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Sent: Tuesday, July 29, 2014 4:43 PM
To: Mike Gazda (mike@powerauthority.org)
Cc: Robert S. Lynch; Todd Dillard
Subject: Comments on the June 24, 2014 "Issue Papers" document

Mike:

The following are IEDA's comments on the subjects in the Issue Papers document.

POLICY MATTERS

The June 24, 2014 "Issue Papers" document prepared by the Arizona Power Authority Commission ("Commission") consultants identifies six (6) issues that will be subject to policy decisions of the Commission: length of contracts, reimbursement, seasonal allocations, opportunity to cure (not labeled policy but policy), status of existing customers, and data submission factors and standardization.

While some comments on these subjects have been submitted to the consultants, many relevant comments have yet to be made. Moreover, these comments should be directed to the Commission and should be submitted during the current informal phase of this process. Postponing them until after the formal process is initiated with a Commission proposal would seriously dilute their deliberative value to the Commission.

At the June 30, 2014 workshop, Stu Somach verbally sketched out a continuing timetable which covered informal process events and deadlines for the summer and fall leading to initiation of the formal process. When that list is reduced to writing, we recommend that it include a date by which the Commission will invite further policy arguments on these subjects. Our recommendation carries with it the caveat that the subject of treatment of existing customers, discussed below, may be less of a policy call than some now think.

Additionally, the proposed schedule should include a suggested timing and methodology for extending the power purchase certificates (PPC's) for existing customers where those PPC's currently have termination provisions. That is the most efficient way to deal with this subject.

THE ROLE OF CONGRESS
IN INFLUENCING APA DECISION-MAKING

There has been much discussion of two related issues during this informal process. Various opinions have been expressed as to how the Commission must deal with Hoover D, having statutes that

nominally only deal with Hoover A (Title 30) and Hoover B (Title 45). Additionally, the status of the existing Commission allottees/contractors (viz. "new allottees") has drawn numerous comments. The following analysis ties the two issues together in the context of the 2011 Act.

What is Hoover D?

In 2011, Congress did more than merely replace the tables used in the Hoover Power Plant Act of 1984. The Hoover Allocation Act contains more decisions than many might realize.

For instance, it is clear from the mathematics that Congress reserved 5% of the total Hoover capacity and energy allocations for "new entrants." It is also true that Congress retained the distinctions between Hoover A and Hoover B in the 2011 Act.

Examining the results of this exercise in congressional allocating demonstrates that Congress did more than many think happened.

Congress started from a new capacity factor, 2074 MW, the current nameplate capacity of Hoover's generators. That was 123 MW larger than existing allocations. It added 14.323 MW to the existing allottee's Hoover A capacity allocations and 4.977 MW to the existing allottee's Hoover B allocations, totaling 19.3 MW. It reserved 103.7 MW as Hoover D capacity for the "new entrants." How were these figures derived?

It turns out, if you do the math, that Congress divided the 123 MW between Hoover A and Hoover B in the same proportion as the two resources had in the 1984 Act. It added those numbers to the existing allocations. It then subtracted 5% of the larger A and 5% of the larger B to produce the 103.7 MW to be allocated as Hoover D. The remainder of the 123 MW (19.3 MW) was added to the existing allottees capacity allocations using the same Hoover A/Hoover B proportions.

This mathematical application contains substantive decisions. Congress retained the distinctions between Hoover A and Hoover B found in the 1984 Act. Congress did not attempt to derive the origin of the extra 123MW but used the existing capacity ratio between A and B in the 1984 Act. By doing so, the net effect of the blanket 5% rule is that Congress took 74% of the D capacity from A allottees and 26% from B allottees. Thus, D capacity reflects these origins for allocation purposes.

For energy, Congress used the same figure used in the 1984 Act, 4,527,001,00 kWh. When the 5% factor was applied, because of the different load factors of A and B, 187,991 kWh were taken away from the A contractors' existing allocations and 38,361 kWh from the B contractors' existing allocations, resulting in the 226,352 kWh reserved for "new allottees." Thus, D energy is 83% A energy and 17% B energy.

Applying this same math to Arizona's Hoover D-2 allocation results in the 11,510 kW being 8,542 kWA and 2,968 kWB. On the energy side, the 25,113,000 kWh of Hoover D-2 energy splits as 20,856,975 kWhA and 4,256,025 kWhB.

Existing v. "New" Allottees

Aside from the impact on Commission deliberations concerning contracting (D-1) and allocating and contracting (D-2) the D resources, these mathematical applications by Congress contain important assumptions. First, Congress knew that the Commission had existing allottees/contractors. It specifically allocated a portion of D to the Commission (11.510 MW) for "new allottees." Thus, Congress demonstrated its knowledge of the existence of current APA allottees/contractors. Moreover, Congress had to assume that the Commission's allottees would continue to be allottees post-2017. Otherwise, the "new allottee" distinction as it applies to Arizona would have no meaning, i.e., all post-2017 Commission allottees would be "new." Conversely, if existing Commission allottees are at risk of not being post-2017 allottees but are barred from applying for D, a manifest unfairness results that Congress could not have intended.

Additionally, since the Commission openly and aggressively supported the bill and Congress' actions in its mathematical allocations, it is likely fair to say that the Commission supported, or at least tacitly supported, the congressional assumption that existing Commission allottees would continue to enjoy that status post-2017. Indeed, the argument is at least available that Congress allocated Hoover D directly to the Commission on the condition that its existing allottees would remain in place. That is certainly the congressional result in California and the state statute result in Nevada. This begs the question why Congress would assume or allow a different result in Arizona that, in turn, would result in manifest unfairness.

Thus, Congress' actions in the Act have substantive impacts on the Commission's future allocation actions. The Commission must decide whether the above-analyzed congressional action impacts its decisions with regard to its existing allottees as well as whether the Commission's actions in supporting the 2011 Act impact its future Hoover D allocation decision-making. To that end, the Commission must decide whether Congress' treatment of Hoover A and B impacts the path that the Hoover D resource (both D-1 and D-2) will take under relevant Arizona law (Title 30 v. Title 45).

ELIGIBILITY FOR B POWER

The back & forth to date over the Red Book centers not on the document itself, but its content. IEDA has never claimed that the Red Book was itself longstanding administrative interpretation of law. Rather, we have pointed out that the document memorializes interpretations of law the Commission had to make then in order to administer that law to the allocation process it was required to complete. We have characterized these interpretations as "longstanding", given the fact that they

were made 29 years ago. We have thus suggested that varying from them in this proceeding requires a stronger rationale and justification than that required to support the original analysis.

Your consultants disagree that the Red Book legal analysis is longstanding interpretation. Were they correct, that would end the matter and this Commission could interpret the law without regard to the Red Book. We think that the Commission needs to give serious consideration to whether the consultants' arguments are defensible.

The central theme of the consultants' argument on this point is that a prior interpretation must be repeated in order to be longstanding. However, the cases they cite merely consider repetition as a factor weighing in favor of that conclusion because, in those cases, it occurred.

Here, the Commission has had no opportunity to revisit those decisions until now. No interim allocations have occurred and thus the Commission has had no need to revisit those decisions. Moreover, no one has challenged those decisions over this 29-year period. Were those decisions so obviously flawed (as the consultants argue) and this scarce, valuable resource thus available to others, certainly someone would have challenged those Commission decisions, especially on eligibility. Under these factual circumstances, there is every likelihood that a court would conclude that those prior decisions were properly characterized as longstanding administrative interpretation. It would then examine the reason(s) why the Commission chose to vary from the prior decisions and would examine whether the Commission had a strong enough basis to do so.

In the consultants' view, that basis is simply that the prior interpretations were just plain wrong. While they devote 12 pages to that argument, that is their ultimate conclusion, to wit: the 1985 legal analysis was fatally flawed.

One has to ask oneself why, if these flaws are so obvious and this resource is so valuable, no one has pursued this line of thinking for the last 29 years?

We will not quarrel with the case law cited by the consultants, only its application. The consultants' analysis ignores the history of the State Water and Power Plan. The Plan was legislated in 1967 when California had blocked passage of the bill authorizing construction of the Central Arizona Project. The Plan needed to assure that both water and power sales would support the State's "go it alone" strategy. Thus, both resources were dealt with in combination in definitions as well as operative statutes. Fast forward to 1982. The project is under construction. Water contracts are being negotiated. Power sales will be critical to repayment and operation of the Central Arizona Project.

The amendment to A.R.S. Section 45-1708(B) must be evaluated in this context. The Commission had been authorized to participate in the Hoover Uprates in 1967. Negotiations that would lead to the 1984 Hoover Power Plant Act were underway. Under these circumstances, the Legislature amended A.R.S.

Section 45-1708(B) to ensure that entities it could count on would be positioned to be allocated and contract for this critical new resource.

Why else amend the statute? Under the existing definitions and substantive provisions, these entities could contract without the amendment.

The fatal flaw in the consultants' argument is that they emasculate the 1982 amendment, an effect they admit can't be countenanced, by claiming to "harmonize" it with prior statutory language. Instead they create discord. The Commission should give additional thought to this issue.

We look forward to additional dialogue on these and other important issues.

Bob

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