new purchasers,” Congress had in mind entities that did not have access to Hoover power in the past, and would buy Hoover power for the first time through the post-2017 allocation process. The legislative history is clearly at odds with a plain reading of 43

U.S.C. section 619a(a)(2)(B), and instead supports an interpretation that a “new allottee” is an entity that did not receive post-1987 Schedule A or B power.

Additionally, if all entities were eligible for Schedule D power, there would be no need to define “new allottees” because, under that construction, all entities that otherwise qualified would be “new allottees.” In order to interpret the statute in a manner that is logical, a “new allottee” must, therefore, be an entity that did not receive post-1987 Schedule A or B power. Moreover, because of the statutory language and the interpretation provided herein, a “new allottee” must be one that did not receive post-1987 power and one that does not receive post-2017 Schedule A or B power. The most logical interpretation of statutory intent is that Congress did not intend that a post-2017 allottee get both Schedule A or B power, and D power.

Recommendation:

The Authority should interpret “new allottee” to mean an entity that did not receive post-1987 Schedule A or B power, and one that does not receive post-2017 Schedule A or B power.

IV. ATTRIBUTING SCHEDULE D POWER TO SCHEDULES A AND B

Comments:

AEPCO commented that the Authority should not allocate any of Schedule D according to Title 30 because there is no portion of Schedule D that is attributable to Hoover’s original nameplate capacity. AEPCO asserts that Schedule D capacity is entirely attributable to Hoover uprating, and that the Authority must allocate Schedule D according to Title 45.

Discussion:

In 1984, the Hoover Powerplant was “uprated” from 1,340 megawatts (MW) to 2,074 MW. At that time, the Western Area Power Administration (Western) only allocated 1,951 MW total (1,448 MW in Schedule A; 503 MW in Schedule B). In 2011, to develop the Schedule D pool, Congress raised each 1984 allocation by about six percent (on paper) to

1,538 MW for Schedule A, and 534 MW for Schedule B, respectively (2,074 MW collectively). Congress then reduced each adjusted allocation by five percent to generate about 104 MW for the Schedule D pool.¹ 43 U.S.C. § 619a(a)(2)(A). With this adjustment, Schedule A was reduced to about 1,462 MW and Schedule B to about 507 MW.

A portion of Schedule D is attributable to Hoover's original nameplate capacity (1,340 MW). The original 1,340 MW served as part of the basis for the calculation that generated the Schedule D pool. Therefore, the Authority will need to allocate a portion of Schedule D according to Title 30.

Western "socializes" Hoover power for various reasons, including the need to eliminate confusion about which entities are entitled to power when Hoover generation is lost. "Socialize" means that Western does not tie each electron leaving Hoover to a specific generator. Without Western tying each electron to a specific generator, the Authority cannot tie the capacity and energy it receives directly to the original and uprating capacity, respectively.

Pursuant to the 2011 Act, the Authority is entitled to receive 190.869 MW of capacity under Schedule A and 189.860 MW under Schedule B. Of the total amount of capacity (380.729 MW), 50.1% is from Schedule A and 49.9% is from Schedule B. The Authority should apply the same principles as Western concerning socializing, and split Schedule D according to the percentages of Schedules A and B the 2011 Act allocates to the Authority. If the Authority splits Schedule D capacity between D-2/A and D-2/B on a 50.1%/49.9% split, then the Authority should divide energy between D-2/A and D-2/B based on the capacity factors for Schedule A and B, respectively.

Recommendation:

Arizona's Schedule A and B allocation percentages from the 2011 Act provide a reasonable basis for splitting Schedule D between D-2/A and D-2/B. The Authority should

¹ Reductions from the adjusted Schedule A amount were about 77 MW, and reductions from the adjusted Schedule B amount were about 27 MW.

divide Schedule D between D-2/A and D-2/B: 5.77 MW as D-2/A, and 5.74 MW as D-2/B. With this capacity split, the Authority should split energy: 18,907.840 kWh as D-2/A, and 6,205.161 kWh as D-2/B.

V. FEDERAL SUPREMACY ISSUES

Comments:

IEDA asked whether there must be a maximum allocation requirement for D-2 power. It is IEDA's understanding that the maximum allocation covers all of Schedule D.

IEDA is also concerned about what happens if Western allocates D-1 power to an entity with which the Authority has no statutory authority to contract. IEDA acknowledged that this is an unresolved issue that may not develop based on Western's ultimate allocations, but that the Authority should explore the issue on its own.

Discussion:

The 2011 Act mandated that the Secretary of Energy allocate to the Authority, within one year of the date of enactment of the 2011 Act, 11.1 percent of the Schedule D contingent capacity and firm energy "for allocation to new allottees in the State of Arizona." On June 14, 2012, Western effected this allocation in the Conformed Power Marketing Criteria or Regulations for the Boulder Canyon Project, 77 Fed. Reg. 35,671, 35,676 (June 14, 2012) (hereinafter "2012 Conformed Criteria"). On December 30, 2013, Western published its final marketing criteria for allocating the post-2017 resource pool. Notice of Final Marketing Criteria, 78 Fed. Reg. 79,436 (Dec. 30, 2013). In the final marketing criteria, Western explained that the following criteria "shall be applied to applicants seeking an allocation of power from the Post-2017 Resource Pool. This includes the 69.17 MW of Schedule D to be allocated within the entire marketing area and the additional 11.51 MW of Schedule D to be allocated in the State of California." *Id.* at 79,443. As Western clarifies, "Western does not have the authority to prescribe requirements upon APA and CRC in their processes for marketing [Boulder Canyon Project] power within the respective states." *Id.*

Based on the terms of the final marketing criteria, the criteria do not apply to the 11.1 percent of Schedule D power that the Authority further allocates to new allottees in the State of Arizona, frequently referred to as “D-2.” The Authority is not “seeking an allocation of power from the Post-2017 Resource Pool.” Congress allocated D-2 power to the Authority, and Western effected this allocation to the Authority in the 2012 Conformed Criteria. Because Western’s final marketing criteria do not govern the Authority’s allocation process, the Authority is not required to implement the maximum allocation criterion that Western is using for its allocation of D-1 power.

With respect to the related comment regarding the Authority’s contracts with entities that receive D-1 allocations, the suggestion to defer analysis of this issue until later in the allocation process is well taken. The Authority will not know which entities will receive D-1 allocations from Western until the end of 2014.

Recommendation:

The Authority is not required to implement Western’s final marketing criteria, including a maximum allocation amount, when allocating power under its jurisdiction.

VI. ELIGIBILITY FOR SCHEDULE B

Comments:

The City of Page and its utility Page Utility Enterprises (collectively, “Page”) disagreed with the conclusion in the Draft Plan that “[t]he language in A.R.S. section 45-1708(B) is not a limitation on the types of entities that are eligible to contract for Hoover uprating power.” Page argued that expanding the eligibility criteria violates the mandate in A.R.S. section 45-1708(B) that power must be purchased from the Authority at wholesale.

IEDA considers this interpretation of A.R.S. section 45-1708 to be wrong. IEDA argues that the 1982 amendments to the state water and power plan were targeted at a specific portion of

the plan and were intended to narrow the qualified contractors for the Hoover uprating project and the Hoover modification project.

Discussion:

The Draft Plan provided a conclusion on which entities are eligible to contract for Hoover uprating/Schedule B power, supported by a more comprehensive statutory interpretation analysis that was not disclosed. That analysis is provided here.

A. Relevant Provisions of Title 45

The definitions in A.R.S. section 45-1702 (Section 45-1702) and the contract provisions in A.R.S. section 45-1708 (Section 45-1708) and A.R.S. section 45-1710 (Section 45-1710) are the provisions of Title 45 relevant to determine which entities are eligible to enter into a contract with the Authority for the sale of Schedule B/Hoover uprating power.

Under Section 45-1702, “district” means “any irrigation district, power district, electrical district, agricultural improvement district or water users association . . . which is directly engaged in the sale, distribution or delivery of municipal, industrial or irrigation water or in the sale, distribution or use of electric power or energy.” A.R.S. § 45-1702(3). “Municipality” is defined as “any incorporated city or town or other corporation organized for municipal purposes.” *Id.* at § 45-1702(4). And “public utility” is defined as “any person, corporation, district, electric cooperative, public agency or political subdivision of the state that provides electrical service to the public by means of electric facilities or provides water for municipal, industrial, irrigation, recreation and fish and wildlife purposes to the public.” *Id.* at § 45-1702(7).

Section 45-1710 provides that:

all municipalities, districts and other public bodies are authorized and empowered to enter into contracts with the director or the authority as provided in section 45-1708 for . . . the sale or transmission of power . . . except that groundwater

replenishment districts established under title 48, chapter 27 are not eligible to contract for the sale or transmission of power under this chapter.

A.R.S. § 45-1710. In turn, Section 45-1708 states:

The authority may enter into and carry out contracts for the sale and transmission of power from power projects included in the state water and power plan . . . the power from such power projects included in the state water and power plan shall be sold at wholesale only to such power purchasers, located within or without the state, in such manner and upon such terms and conditions, as shall be determined by the authority to be necessary or advisable to effectuate the purposes of this article, except that power and energy of the authority from the . . . uprating project shall be sold to power purchasers within this state. Any public utility providing electrical service and any district organized to provide electrical service may enter into such contracts with the authority for the sale and transmission of power and energy . . . except that nontax-exempt public utilities shall be granted an option to purchase the maximum amount of said capacity permitted by federal regulations governing the issuance of tax-free bonds. Such contracts may contain such other terms and conditions as the authority and such public utility or district may determine, including provisions by which the public utility or district is obligated to pay for power irrespective of whether energy is produced or delivered to it or whether any project contemplated by any such agreement is completed, operable or operating, and notwithstanding suspension, interruption, interference, reduction or curtailment of the output of such project.

A.R.S. § 45-1708(B) (emphasis added). Finally, “wholesale” is a defined term for purposes of Title 45. “Wholesale” means “sales to municipalities, district or public utilities for resale or distribution.” A.R.S. § 45-1702(13).

B. Statutory Interpretation

1. Rules of Statutory Interpretation

“The cardinal rule of statutory construction is to ascertain the meaning of a statute and the intent of the legislature at the time the legislature acted. To arrive at legislative intent, this Court first looks to the words of the statute.” *Kriz v. Buckeye Petroleum Co.*, 701 P.2d 1182, 1185 (Ariz. 1985) (citations omitted). The court begins with the text of the statute “because it is best and most reliable index of a statute’s meaning.” *State v. Simmons*, 240 P.3d 279, 280 (Ariz.

2010). When the text is clear, “there is no need to resort to other method of statutory interpretation to determine the legislature’s intent because its intent is readily discernable from the face of the statute.” *Id.* If the statutory language is not clear, a court determines “legislative intent by reading the statute as a whole, giving meaningful operation to all of its provisions, and by considering factors such as the statute’s context, subject matter, historical background, effects and consequence, and spirit and purpose.” *Id.* (internal quotations omitted).

2. “Any” Does Not Mean “Only”

Looking first to the terms of the statute, Section 45-1708(B) provides that “any public utility providing electrical service” and “any district organized to provide electrical service” may enter into contracts with the Authority for the sale of power from power projects included in the state water and power plan. The statute does not say “only” these types of public utilities and districts may enter into these contracts. The adjective “any” is not a restriction. *See Webster’s Third New International Dictionary* 97 (1987) (“any” means “EVERY—used as a function word . . . to indicate one that is selected without restriction or limitation of choice”). The clause grants authority to enter into these contracts to public utilities providing electrical service and districts organized to provide electrical service; it does not eliminate the authority of other public utilities and districts provided in another section of the state water and power plan to contract for this power. To interpret this sentence as a restriction on the type of entity that may enter into such a contract would require the addition of language of the statute that the Legislature did not include. Such an interpretation is not proper. *State v. Thompson*, 65 P.3d 420, 430 (Ariz. 2003) (“it is not the province of the judiciary to add language to a statute that the legislature expressly excluded”); *City of Phoenix v. Butler*, 515 P.2d 1180, 1182 (Ariz. 1973) (“The choice of the appropriate wording rests with the Legislature”).

3. The Statutes Are Ambiguous

A court is not at liberty to resort to the rule of statutory interpretation unless a statute is ambiguous or unclear. *State v. Sweet*, 693 P.2d 921, 924 (Ariz. 1985). “An ambiguity in a statute is not simply that arising from the meaning of particular words, but includes such as may arise in respect to the general scope and meaning when all its provisions are examined.” *Id.* (internal quotations omitted). “An ambiguity may also be found to exist where there is uncertainty as to the meaning of the terms of a statute.” *Id.* The state water and power plan is sufficiently ambiguous when all of its provisions are examined. The ambiguity arises from the tension between the authority granted in Section 45-1710 to municipalities, districts, and other public bodies to enter into contracts for the purchase of power from projects in the state water and power plan, and the language in Section 45-1708(B), which specifically authorizes public utilities providing electrical service and districts organized to provide electrical service to enter into the same contracts. The ambiguity in the statute warrants using additional tools of statutory construction to determine legislative intent, including rules of statutory interpretation and the overall purposes and aims of the Legislature in enacting the statute. *See id.* at 924-25.

4. Section 45-1708 Must Be Harmonized with Section 45-1710

Section 45-1710 states that “all municipalities, districts and other public bodies are authorized and empowered to enter into contracts with . . . the authority as provided in section 45-1708 for . . . the sale or transmission of power” Thus, under Section 45-1710, municipalities and other public bodies have authority to contract with the Authority under the terms provided in Section 45-1708. If the language in Section 45-1708(B) were interpreted as a restriction on the types of entities that may contract for power from power projects in the state water and power plan, then the authority granted to “municipalities” and “other public bodies” in Section 45-1710 to enter into these contracts would be meaningless.

“Courts avoid interpreting a statute so as to render any of its language mere surplusage, and instead give meaning to each word, phrase, clause, and sentence so that no part of the statute will be void, inert, redundant, or trivial.” *City of Phoenix v. Phoenix Empl. Rels. Bd.*, 86 P.3d 917, 920-21 (Ariz. Ct. App. 2004); *see also State v. Pitts*, 874 P.2d 962, 964 (Ariz. 1994) (courts “presume the legislature did not intend to write a statute that contains a void, meaningless, or futile provision,” and when possible, courts “interpret statutes to give meaning to every word”). The Authority must also avoid interpretations that render words and sentences in the statute meaningless. Section 45-1710 grants authority to municipalities and other public bodies to enter contracts with the Authority as provided in Section 45-1708. Section 45-1708 mainly concerns the terms and conditions of the contracts, particularly related to pricing and revenue, and limits the geographic location of power purchasers. It does not expressly limit the types of entities that may enter into contracts. Such an interpretation avoids rendering the use of “municipalities” and “other public bodies” in Section 45-1710 meaningless and is consistent with principles of statutory construction.

Section 45-1710 also contains an express exception to the authority granted to “municipalities, districts and other public bodies.” Specifically, “groundwater replenishment districts established under title 48, chapter 27 are not eligible to contract for the sale or transmission of power under this chapter.” A.R.S. § 45-1710. This clause demonstrates an explicit restriction on the type of entity that may contract for the sale of power under Title 45, chapter 10. The clause may be compared to the language in Section 45-1708(B), which is not so explicit. The unambiguous restriction on eligibility in Section 45-1710 related to groundwater replenishment districts implicitly denies the existence of other implicit restrictions. *Cf. State Comp. Fund v. Superior Court*, 948 P.2d 499, 503 (Ariz. Ct. App. 1997) (“The provision of one exemption in a statute implicitly denies the existence of other unstated exemptions.”).

Both Sections 45-1708 and 45-1710 are contained in the state water and power plan set forth in Title 45, chapter 10. Related provisions of a statute should be harmonized. *See Cypress on Sunland Homeowners Assn. v. Orlandini*, 257 P.3d 1168, 1177 (Ariz. Ct. App. 2011) (“We

consider individual sections of a statute in the context of the whole statute . . . and construe statutory provisions in light of the entire statutory scheme ‘so they may be harmonious and consistent’ ”); *Sempre Ltd. P’ship v. Maricopa County*, 235 P.3d 259, 264 (Ariz. Ct. App. 2010) (“We interpret related statutes to harmonize their provisions.”) Accordingly, the Authority should interpret Sections 45-1708 and 45-1710 to be consistent and in harmony.

Section 45-1710 may be construed to give authority to municipalities, districts, and other public bodies, but not groundwater replenishment districts, to enter into contracts for the sale and transmission of power from the uprating project consistent with Section 45-1708. Section 45-1708 grants authority to public utilities providing electric service and districts organized to provide electric service to enter into these contracts as well. Section 45-1708 also sets forth limitations applicable to the contracts for uprating power, including that the power must be sold at “wholesale,” to power purchasers in the state, and at rates to cover the Authority’s bond issuance. This interpretation harmonizes the provisions and does not result in improperly denying authority to some entities or organizations that the Legislature granted when it enacted the state water and power plan.

5. Effect of Statutory Amendments

In its comment letter, IEDA referred to different canons of statutory interpretation to support its position that the 1982 amendments to the state water and power plan limit eligibility for Schedule B power: (1) special or specific statutory provisions will usually control over those that are general, and (2) “the concept of a subsequent amendment needing to be read *in pari materia* with existing law and given effect to its plain meaning.” However, the latter “concept” involves several canons of statutory interpretation, and these canons support the interpretation in the Draft Plan.

If separate statutes “relate to the same subject or have the same general purpose—that is, statutes which are *in pari materia*—they should be read in connection with, or should be

construed together with other related statutes, as though they constituted one law.” *State ex rel. Larsen v. Farley*, 471 P.2d 731, 734 (Ariz. 1970). The Arizona Supreme Court further elaborates on how to read statutes, which are in *pari materia*:

[w]hen statutes relate to the same subject matter, the later enactment, in the absence of any express repeal or amendment therein, is held to have been enacted in accord with the legislative policy embodied in the earlier statute. In so far as the provisions of a special statute are inconsistent with those of a general statute on the same subject, the special statute will control. The general statute remains applicable, however, to all matters not dealt with in the specific statute While a statute may be repealed by implication as well as by direct language, such repeals are not favored and will not be indulged if there is any other reasonable construction. It is only when by no reasonable construction can two statutes be operative that the latter act repeals the former by implication.

Id. (internal citations omitted).

Reading Section 45-1708(B) to mean only public utilities providing electrical service and only districts organized to provide electrical service are eligible to enter into contracts for Hoover uprating power violates all of these rules of statutory interpretation; such an interpretation effectively repeals by implication the authority granted in Section 45-1710 to municipalities, districts, and other public bodies to contract for Hoover uprating power. The two related sections may be construed together as one law, so that both are operative. Section 45-1710 gives authority to municipalities, districts, and other public bodies to contract, and Section 45-1708(B) gives authority to public utilities providing electrical service and districts organized to provide electrical service to contract. The two sections are not inconsistent, and it is not necessary for one to control over the other.

The comments focus on the 1982 amendments to the state water and power plan. The comments do not mention that the Legislature amended Section 45-1710 in 1991 to prohibit groundwater replenishment districts organized under Title 48, chapter 27, from contracting for the sale or transmission of power under the state water and power plan. 1991 Ariz. Sess. Laws ch. 211. It is telling that when it acted to exclude certain groundwater replenishment districts,

the Legislature amended Section 45-1710, not Section 45-1708(B), to effect the express prohibition. Moreover, if the 1982 amendments to Section 45-1708(B) did, in fact, limit the types of entities eligible to contract for Hoover uprating power, then the Legislature would not have needed to amend the state water and power plan in 1991 to exclude groundwater replenishment districts.

6. Meaning of Section 45-1708(B)

All of the arguments outlined above support the position that the language in Section 45-1708(B) regarding “any public utility providing electrical service” and “any district organized to provide electrical service” does not operate as a restriction on the types of entities that may enter into contracts for Hoover uprating power. If the language is not a restriction, then the language must have some other purpose. Just as “municipalities” cannot be read out of section 45-1710, these sentences in section 45-1708(B) must also have some meaning. *See PERB*, 86 P.3d at 920-21 (courts avoid statutory interpretations that render any statutory language “mere surplusage”).

More than just the few sentences in subsection (B), Section 45-1708 describe the contracts the director of water resources and the Authority may execute respecting projects in the state water and power plan. There are statements of general authority, such as the Authority “may enter into and carry out contracts for the sale and transmission of power from power projects included in the state water and power plan.” A.R.S. § 45-1708(B). Similarly, both the director and the Authority are authorized to contract with the United States as “necessary or required in carrying out or accomplishing” any of the purposes of the state water and power plan. *Id.* at § 45-1708(D).

There are also very specific terms for the director’s and the Authority’s contracts. Colorado River water developed or stored by the CAP shall be sold at “wholesale.” A.R.S. § 45-1708(A). Power from the Hoover uprating project shall be sold to power purchasers in the state. *Id.* at § 45-1708(B). Power sales contracts may contain terms under which the purchaser is

required to pay irrespective of whether energy is produced or delivered, or whether the project is completed or operable. *Id.* “Contracts or agreements entered into with the United States may contain such terms, conditions, covenants and restrictions for the security of the United States or any subsequent holders of bonds issued to evidence such loans, grants or advances of money.” *Id.* at § 45-1708(D).

In this context, the language in Section 45-1708 related to public utilities and districts may be interpreted as controlling the terms and conditions of the contracts the Authority may enter into with these entities. Recall, the sentences in full state:

Any public utility providing electrical service and any district organized to provide electrical service may enter into such contracts with the authority for the sale and transmission of power and energy by which such public utility or district is obligated to make payments in amounts which shall be sufficient to enable the authority to meet all its costs allocable thereto, including interest and principal payments, whether at maturity or upon sinking fund or other mandatory redemption, for its bonds or notes, reasonable reserves for debt service, operation and maintenance expenses and amounts to pay for renewals, replacements and improvements and to meet the requirements of any rate covenant with respect to debt service coverage and any other amounts required for reserves or other purposes, all as shall be provided in the resolution, trust indenture or other security instrument of the authority Such contracts may contain such other terms and conditions as the authority and such public utility or district may determine, including provisions by which the public utility or district is obligated to pay for power irrespective of whether energy is produced or delivered to it or whether any project contemplated by any such agreement is completed, operable or operating, and notwithstanding suspension, interruption, interference, reduction or curtailment of the output of such project.

A.R.S. § 45-1708(B). Most of the language quoted above details terms and conditions, including payment, rates, and delivery. Furthermore, the second sentence begins with “[s]uch contracts may contain such *other terms and conditions* as the authority and such public utility or district.” *Id.* (emphasis added). This language returns the focus to terms and conditions, not the type of entity.

Accordingly, the Authority may conclude that Section 45-1710 allows the Authority to contract with municipalities, districts, and other public bodies, but not groundwater replenishment districts organized under Title 48, chapter 27, for the sale or transmission of power under the state water power plan. The “as provided in section 45-1708” language in Section 45-1710 refers to the terms and conditions specified in Section 45-1708, which vary depending on the type of entity, i.e., power purchasers, water purchasers, or the United States. Section 45-1708 does not restrict the type of entities that may contract, but only specifies the terms and conditions of the particular entity’s contract.

7. Accounting for “Wholesale”

Section 45-1708(B) provides that power from “power projects in the state water and power plan shall be sold at wholesale only.” The comments use a lay definition of the word “wholesale” and ignore the definition provided within the statute. For purposes of chapter 10 of Title 45, “wholesale” is a defined term. “When a statutory scheme expressly defines certain terms, [the court is] bound by those definitions in construing a statute within that scheme.” *State v. Wilson*, 26 P.3d 1161, 1168 (Ariz. Ct. App. 2001). Thus, when construing Section 45-1708(B), “wholesale” means “sales to municipalities, districts or public utilities for resale *or* distribution.” A.R.S. § 45-1702(13) (emphasis added). This definition, therefore, includes not only the commonly understood meaning of “wholesale,” but also provides the authorization to allocate Schedule B power to entities that do not resell power but “distribute.” Any other definition would not give meaning to the disjunctive “or” utilized in the statute.

Moreover, to the extent that the comments suggest that the interpretation proposed in the Draft Plan violates the unambiguous mandate to sell Hoover uprating power at “wholesale,” those comments ignore the fact that the interpretation in the Draft Plan and the wholesale mandate in Section 45-1708(B) are not mutually exclusive. The Authority does not have to limit eligibility to public utilities providing electric service and districts organized to provide electric service to comply with the “wholesale” mandate. This is a separate limitation that applies to

contracts with municipalities, districts, and other public bodies under Section 45-1710, and to contracts with public utilities and districts under Section 45-1708(B).

C. Departure from the Red Book

The above analysis departs from the brief conclusion contained in the Red Book regarding eligibility to enter into contracts for Hoover uprating power. To the extent the comments suggest that the Authority must set forth a more reasoned analysis than the statements included in the Draft Plan before the Authority may deviate from the Red Book, the above statutory interpretation analysis is sufficient.

D. “Preference” in Section 45-1708(B)

The clause “any public utility providing electric service or any district organized to provide electric service” cannot be reasonably construed as a preference provision for Schedule B power. This language does not establish a priority or hierarchy of entities entitled to allocations. *Compare* A.R.S. § 30-125(A). Rather, it identifies two groups of entities that are eligible to enter contracts with the Authority for Hoover uprating power.

Section 45-1708(B) contains an “option” for nontax-exempt utilities. This section states, “nontax-exempt public utilities shall be granted an option to purchase the maximum amount of said capacity permitted by federal regulations governing the issuance of tax-free bonds.” This “option” is mandatory. Thus, where A.A.C. section R12-14-101(16) defines “preference” to mean the priority of entitlement to power in A.R.S. section 45-1708, it must be referring to the nontax-exempt option, rather than “any public utility providing electric service or any district organized to provide electric service” language.

Recommendation:

To give effect to all the relevant provisions of Title 45, the Authority should interpret eligibility for Schedule B/Hoover uprating power under Title 45 as follows. Section 45-1710 allows municipalities, districts, and other public bodies to enter into contracts with the Authority for Hoover uprating power, but excludes groundwater replenishment districts formed under Title 48, chapter 27, from contracting for this power. Section 45-1708(B) separately authorizes public utilities providing electric service and districts organized to provide electric service to enter into these contracts. Other clauses of Section 45-1708(B) limit the terms of these contracts, including pricing and the location of the purchasers (within the state). In particular, purchases of Schedule B/Hoover uprating power must be for “wholesale,” meaning Hoover uprating power must be sold to municipalities, districts, or public utilities for resale *or* distribution.

VII. DEFINITION OF “PUBLIC BODIES”

Comments:

During the April 7, 2014 workshop, commenters asked what the definition of a public body is for purposes of Section 45-1710.

Discussion:

Based on the above analysis, municipalities, districts, and other public bodies are eligible to contract for Hoover uprating power under Section 45-1710. “Municipalities” and “districts” are defined terms in Section 45-1702; “public bodies” is not defined.

Courts “assume that the legislature has given words their natural and obvious meanings unless otherwise stated.” *State v. Garcia*, 193 P.3d 798, 800 (Ariz. Ct. App. 2008) (citing A.R.S. § 1-213). “Public body” is a general term that is used throughout the Arizona Revised Statutes. There is no definition for “other public bodies” in Title 45, but there are specific definitions in other titles related to public agencies. For instance, the definition of “public body” for the public records statutes is “this state, any county, city, town, school district, political subdivision or tax-supported district in this state,” including any branch or board of the foregoing, and “any public

organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state.” A.R.S. § 39-121.01. The definition of “public body” for the open meeting law is “the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of this state or political subdivisions” A.R.S. § 38-431. These definitions essentially capture any public entity formed under the laws of the state.

Recommendation:

The Authority should interpret “other public bodies” in Section 45-1710 consistent with other definitions of “public bodies” in the Arizona Revised Statutes. That is, “other public bodies” means this state, or any political subdivisions or tax-supported district in the state, including agencies and instrumentalities of the foregoing. The Authority’s contract with a “public body” for the sale of Hoover power must be for “wholesale” to comply with the mandate in Section 45-1708(B). Again, “wholesale” is a defined term and means “sales to municipalities, districts or public utilities for resale or distribution.” A.R.S. § 45-1702(13). Thus, a “public body” effectively must also be a “public utility” as it is defined in Section 45-1702(7). “Public body” establishes the pool of eligible entities, but the limitation on “wholesale” sales restricts the pool back to municipalities, districts, and public utilities.

VIII. TITLE 30 PROVISIONS THAT ARE GENERALLY APPLICABLE

Comments:

IEDA commented that it would be helpful to catalog the statutory provisions in Title 30 that the Commission finds are generally applicable to the overall process versus the provisions that are specifically applicable only to Hoover A allocations.

The entities represented by Moyes, Sellers & Hendricks commented that certain provisions of Title 30 are applicable to all power within the Authority’s jurisdiction.

Discussion:

Title 45 states that the “power conferred by this article shall be in addition to and supplemental to the powers conferred by any other law, general or special.” A.R.S. § 45-1722. Except as otherwise provided in Article 1 of Chapter 10 of Title 45, “the provisions of title 30, chapter 1 and chapter 1 or 2 of this title, *insofar as they relate to the matters herein contained*, are superseded, it being the legislative intent that this article shall constitute the exclusive law on such matters.” *Id.* (emphasis added). Thus, Title 45 only supersedes provisions of Title 30 if the matter is addressed in Title 45, or related to a matter addressed in Title 45.

As it relates to Hoover power (as opposed to the CAP and its appurtenant works and facilities), Title 45 contains explicit provisions related to contracts for Hoover uprating power. *See* A.R.S. § 45-1703(C). Title 45 therefore supersedes Title 30 on any matter related to contracts for Hoover uprating/Schedule B power. For example, A.R.S. section 30-127 provides that if a power sales contract is made for a period exceeding 20 years, then it must include a provision that the Authority may terminate the contract “upon reasonable notice . . . at any time after the initial twenty year period.” Because the provision in Title 30 relates to contracts, which is a matter contained in Title 45, the Title 30 provision is superseded by Title 45 and does not apply to contracts for Hoover uprating power.

A.R.S. section 30-124(B) contains the Authority’s statutory mandate to dispose of power, as nearly as practical, in an equitable manner to render the greatest public service and at levels calculated to encourage the widest practical use of electrical energy. A.R.S. section 30-124(B) concerns how power “shall be disposed of” by the Authority. There is no similar provision in Title 45. In fact, Title 45 does not dictate how the Authority shall dispose of Hoover uprating power, but rather leaves the Authority free to negotiate the terms of its power contracts. *See, e.g.*, A.R.S. § 45-1710 (municipalities, districts and other public bodies may contract with the authority for the sale and transmission of power “on such terms and conditions as shall be determined by the parties”). Because Title 45 does not contain qualitative principles affecting

the disposition of Hoover power, A.R.S. section 30-124(B) generally applies to Hoover allocations.

Further, Title 30 provides for the Authority to adopt rules and regulations for the disposition of Hoover power. This authority to adopt regulations for power disposition generally applies to Hoover allocations. Pursuant to this authority, the Authority has adopted regulations governing power allocation and use under both Titles 30 and 45. *See* A.A.C. § R12-14-101.

Title 30 also obligates the Authority to develop plans for the use of power. The Authority must “formulate plans and development programs for the practical, equable and economical utilization of electric power placed under its supervision and control.” A.R.S. § 30-123(A). The Red Book is an example of such a plan. Title 45 does not contain a provision concerning the development of plans for power use. Therefore, the Authority must adopt plans that ensure the *practical, equable* and *economic* use of all electric power under its control, including Hoover uprating power.

Recommendation:

At a minimum, A.R.S. section 30-124(B), and the portions of sections 30-123(A) and 30-124(D) discussed above generally apply to Hoover allocations and use of Hoover power.

IX. REIMBURSEMENT

Comments:

The entities represented by Moyes Sellers & Hendricks commented that the Draft Plan should acknowledge that the significant benefit of low rates of post-2017 Hoover power is made possible by the capital investment by the Authority’s existing customers. These entities suggest that “new allottees” should pay a pro rata reimbursement of those investments similar to what is required by the 2011 Act for D-1 power. The districts represented by Ryley Carlock & Applewhite expressed the same sentiment.

These same entities also commented that it is inequitable for existing customers to pay all of the costs associated with the post-2017 Hoover power allocation process. These entities suggest that the Authority could use money from the APA fund to reimburse existing customers on a pro rata basis, with the new customers paying a surcharge to replenish the APA fund. Alternatively, these entities offer that new allottees could pay a reimbursement fee/surcharge on a pro rata basis with the fee reimbursed proportionately to the existing customers.

Discussion:

A.R.S. section 30-124(C) sets forth the Authority's powers with respect to electric rates. A.R.S. section 30-124(C) states that rates shall include "proportionate general price components, costs of purchases or production, transmission, depreciation, maintenance, amortization and such other appropriate price factors as the authority deems necessary or advisable but no rates established by the authority shall increase rates to purchasers fixed in existing power contracts with the purchasers during the term of their respective contracts." A.R.S. section 30-124(C) provides the Authority broad discretion to require existing customers to pay proportionately for anything it deems *necessary* or *advisable*.

Under Title 45, the Authority may enter into contracts for the sale of Hoover uprating power "upon such terms and conditions, as shall be determined by the authority to be necessary or advisable to effectuate the purposes of [] article [1]." A.R.S. § 45-1708(B). A key purpose of Title 45 is to ensure an adequate supply of power to serve agricultural water. The Authority may impose charges for Hoover uprating power. *Id.* at § 45-1709(4). These Title 45 statutes similarly provide broad contracting and rate-setting authority.

Recommendation:

In its post-2017 power sales contracts with both existing and new customers, the Authority may include a rate to cover each contractor's proportionate share of the post-2017 allocation process. The Authority could also impose a charge on new customers to pay their

proportionate share of the capital investment in Hoover Dam. Neither A.R.S. section 30-124(C), section 45-1708(B), nor section 45-1709(4), however, *require* the Authority to impose electric rates on new customers sufficient to reimburse existing customers for these types of expenditures. This is a policy decision for the Authority.

X. SEASONAL ALLOCATIONS

Comments:

The Town of Fredonia commented that the Authority should consider the seasonal load patterns of existing customers, most of which are summer peaking entities. Fredonia believes that Schedule B and D power could be allocated to it in the winter months, and less in summer months. Seasonal allocation is a common practice among operating utilities, and the Authority should consider doing the same, especially if the Salt Rive Project (SRP) does not agree to bank excess energy.

Recommendation:

This is a policy decision for the Commissioners, informed by whether the Resource Exchange Program sufficiently manages differences in seasonal loads and the administrative burden of managing seasonal allocations and contracts.

XI. JOINT APPLICATIONS

Comments:

In its editorial comments, IEDA gives the example that a joint powers authority formed under state law would be a single entity made up of other distinct entities, but a power pooling association would not be. IEDA asks for further analysis for the following statement in the Draft Plan: “The Authority will not accept joint applications from multiple prospective purchasers.”

At the April 7, 2014 workshop, Mr. David Fitzgerald, on behalf of AEPCO, commented that the statement in the Draft Plan regarding joint application should be revisited as there may be creative scheduling possibilities if the Authority allows entities to join applications.

Discussion:

The regulations related to applications for electric service are phrased in singular terms. That is, the regulations state that “[a] Qualified Entity” that wants to purchase Hoover power must file “an application.” A.A.C. § R12-14-201(E); *see also id.* at § R12-14-202(A). In turn, a “Qualified Entity” is “any Entity eligible to purchase Power from the Authority” *Id.* at § R12-14-101(18). Although the regulations do not strictly preclude a joint application, the language does imply that each entity will file a singular application.

“Qualified Entities” include a “person” or “operating unit” under Title 30, and municipalities, districts, and public utilities under Title 45. If the applicant, whether a joint powers authority or some other association, meets the definition of one of these entities, then it may submit a single application as a Qualified Entity.

There is a separate concern if a Qualified Entity overlaps with another Qualified Entity and both are requesting allocations of Hoover power. For example, a joint powers authority that is a Qualified Entity may include a district, and both may apply for Hoover power. Under A.R.S. section 30-153(B), “no power purchase certificate shall be issued to an applicant for territory which is then being served with electrical energy by a person or operating unit” If the two Qualified Entities are seeking an allocation of Schedule A power, then they would need to adjust their respective service territories to ensure they remain eligible for a power purchase certificate.

Recommendation:

If an applicant, whether a joint powers authority or some other association, meets the definition of a Qualified Entity, then it should submit a single application as a Qualified Entity.

XII. POWER PURCHASE CERTIFICATES FOR EXISTING CUSTOMERS

Comments:

Commenters asked for confirmation that existing holders of power purchase certificates are not required to reapply for a new power purchase certificate to serve the same territory.

Discussion:

Receipt of a power purchase certificate is a prerequisite to becoming a “purchaser of electrical energy generated by the waters of the main stream of the Colorado” under Title 30. A.R.S. § 30-151. The statute only requires a person or operating unit to obtain a Power Purchase Certificate prior to first purchasing electrical energy from the Authority. Once a person or operating unit becomes a purchaser, it necessarily must have a Power Purchase Certificate, and need not obtain a new one. Further, Authority regulations specify that “[t]he holder of an existing Power Purchase Certificate is required to re-apply for a Power Purchase Certificate *only if* the holder wants to use the Long-term Power acquired under A.R.S. Title 30, Chapter 1, in a Service Territory that differs from the Service Territory described in the holder’s existing Power Purchase Certificate.” A.A.C. § R12-14-202(D). This regulation properly follows the standard set forth in A.R.S. section 30-151 because it clarifies that an existing purchaser does not need to reapply for a Power Purchase Certificate.

There is a distinct issue from the one raised in the comments whether existing customers’ Power Purchase Certificates have a termination date that would require the entities to obtain new Power Purchase Certificates to enter into a power sales contract for post-2017 Hoover power. *See* A.A.C. § R12-14-203(E) (“A Power Purchase Certificate is in effect only during the time the holder of the Power Purchase Certificate has an existing Power Sales Contract”).

Recommendation:

The Authority should not require existing purchasers to reapply for a Power Purchase Certificate, unless the purchaser seeks to use Long-term Power in a service territory that differs from the service territory in the purchaser’s existing Power Purchase Certificate. Existing purchasers with Power Purchase Certificates must separately analyze whether their Certificate will expire with the existing Power Sales Contract for post-1987 Hoover power.

XIII. APPLICATION REVIEW AND OPPORTUNITY TO CURE

Comments:

Several entities suggested that seven days is too short to cure a defective application. Recommendations for a longer time period range from seven business days to 30 days.

IEDA suggested that the Authority hold a workshop on how to prepare an application to help educate potential applicants and avoid any deficiencies.

The entities represented by Ryley Carlock & Applewhite commented that the Draft Plan should provide that if the Authority does not identify any deficiencies in an application within a discrete time period, perhaps 30 days, the application is deemed “administratively complete.”

Discussion:

Under A.A.C. section R12-14-201(F), not later than 60 days after the due date for filing an application for electric service, the Authority must provide a notice or proposed allocation of Long-term Power to eligible prospective Purchasers. If the Authority grants additional days to cure a defective application after the filing deadline has passed, then it is effectively subtracting those days from the 60-day period that it has to develop a proposed allocation based on the applications.

Recommendation:

As suggested by the comments, the Authority should hold an application workshop prior to the filing deadline to assist customers and avoid potential confusion. Additionally, the Authority may consider implementing a “pre-approval” process before the filing deadline. However, once the filing deadline expires, the Authority should maintain that an entity has seven calendar days to cure a defective application once the applicant is notified of the deficiency. If the Authority does not identify any deficiencies in an application within 30 days, the application should be deemed “administratively complete.”

XIV. ASSUMPTIONS RELATED TO THE 2011 ACT

Comments:

Many of the existing customers commented that in supporting the enactment of the 2011 Act, the existing customers assumed that the Authority would adopt an allocation where existing customers' post-1987 allocations are reduced in the same manner that the Authority's allocations were reduced in the 2011 Act. The entities acknowledge that this was an assumption but also state that there is no agreement that any additional reductions beyond five percent are acceptable.

Discussion:

There is no statutory language in the 2011 Act that restricts the Authority's discretion to allocate Schedule A and B Hoover power either to its existing customers or some other type of entity. The federal statute is silent in this regard, and there is little evidence in the legislative history of the 2011 Act confirming that this was the intent. In a letter asking for co-sponsors of H.R. 470, the original sponsors, Congressman Heck and Congresswoman Napolitano, refer to the consumers of Hoover power who have invested in Hoover power and state that the proposed legislation is critical to their interests. Congressman Heck repeated this point in his statements on the floor. 157 Cong. Rec. H4679 (Oct. 3, 2011) (statement of Rep. Heck). Other statements on the effect of the 2011 Act on existing customers refer to the contractors identified in the statute, i.e., States and entities in California, not the existing customers of the Authority. *See, e.g.,* H.R. No. 112-59, pt. 1, at 2-3 (2011).

Recommendation:

There is no statutory language in the 2011 Act that binds the Authority's allocation of Schedule A and B power under its jurisdiction with respect to its existing customers. Whether the Authority allocates power from these schedules to existing customers consistent with the reductions in the 2011 Act, or allocates based on some other methodology, is a policy decision, informed by the points raised in the comments.

XV. DATA SUBMISSION AND STANDARDIZATION

A. Where Load Is Measured

Comments:

K.R. Saline & Associates (K.R. Saline) recommended that the Authority use coincident peak demand measured at the transmission system level and adjusted for local system losses. The entities should report whether their demands are coincident or non-coincident, as well as any assumption used in determining their coincident peak demands

Roosevelt Water Conservation District (RWCD) recommends that all entities submit their load data reflected at their Hoover point of delivery.

Silverbell Irrigation and Drainage District (Silverbell IDD) commented that data must be based upon a common delivery point.

Discussion:

The Authority's decision where to measure load is related to two policy decisions that the Authority must make: (1) whether to favor certain uses in the allocation, and (2) how an applicant's data should be substantiated. On the first point, the Consultant asked for an "agricultural load" in the voluntary data request. Besides eliciting the question of what the definition of "agriculture" is, the request also raised the question of how to substantiate the entity's estimate. The entity could estimate agricultural load by multiplying total load (at the transmission level) by the percentage of agricultural users. In this case, the entity's billing records could be used to substantiate the load data at the substation level, but the percentage of agricultural use would still remain an estimate because the substation billing data would not be broken down by type of use. The Authority could require more specific data based on individual meter readings for equipment used in agricultural business however that concept is ultimately defined. The latter method becomes more difficult for larger entities with a diversity of

customers and numerous meters, and likely would still involve some level of estimation for the entities that cannot provide individual meter readings.

Recommendation:

Because of the difficulty and burden associated with gathering data at the individual meter level, the Authority should require load data measured at the transmission system level, on the high side of the transmission level voltage. If the applicant's point of delivery is located at the low side of transmission level voltage or at a distribution metering point, then the data must be adjusted to the high side of the transmission delivery point chosen. In this case, the applicant must list and describe any assumptions used for its load adjustments. The determination of agricultural load is discussed further in Sections XV.D and XV.F.

B. How Peak Load is Measured

Comments:

Commenters at the April 7, 2014 workshop recommended that the Authority standardize the technical interpretation of load, such as an annual average of 12 monthly peak capacities or the highest peak capacity that occurred in the course of the year.

Discussion:

The Authority bills its existing customers monthly, and billing by utilities generally, including the Authority's customers, is done on a monthly basis. Therefore, monthly load data is readily accessible. Monthly load data more accurately depicts an entity's load demands, which will vary based on the irrigation season or other seasonal peaks.

Recommendation:

The Authority should use the highest monthly peak for capacity and energy that occurred in the calendar year as the peak load for that year. If more than one delivery point is used to serve the entity, then the highest hour of coincidence of all aggregated delivery points should be

used. The applicant should supply this data on highest monthly peak, in both capacity and energy, for each calendar year requested on the application.

C. Historical Versus Projected Load

Comments:

Silverbell IDD commented that a five-year average load should represent only two years of historical load and two or three years of projected load. Three of the five previous years are not representative of operations due to the economic conditions during the recession.

Discussion:

Load growth projections necessarily involve assumptions that are not always accurate. For example, in 2005, the utilities projected five percent growth per year for three- and five-year planning cycles. By 2008, projections for three-year growth were negative or zero percent. The Authority has not yet decided the term of the power sales contracts for post-2017 power, but the term could be for as long as 50 years. Long-term resource allocation and contracting based on speculative data introduces unnecessary risk into the allocation process. Presumably, for this reason, the Authority, in the Red Book, used the applicants' loads for the previous five years to determine allocation amounts.

The Authority is considering a specific type of projected load as an allocation methodology, i.e., In Lieu water, which is discussed below in Section XV.E. In that case, projected load corresponds to certain changes in an applicant's water supply, and is not a general projection of growth in an applicant's service territory.

Recommendation:

Load growth projections may be relevant to the Authority's allocation decisions, and the Authority has discretion to consider projected loads. To determine existing average load, however, the Authority should use five years of historical load information. Under the

Authority's regulations, an applicant must provide in its application for electric service a statement of the applicant's kilowatt and kilowatt-hour sales or usage during each of the 24 months immediately preceding the date of the application, classified by use such as residential commercial, irrigation, etc. A.A.C. § R12-14-202(A)(5). From this information, the Authority can determine peak load for the two years immediately preceding the application date. In addition, for the three years preceding the 24-month period referenced in the regulation, the Authority should require peak capacity and energy for each of the three years, the month of the year in which the peak load occurred, and the annual energy used for each year.

D. Definition of "Agriculture" for Determining Agricultural Load

Comments:

Several commenters acknowledged that the definition of "agriculture" is an item for discussion, but they did not suggest how to define agriculture.

RWCD recommended that agricultural load be defined to include: irrigation water pumping; sumps; booster pumps; egg farms; lift stations; drip irrigation pumps; packing sheds; cooling facilities; cotton gins; grain elevators; farm labor and farm owner residences; feed lots; dairies; district office buildings; shops; warehouse buildings and other district loads needed to operate the district; small farms; ranchettes; mini-farms, and pastures. RWCD noted that it provides irrigation water to agricultural, commercial, municipal, and residential water users at the same rate. Thus, if RWCD's Schedule A allocation is reduced because it does not have 100 percent agricultural power users, its power costs will increase for all users, adversely affecting the rates for agricultural users. RWCD also commented that it does not believe a bias toward agriculture is consistent with the mandate in A.R.S. section 30-124(B) to dispose of power to render the greatest public service and to encourage the widest practical use of electrical energy. RWCD described a method to estimate agricultural load, which involves multiplying the average annual system peak demand by the percentage of water or power delivered to the agricultural category of customers on the peak day.

The districts represented by Ryley Carlock & Applewhite recommended the same definition as RWCD, but did not explicitly mention small farm loads. The districts commented that the wheeling contracts that some districts have with Arizona Public Service Company (APS) include a limitation related to “agricultural purposes” on a commercial scale, but noted that this definition has been disputed for years and continues to be a source of disagreement. The districts questioned whether agricultural use alone is appropriate, or whether both agricultural and irrigation uses should be used to determine agricultural load.

Avra Water asked how the Authority will treat agriculture that is shipped out of state given the statutory mandate to render the greatest public service.

Discussion:

The comments on this issue take two forms: (1) the Authority should not allocate Hoover power based on agricultural load because focusing on agricultural load in allocating Hoover power is not consistent with its statutory mandates; and (2) if the Authority does allocate based on agricultural load, then it must define what is included as “agricultural load.”

Regarding the first assertion, Title 30 requires that “[e]lectric power, as nearly as practical, shall be disposed of in an equitable manner so as to render the greatest public service and at levels calculated to encourage the widest practical use of electrical energy.” A.R.S. § 30-124(B). A.A.C. section R12-14-201(J) provides that “[w]ithin each class of preference priorities established by A.R.S. section 30-125(A), the Authority shall allocate Long-term Power equitably among Qualified Entities in the same preference class based upon the needs of the Entities and the type of use of Long-term Power.” Based on the reference in both sections to the “use” that is made of the allocated power, the Authority may reasonably exercise its discretion to favor certain uses, provided that the Authority explains how doing so achieves the greatest public service and widest practical use of the power. *Cf. Havasu Heights Ranch and Development Corp. v. Desert Valley Wood Products, Inc.*, 807 P.2d 1119, 1122-23 (Ariz. Ct. App. 1990).

On the second point, in addition to the definitions of agricultural use offered by the commenters, there are other potentially relevant definitions. The 1988 Master Repayment Contract for the Central Arizona Project² defines “agricultural water” as “project water used primarily in the commercial production of agricultural crops or livestock, including domestic use incidental thereto, on tracts of land operated in units of more than 5 acres.” The amended subcontracts for non-Indian agricultural priority water incorporate the same definition.

Arizona’s Groundwater Management Code defines “irrigation use.” Generally, irrigation use is the use of water “on two or more acres of land to produce plants or parts of plants for sale or human consumption, or for use as feed for livestock, range livestock or poultry, as such terms are defined in section 3-1201. A.R.S. § 45-402(23). In Arizona, landowners may form an “Irrigation and Water Conservation District” for the “irrigation of lands.” *Id.* at § 48-2903(A). “Irrigation use,” in contrast to agricultural water use, entails use on land solely for crop production. Agricultural water use includes both crop and livestock production.

Recommendation:

The Authority may give greater weight in its allocation to loads directly attributable and used for agricultural and irrigation purposes, provided that the Authority explains how doing so achieves the greatest public service and widest practical use. Conversely, with sufficient justification, the Authority could take other uses into consideration as part of the allocation process. This would include consideration of increased load over that which existed in 1985, municipal and industrial (M&I) load, and the use of power for M&I to subsidize agricultural load. This is a policy decision for the Authority.

If the Authority decides to give greater weight in its allocation to loads directly attributable and used for agricultural purposes, the Authority should adopt a definition of agriculture that includes power uses associated with water production and conveyance for both

² Contract Between the United States and the Central Arizona Water Conservation District for Delivery of Water and Repayment of Costs of the Central Arizona Contract, Amendment No. 1, executed December 1, 1988.

crop production and livestock (“agricultural water use”), rather than a definition that simply includes water uses for crop production (“irrigation use”). Basing allocations on loads attributable to agricultural water use is more likely to achieve broader public service and wider practical use.

Moreover, *commercial scale* agriculture is more likely to achieve broader public benefits than non-commercial agriculture because commercial agriculture is more likely to drive broader economic benefits. Also, including agricultural *related* loads (e.g., packing sheds, cooling facilities, district facilities, incidental domestic uses) in the definition of agricultural loads is more likely to achieve wider practical use within the commercial agriculture demand sector. A broader public benefit would likely be served by providing agricultural related facilities low-cost Hoover power because such service reduces costs and provide stability for the agricultural sector. The Authority’s definition should incorporate these uses as “agricultural water use” as well.

E. In Lieu Water

Comments:

Buckeye Water Conservation and Drainage District (Buckeye WCDD) asks whether an effluent contract will be treated similar to short-term contracts for water delivered by the CAP.

Electrical District No. 3 and Electrical Districts No. 4 and No. 5 separately commented that any “load normalization” method should recognize that certain CAP water supplies are less likely to be available to non-Indian agricultural water users after 2030 (CAP Ag Pool) than other types of CAP and surface water supplies.

The entities represented by Moyes Sellers & Hendricks commented that the Authority should exercise caution when attempting to equate an applicant’s current surface water supplies and future availability to historical and projected future electric loads. They add that it is necessary to “standardize” the basis for calculating water data to ensure fair comparisons.

RWCD supports the adjustment of historical load data to reflect the monthly peak demands and energy consumption that would have occurred if it were pumping groundwater. RWCD notes that In Lieu water is just as uncertain as CAP Ag Pool water, if not more so, and the two water uses should be treated the same for normalization purposes.

The districts represented by Ryley Carlock & Applewhite commented that the term “pumping equivalent” or “normalization” should be used instead of In Lieu water, which means different things to different entities. These terms would encapsulate all non-permanent water supplies that an applicant uses instead of pumping groundwater. The districts suggest the following language:

The amount of pumping equivalent water (i.e., nonpermanent, non-groundwater supplies) received during the previous five (5) calendar years, together with (i) a calculation of the amount of capacity and energy that would have been used to pump groundwater had the pumping equivalent water not been available, and (ii) the methodology used to calculate such capacity and energy.

Discussion:

The commenters appear to agree that In Lieu water is a relevant concept, and under A.A.C. section R12-14-201(J), the Authority must consider the needs of the prospective purchaser when allocating Long-term Power. An applicant’s water supply and the power needed to extract, convey, or deliver that water are necessary to understanding the applicant’s needs. However, the commenters are wary of the Authority using the concept as a basis for allocation because of its inconsistent application among entities with different water supplies, i.e., CAP Ag Pool water versus excess groundwater savings facility CAP water use versus effluent. Thus, if the Authority decides to allocate Hoover power based on an entity’s load adjusted for future available water supplies, then the method for calculating the adjustments must be consistent.

Recommendation:

The Authority has discretion to consider load adjustments based on future available water supplies. *See* A.R.S. § 30-124; A.A.C § R12-14-201(I). If the Authority decides to consider an

entity's load adjusted for future available water supplies or allocate power based on this data, then the method for calculating the adjustments must be consistent. The formulation suggested by Ryley Carlock & Applewhite is reasonable, and the term "pumping equivalent" addresses the concerns of consistent interpretation of "in lieu" water. The Authority should further define "nonpermanent, non-groundwater supplies" to target the water supplies it considers most relevant to this inquiry, i.e., CAP Ag Pool water, arrangements with third parties for CAP water pursuant to groundwater savings facility or storage permits, or effluent contracts. Last, the amounts of pumping equivalent energy use so determined should be subject to a limitation to the total existing capacity of that entity (adjusted for entitlements from other federal resources, as appropriate). The arrived-at contract term, i.e., 50 years or a shorter term, may also be relevant to addressing this issue.

F. Calculating Agricultural Load

Comments:

At the April 7, 2014 workshop, K.R. Saline and other participants described the problem created by multiplying the agricultural use percentage by the pumping equivalent load. Pumping equivalent water may be used solely for agricultural purposes, and this method improperly assumes that pumping equivalent water carries the same use classifications (i.e., commercial, residential) as total load.

Discussion:

The initial spreadsheets discussed at the April 7, 2014 workshop applied the percentage of load attributable to agricultural uses to the pumping equivalent load in the same manner that the agricultural percentage was applied to the total load. For entities that use all pumping equivalent water for agricultural purposes, applying the agricultural percentage for total load to the pumping equivalent load improperly reduces the pumping equivalent load.

Recommendation:

To determine agricultural load generally, the applicant should report the percentage of its load devoted to agricultural use, as that term is defined, and provide an explanation for how it arrived at that percentage. Although individual meter data should not be required to verify an applicant's reported percentage, the applicant should be required to use a method for determining agricultural load that is supported by documentation, such as billing records or other internal reporting mechanisms.

If the Authority decides to allocate Hoover power based on agricultural use and pumping equivalent load data, then the Authority should ask applicants to differentiate how they use nonpermanent, non-groundwater supplies. The percentage of pumping equivalent water used for agricultural purposes should then be applied to the pumping equivalent load to produce a capacity and energy number that accounts for agriculture use and pumping equivalent water.

G. Other Federal Resources

Comments:

The entities represented by Moyes Sellers & Hendricks commented that it is appropriate for the Authority to take into account an applicant's other federal power resources, or lack thereof. At the April 7, 2014 workshop, Mr. Moyes discussed the requirement that the Authority shall consider other federal resources under A.A.C. section R12-14-201(K). Mr. Moyes noted that the alternatives presented at the workshop did not reference or incorporate this requirement.

The Grand Canyon State Electric Cooperative Association commented at the April 7, 2014 workshop that it supports an inquiry into other available federal resources during the application process.

K.R. Saline commented at the April 7, 2014 workshop that what an entity may have under contract from a federal power resource, such as the Colorado River Storage Project, is different than what is actually being scheduled from that resource.

Buckeye WCDD asked whether it is necessary to list surplus power from Navajo Generating Station as a federal resource given that its long-term availability is not guaranteed.

Discussion:

A.A.C. section R12-14-201(K) requires the Authority to consider “other sources of Power available to the prospective Purchaser from the federal government.” To understand the power that is “available” to the entity, specific additional information is necessary: (1) the entity’s contractual entitlement to a federal power resource; (2) when the contract expires, or other information on factors affecting the term of the contract; and (3) the amount of power the entity has actually received or scheduled pursuant to the contract. This type of inquiry should address the commenters’ concerns, especially with respect to those comments that suggest that the allocation or contract amount available from other federal resources may not be indicative of the amount of power the entity actually receives from those sources.

Recommendation:

To meet its obligation to consider other sources of federal power available to the applicant, the Authority should require an applicant to submit the following information: (1) the entity’s contractual entitlement to a federal power resource; (2) when the contract expires, or other information on factors affecting the term of the contract; and (3) the amount of power the entity has actually received or scheduled pursuant to the contract.

H. Requests for Additional Data Requirements

Comments:

AEPCO considered the following data essential to a fair allocation process:

1. The applicant's kilowatt and kilowatt-hour sales during each of the 24 months prior to date of application;
2. The amount of power, if any, not used by an existing customer broken down by days and hours when energy has been available but not used; and
3. The transmission arrangements a customer will rely on for its points of delivery.

Discussion:

The Authority's regulations require an applicant to submit some of the information described above. *See* A.A.C. § R12-14-202(A)(2), (5). The Authority has discretion to require additional information, especially if the information is reasonably related to considerations mandated by statute or regulation. *See* A.R.S. §§ 30-124(A), 45-1709. It is anticipated that the draft applications will be developed over the next few months, with the allocation process participants' input, at which time this comment can be more appropriately addressed.

Recommendation:

The Authority should consider whether this data is reasonably related to factors or information it must consider by statute or regulation.