12/29/2014

ARIZONA POWER AUTHORITY

(Revised)

Public Information and Comment Draft Plan

Hoover Power Allocation

Post-2017

GLOSSARY OF TERMS

1984 Act: The Hoover Power Plant Act of 1984, Pub. L. No. 98-381, 98 Stat. 1333.

2011 Act: The Hoover Power Allocation Act of 2011, Pub. L. No. 112-72, 125 Stat. 777.

Allocation Methodology: A formula or method and associated rationale that the Authority may use to allocate the capacity and firm energy that the Authority received under the 2011 Act to eligible entities in Arizona.

Alternative: A combination of Spreadsheets for Schedule A, Schedule B, and Schedule D-2.

Contractors: The entities named in Sections 105(a)(1)(A), 105(a)(1)(B), and 105(a)(1)(C) of the 1984 Act, and Sections 2(a), 2(b), 2(c), and 2(d) of the 2011 Act that received allocations of Hoover power by federal statute.

Consultants: The Authority's legal and technical consultants for the post-2017 Hoover power allocation process.

Customer: An entity that contracts to purchase power from the Authority under Arizona Revised Statutes Title 30, Chapter 1 or under Arizona Revised Statutes Title 45, Chapter 10. (The definition is essentially synonymous with the term "Purchaser." *See* Arizona Administrative Code ("A.A.C") § R12-14-101(17).)

D-1 Power: The 66.7% of Schedule D power (69,170 kW, 151,013,000 kWh) that the Western Area Power Administration allocates to new allottees in the marketing area for the Boulder City Area Projects pursuant to the 2011 Act.

D-2 Power: The 11.1% of Schedule D power (11,510 kW, 25,113,000 kWh) that the Authority allocates to new allottees in the State of Arizona.

D-2/A Power: Any Schedule D capacity and energy attributable to adjustments in Schedule A.

D-2/B Power: Any Schedule D capacity and energy attributable to adjustments in Schedule B.

Draft Plan: The Public Information and Comment Draft Plan, Hoover Power Allocation, Post-2017, presented by the Consultants on March 17, 2014.

Issue Papers: A paper presented by the Consultants on June 24, 2014 that summarized comments on the Draft Plan and major legal, policy, and data submission and standardization issues, analyzed the issues where appropriate, and provided recommended legal conclusions.

Long-term Power: Any supply of power that is available to the Authority for a period of more than 366 consecutive days and that is subject to the jurisdiction of, and disposition by, the Authority. *See* A.A.C. § R12-14-101(11).

Preliminary Proposal: The preliminary allocation of post-2017 Hoover power presented by the Authority after it decides that a supply of Long-term Power is available.

Post-1987 Hoover power: The capacity and firm energy allocated to entities in Sections 105(a)(1)(A), 105(a)(1)(B), and 105(a)(1)(C) of the Hoover Power Plant Act of 1984, Pub. L. No. 98-381, 98 Stat. 1333, for delivery commencing June 1, 1987 or as it thereafter became available, and further allocated by the Authority to entities in Arizona according to the Red Book.

Post-2017 Hoover power: The capacity and firm energy allocated to entities in Sections 2(a), 2(b), 2(c), and 2(d) of the Hoover Power Allocation Act of 2011, Pub. L. No. 112-72, 125 Stat. 777, for delivery commencing October 1, 2017, to be further allocated by the Authority to entities in Arizona.

Power Purchase Certificate: A certificate that a prospective Purchaser must obtain from the Authority prior to becoming a purchaser of electrical energy generated by the waters of the main stream of the Colorado River under Title 30.

Red Book: The "Final Hoover Power Marketing Post-1987" document published on June 7, 1985.

Revised Draft Plan: The draft of a proposed post-2017 Hoover power allocation plan, including allocation methodologies for post-2017 Hoover power, presented by the Consultants on December 29, 2014, for public discussion and comment.

Spreadsheet: The results, or possible allocation of post-2017 Hoover power, when an Allocation Methodology for a particular Schedule (e.g., Schedule A) is applied to the voluntary data submitted by interested parties to the Consultants.

State Water and Power Plan: A water and power plan for the State of Arizona consisting of specific works and facilities, including the Authority's interest in or rights to capacity and any associated energy of the Hoover power plant uprating project. *See* Ariz. Rev. Stat. § 45-1703(A)(4).

I. INTRODUCTION

The purpose of this document, hereinafter referred to as the "Revised Draft Plan," is to provide a proposed post-2017 Hoover power allocation plan, with examples of different methodologies for allocating post-2017 Hoover power, for consideration by the Arizona Power Authority ("Authority," "APA," or "Commission") as well as the public, existing post-1987 Hoover power Customers, and prospective post-2017 Hoover power applicants. The document focuses on key legal and policy considerations that have factored into the development of the methodologies. Sections II, III, and IV include the Consultants' recommendations to the Authority regarding the legal and procedural requirements affecting the final allocation plan. In some cases, including the analysis related to the Schedule D power pool, alternative analyses are presented. *The Authority has not adopted any position with respect to these recommendations or conclusions. The Authority will present its own proposal covering all of the issues dealt with in this Revised Draft Plan when it presents its "Preliminary Proposal" during the regulatory process, described* infra *section III.B.4.*

Section V of this Revised Draft Plan discusses various policy issues that interested parties have identified during the public review and comment process. This section summarizes the issues but does not include any recommendation. The Authority's initial decision on these policy issues will be presented in its Preliminary Proposal.

This Revised Draft Plan and the allocation methodologies included herein will be the subject of workshops conducted by the Consultants and formal conferences convened by the Authority. The dates, times, and locations of these workshops and conferences will be provided by the Authority. The Authority will also provide dates on which written comments should be submitted to the Authority and its consultants.

These comments will be reviewed, responded to, and utilized in refining the substance of this document and arriving at a proposal on the post-2017 allocation of Hoover Power that will

be considered by the Authority in a public information Conference pursuant to Arizona Administrative Code ("A.A.C.") section R12-14-201(A), in a public comment Conference pursuant to A.A.C. section R12-14-201(B), and in the development of a final post-2017 Hoover power allocation plan.

II. LEGAL AND HISTORICAL BACKGROUND

A. Post-1987 Hoover Power

1. Congressional Allocation of Hoover Power

The Boulder Canyon Project Act of 1928, Pub. L. No. 70-642, 45 Stat. 1057 (codified as 43 U.S.C. § 617) ("BCPA"), authorized the Secretary of Interior[1] "to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River . . . adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water." 43 U.S.C. § 617. In addition to controlling floods, regulating the Colorado River, and providing storage and delivery of stored water, the Boulder Canyon Project was also intended to generate electrical energy. *Id*. Section 5 of the BCPA authorizes the Secretary to contract for the delivery of stored water and "generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at" the Hoover Dam. *Id*. § 617d. The term of these electrical sales contracts shall not be longer than 50 years. *Id*. § 617d(a).

[1] The Department of Energy Organization Act transferred the power marketing functions of the Bureau of Reclamation and other offices in the Department of Interior to the Secretary of Energy, head of the Department of Energy. 42 U.S.C. §§ 7131, 7152. Although section 5 of the BCPA refers to the Secretary of Interior as the "Secretary" who offers to contract for electric energy from Hoover Dam, 43 U.S.C. § 617d, the Secretary of Energy is the agency head currently responsible for power sales. The Secretary of Energy has assigned the responsibility of marketing and contracting for power from the Boulder Canyon Project to the Western Area Power Administration ("Western").

Before the original section 5 contracts for Hoover power expired in 1987, Congress enacted the Hoover Power Plant Act of 1984, Pub. L. No. 98-381, 98 Stat. 1333 ("1984 Act"). In the 1984 Act, Congress authorized a project to increase capacity of existing generating equipment at the Hoover power plant, known as the "uprating program" or "uprating project." § 101(a), 98 Stat. at 1333. Congress also statutorily allocated pools of Hoover power to named Contractors. Congress directed the Secretary of Energy to offer a renewal contract to existing Contractors for the amounts specified in the table, which was labeled "Schedule A." § 105(a)(1)(A), 98 Stat. at 1335. The increased capacity and associated energy resulting from the uprating project was allocated in "Schedule B." § 105(a)(1)(B), 98 Stat. at 1336. The funds advanced by non-federal purchasers under contracts for Schedule B power provided the financing for the uprating project. § 105(d), 98 Stat. at 1338. The contracts for allocations from the 1984 Act will expire on September 30, 2017. § 105(a)(4)(A), 98 Stat. at 1337.

2. Arizona Allocation – Post-1987 Hoover Power – The "Red Book"

The Authority allocated Hoover power for the previous marketing period, which began on June 1, 1987, and extends to September 30, 2017. This allocation was undertaken consistent with the "Final Hoover Power Marketing Post-1987" document published on June 7, 1985. This document is commonly referred to as the "Red Book." In the Red Book, the Authority set forth the allocation principles and methods that it used to allocate Schedule A and Schedule B power to selected entities.[2]

The status of the Red Book with respect to the allocation of post-2017 power has been raised by various parties. Notwithstanding its significance, the Red Book, and the allocation

[2] In the Red Book, the Authority also explained the purpose and effect of the "recapture provision." This recapture provision was included in all Schedule B power sales contracts for the benefit of the Central Arizona Water Conservation District ("CAWCD"). Pursuant to these recapture provisions, upon meeting certain conditions, CAWCD was able to request that the Authority give notice to entities with power sales contracts for Schedule B power and recapture a portion of Schedule B power for use by CAWCD as an additional power supply for the Central Arizona Project ("CAP").

principles and methods set forth therein, do not control the Authority's allocation of post-2017 power. The Red Book is an administrative action taken in 1985 when the Authority implemented relevant statutes and regulations to allocate a defined supply of power for the marketing period from 1987 to 2017. Unlike a formal rule promulgated under the Arizona Administrative Procedure Act, the Red Book is temporary, of limited application to specific power users, and is a form of policy implementation. *See Redelsperger v. City of Avondale*, 87 P.3d 843, 846 (Ariz. Ct. App. 2004). It is not a statement of general applicability. *See Havasu Heights Ranch & Dev. Corp. v. State Land Dep't*, 764 P.2d 37, 45 (Ariz. Ct. App. 1988).

Moreover, the interpretations and determinations contained in the Red Book are not entitled to deference because they do not qualify as longstanding administrative interpretations. 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). However, a critical element in the determination that an interpretation is "longstanding and consistent" is that the interpretation occurred more than one time. *Id.* at 274 (agency interpreted statute for at least 20 years); *Bergstresser v. Indus. Comm'n of Arizona*, 474 P.2d 450 (Ariz. Ct. App. 1970) (agency "consistently interpreted" the statute at issue for over 40 years since its enactment); *Long v. Dick*, 347 P.2d 581, 583 (Ariz. 1959) (adopting the "uninterrupted administrative interpretation" by "various superintendents" over a period of 12 years). In contrast, 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 in order to draw the conclusion that that interpretation was a "longstanding administrative interpretation."

The Authority also confirmed the Red Book's limited application in its formal responses to public comments on the 1993 revisions to the Authority's regulations: "[t]he conditions set forth in the Red Book . . . relate specifically to the reallocation of Hoover Power in 1985 and do not apply to any other Power which fall[s] under the jurisdiction of the Authority, nor, in fact,

will the Red Book apply to an allocation or reallocation of Hoover Power after the existing contracts expire in 2017." Arizona Power Authority Rules Revision, Concise Explanatory Statement 17-18 (Oct. 6, 1993), *available at* http://2017.powerauthority.org/wp-content/uploads/2012/10/APA-Rules-Revision-10-06-93.pdf. The Authority maintains this view today and will not treat the Red Book as precedential or other legal authority for the post-2017 period.

B. Post-2017 Hoover Power

1. Hoover Power Allocation Act of 2011

To address the marketing period following the expiration of the existing federal Hoover power contracts, Congress adopted the Hoover Power Allocation Act of 2011, Pub. L. No. 112-72, 125 Stat. 777 ("2011 Act"). Like the 1984 Act, the 2011 Act statutorily allocated power from Schedules A and B to named Contractors and directed the Secretary to offer contracts for the specified amounts to those named Contractors. § 2(a)-(b), 125 Stat. at 777-78. The 2011 Act also created a new resource pool, referred to as "Schedule D." § 2(d), 125 Stat. at 779. The resource pool is equal to five percent of the full rated capacity of the Hoover power plant — 2,074,000 kilowatts — and associated firm energy, and is available to "new allottees." *Id*.

Western is charged with allocating 66.7 percent of Schedule D directly to "new allottees." 43 U.S.C. § 619a(a)(2)(C)(i)-(ii). This pool is referred to as "D-1" power. A "new allottee" is an "entit[y] not receiving contingent capacity and firm energy under subparagraphs (A) and (B) of paragraph (1)." *Id*. § 619a(a)(2)(B). In turn, "subparagraphs (A) and (B) of paragraph (1)" are the subparagraphs containing Schedule A and Schedule B. The Authority will enter into contracts with new allottees that receive an allocation of D-1 power from Western and that are not federally recognized Indian tribes. *Id*. § 619a(a)(2)(C)(ii). The Authority's contracts with these D-1 allottees will include the provisions mandated by the 2011 Act, such as the requirement that new allottees pay a proportionate share of the State's contribution to the Lower Colorado River Multi-Species Conservation Program and that new allottees pay to Western a pro

rata share of Hoover Dam repayable advances. *Id*. §§ 619a(a)(2)(E), 619a(a)(5)(D). Contractors must also "authorize and require Western to collect from new allottees a pro rata share of Hoover Dam repayable advances paid for by contractors prior to October 1, 2017," and then "remit such amounts to the contractors that paid such advances . . . as specified in section 6.4 of the Implementation Agreement." *Id*. § 619a(a)(5)(D). Any of the D-1 contingent capacity or firm energy that is not allocated and placed under contract by October 1, 2017, must be returned to the Contractors in Schedules A and B in proportion to each Contractor's allocation of Schedule A and B capacity and energy.[3] *Id*. § 619a(a)(2)(F).

Western published its final marketing criteria for D-1 power on December 30, 2013. Notice of Final Marketing Criteria and Call for Applications, 78 Fed. Reg. 79,436 (Dec. 30, 2013) (hereinafter "Final Marketing Criteria"). Applications for this pool of Hoover power were due by March 31, 2014. *Id*. Western issued its proposed allocation of D-1 power on August 8, 2014. Notice of Proposed Allocation, 79 Fed. Reg. 46,432 (Aug. 8, 2014). Western published the final allocations on December 18, 2014. Notice of Final Allocation, 79 Fed. Reg. 75,544 (Dec. 18, 2014) (hereinafter "Final D-1 Allocation").

The Authority received an allocation of 11.1 percent of Schedule D power, referred to as "D-2" power, for further allocation to new allottees in the state of Arizona. 43 U.S.C. § 619a(a)(2)(D)(i). Western confirmed this allocation when it issued the 2012 Conformed Power Marketing Criteria for the Boulder Canyon Project. Conformed Power Marketing Criteria or Regulations for the Boulder Canyon Project, 77 Fed. Reg. 35,671, 35,676 (June 4, 2012). Any of the D-2 contingent capacity or firm energy that is not allocated and placed under contract by October 1, 2017, is to be returned to the State of Arizona, in the same proportion as the allocations of Schedule A and B capacity and energy. 43 U.S.C. § 619a(a)(2)(F).

[3] The Authority will not know until Western completes its contracting process (as late as October 1, 2017) if some amount of D-1 power will revert back to the State of Arizona as a result of any D-1 allottee choosing not to enter into a contract with Western for its D-1 allocation. If this scenario occurs, the Authority will initiate a separate allocation process for that power.

2. Amounts of Contingent Capacity and Firm Energy Available to Arizona for Allocation from Schedules A, B, and D-2

The Authority may allocate the following quantities of contingent capacity (kilowatt or kW) and firm energy (kilowatt-hour or kWh) from:

Schedule A:
Contingent Capacity: 190,869 kW
Firm Energy: 429,582,000 kWh in summer, and 184,107,000 kWh in winter.

Schedule B:
Contingent Capacity: 189,860 kW
Firm Energy: 140,600,000 kWh in summer, and 60,800,000 kWh in winter.

D-2 Power from Schedule D:
Contingent Capacity: 11,510kW
Firm Energy: 17,580,000 kWh in summer, and 7,533,000 kWh in winter

In any year when the actual energy generated at Hoover power plant, less any amount delivered to Arizona under Schedule C, is less than 4,527,000,000.001 kWh, the deficiency will be borne by the Schedule A, B, and D Contractors in proportion to the Contractors' allocations. 43 U.S.C. § 619a(a)(3). Similarly, if water is not available in quantities sufficient to produce the contingent capacity and firm energy set forth in Schedules A, B, and D, the Secretary of Energy adjusts each Contractor's entitlement under Schedules A, B, and D in the same proportion of the Contractors' allocations to the full rated contingent capacity and firm energy obligations. *Id.* § 619a(d).

3. State Law Applies to the Authority's Allocation of Post-2017 Hoover Power

Power generated from the main stream of the Colorado River is not classified, under Arizona law, by the terms "Schedule A," "Schedule B," or "Schedule D." Rather, different

statutes, located in separate titles of the Arizona Revised Statutes ("A.R.S."), provide authority for the disposition of Hoover power. Chapter 1 of Title 30[4] sets forth the general powers and duties of the Authority. Specifically, the Authority "shall bargain for, take and receive, in its own name on behalf of the state, electric power developed from the waters of the main stream of the Colorado River . . . ." A.R.S. § 30-121. The provisions in Title 30, including the preference term, *id*. § 30-125, and the power purchase certificate requirement, *id*. § 30-151, apply to the disposition of power from Schedule A. *See id*. §§ 30-121(A), 30-124(A); *see also id*. § 45-1703(C) (excepting what is Schedule A power from being allocated under Title 45).

Chapter 10 of Title 45 sets forth the State Water and Power Plan. The Legislature originally enacted the State Water and Power Plan to assure the financing and construction of the CAP. Section 45-1703 lists works and facilities that comprise the State Water and Power Plan, which include the Authority's interest in capacity and associated energy of the Hoover power plant uprating project. "Power and energy of the authority from . . . the Hoover power plant uprating project shall be sold by the authority pursuant to this article." A.R.S. § 45-1703(C). Although not labeled as such under state law, the Schedule B allocations within the 1984 legislation, by definition and label, represent the capacity and energy associated with the uprating project. *See* 1984 Act § 105(a)(1)(B), 98 Stat. at 1336 (authorizing "contracts for delivery commencing June 1, 1987, or as it thereafter becomes available, of capacity resulting from the uprating program and . . . associated firm energy . . . as specified in the following table"); *see also id*. (Schedule B statutory matrix entitled "Contingent Capacity Resulting from the Uprating Program and Associated Firm Energy"). Thus, the provisions in Chapter 10 of Title 45 govern the disposition of Schedule B capacity and energy. To the extent any provisions in Title 30 conflict with the matters contained in Title 45, the Title 30 provisions are superseded. A.R.S § 45-1722; *see also id*. § 30-122(D).

[4] All references hereinafter to Title 30 as well as Title 45 and Title 48 refer to the A.R.S., unless otherwise noted.

Schedule D power does not fit neatly into the Arizona regulatory structure. Schedule D is a resource pool "created" by the 2011 Act. How best to deal with Schedule D is the subject of more focused discussion below.

III. ADMINISTRATIVE PROCEDURE

A. Scope of Authority

The Authority "shall bargain for, take and receive, in its own name on behalf of the state, electric power developed from the waters of the main stream of the Colorado River," which "may be made available, allotted or allocated to the state in its sovereign capacity." A.R.S. § 30-121(A). The Authority "shall take such steps as may be necessary, convenient or advisable to dispose of electric power within its jurisdiction." *Id*. § 30-124(A). Thus, the Authority has the right to receive available Hoover power supplies, and governing statutes and regulations provide the Authority broad discretion and flexibility on how best to allocate Hoover power.

B. Public Participation

This section discusses how the Authority may develop, release, and revise Hoover power allocation proposals, working toward a final allocation plan, consistent with its regulations and general administrative procedure requirements.

1. Informal and Formal Procedures

The Authority has held and intends in the future to hold public information workshops and to also hold formal Conferences, convened pursuant to A.A.C. section R12-14-601, to discuss the draft allocation methodologies and underlying rationale with members of the public, existing customers, and prospective customers. The dates, times, and locations of these workshops and conferences have been and will be provided by the Authority. This process, referred to as the "Preliminary Process," is separate and distinct from the regulatory process that

begins once the Authority declares a supply of "Long-term Power" is available under A.A.C. section R12-14-201(A). This regulatory process is referred to as the "Formal Process." The separate procedures and opportunities for public participation are described below.

2. Ex Parte Policy

Different procedural requirements exist for agency actions depending on whether the agency action is quasi-judicial (administrative adjudications), quasi-legislative (administrative rulemakings), or administrative. The allocation of available Hoover power pursuant to applicable statutes and regulations is an administrative action. Unlike formal administrative adjudications,[5] *see* A.A.C. § R2-19-105, there is no regulation or principle from case law prohibiting ex parte communications during an administrative action such as the allocation process.

The Commission has expressed its position that there is some benefit to being available to receive input from members of the public and potential applicants in order to be responsive to comments or concerns regarding the general allocation process. At the same time, the Commission is dedicated to maintaining the integrity and transparency of the public process and of the administrative record that will support its administrative action. In this regard, the Commission must develop a common record upon which it may make and rationalize allocation decisions. There is a risk in receiving information ex parte because the information, by definition, is not in the administrative record and will not be available to a hearing officer or reviewing court should the final allocation plan be challenged.

For these reasons, the Authority adopted Resolution 14-5 on March 18, 2014. Under Resolution 14-5, the Commission may have or participate in ex parte communications during the

[5] The Arizona Agency Handbook also describes the restrictions on ex parte communications that apply to agencies conducting administrative adjudications. Arizona Attorney General, Arizona Agency Handbook 10-28 to 10-29, 10-60 (Revised 2013).

Preliminary Process. If a Commissioner obtains any information from a communication during the Preliminary Process that may form the basis of the Commission's actions, then the information obtained from the communication, or the communication, may be disclosed and included in the administrative record. Once the Formal Process begins, the Commission shall not have or participate in ex parte communications. If an ex parte communication inadvertently occurs, the Commissioner must disclose the ex parte communication. If such ex parte communications is verbal, the disclosure must include the identity of the person(s) involved in the communication, the identity of the entity that the person represents, the date of the communication, and the substance of the communication. This summary must be included in the administrative record. If the ex parte communication is written, then the written communication or a copy of the written communication must be placed in the record.

Resolution 14-5 does not prohibit communications to the Commissioners during properly noticed public meetings because these communications are not "ex parte." Similarly, communications with staff members of the Authority are not "ex parte," under the definition in Resolution 14-5. Nonetheless, if relevant information is communicated to Authority staff, and such information is provided to the Commission, that information may be included in the record.

3. Preliminary Process

The Authority's regulations require it to present a "preliminary proposal for the allocation and marketing of available Long-term Power" at the public information Conference. A.A.C. § R12-14-201(A). The decision that a supply of Long-term Power is available triggers a series of inflexible deadlines, described *infra* in section III.B.4, that force the Authority to take specific actions at specific times to comply with its regulations. (This is the initial step in the Formal Process.) The Authority has decided that it does not want any opportunity for discussion of possible allocation methodologies to be constrained or cut short by the regulatory timeline. In addition, the timeline established by regulation does not allow or account for possible changes to the preliminary proposal that may necessitate an additional comment period. As a consequence, the Authority has developed and implemented the Preliminary Process.

During the Preliminary Process, the Authority's staff and consultants have held and will hold workshops to discuss possible allocation alternatives with interested parties, after giving sufficient notice to the public. Additionally, the Commission may hold a Conference related to any subject matter within the Authority's jurisdiction. A.A.C. § R12-14-601(A). "A Conference is intended to provide information and receive comments regarding any pending or proposed course of action by the Commission." *Id*. The Authority must give at least 10 days notice before holding a Conference, and the Commission is not permitted to take any formal or binding action at the Conference. *Id*.

Consistent with these procedures, the Authority has added opportunities for public participation in the Preliminary Process by instructing its Consultants to engage in a process of public review and comment on possible allocation methodologies. On March 17, 2014, the Consultants first presented a "Public Information and Comment Draft Plan" (hereinafter "Draft Plan"). The Draft Plan was the subject of a public workshop, during which interested parties gave verbal comments and discussed questions with the Consultants. The comments submitted on the Draft Plan identified a number of major legal and policy issues as well as questions related to data submission and standardization. Based on this information, on June 24, 2014, the Consultants presented the "Issue Papers," which summarized comments on the major legal and policy issues, analyzed the issues where appropriate, and provided recommended legal conclusions. The Issue Papers also identified various policy issues that are minimally affected by statute or regulation and that the Commission must decide. The Issue Papers were the subject of public workshops held on June 30, 2014 and September 29, 2014. Interested parties also submitted written comments. This document—the "Revised Draft Plan"—incorporates the analysis in the Issue Papers, revised where appropriate in response to comments, and makes additional changes to the Draft Plan to update information and actions taken by the Authority.

The Consultants will hold a workshop on the Revised Draft Plan on January 16, 2015, and consider another round of comments on the allocation methodologies and recommended conclusions that form the underlying rationale that went into the development of the

methodologies. These comments will be used in refining the substance of this document and arriving at a "Final Draft Plan," which the Consultants will present for the Authority's consideration by mid-February of 2015. In addition, the Authority may schedule a time for interested parties to present their policy arguments before the Commission as well as other information they believe may be relevant to preparation of a preliminary proposal. This may take place at the monthly meeting tentatively scheduled for January 20, 2015. Alternatively, the Commission may convene a "Conference" pursuant to A.A.C. section R12-14-601 for this purpose. Thereafter, at the determination of the Commission, the Formal Process may begin.

All of the materials generated in the Preliminary Process, including, without limitation, draft documents, comments, responses to comments, transcripts of informal workshops, and formal APA meetings and Conferences will be incorporated into the Formal Process administrative record.

4. Formal Process

a. Regulatory Timeline

The Authority's regulations for allocating and contracting for Long-term Power set forth a process that commences once the Authority decides that a supply of Long-term Power is available and gives public notice of its intent to receive applications for electric service. This first notice must contain: (1) public notice of "the date, time, and place for a public information Conference at which the Authority shall provide a preliminary proposal for the allocation and marketing of available power," A.A.C. § R12-14-201(A); and (2) notice of intent to receive applications for electric service and the deadline for receipt of applications, *id*. § R12-14-201(A), (E). Both the scheduling of the public information Conference and the due date for applications, in turn, trigger two series of deadlines that force the Authority to take specific actions to comply with its regulations.

On one track, the Authority must provide a preliminary proposal at the public information Conference. A.A.C. § R12-14-201(A). Not later than 60 days following the public information Conference, the Authority must hold a public comment Conference. A.A.C. § R12-14-201(B). At its public comment Conference, the Authority must receive oral and written comments on "the Authority's Long-term Power proposal provided at the public information Conference," i.e., the preliminary proposal. *Id*.

On another track, not later than 60 days after the deadline for receipt of Long-term Power applications, the Authority must notify interested parties of the names of the prospective Purchasers that are eligible to receive an allocation of Long-term Power. A.A.C. § R12-14-201(F). The notice must include a proposed allocation of Long-term Power to the eligible prospective Purchasers. *Id*. For those prospective Purchasers that must obtain a power purchase certificate under Title 30, not later than 30 days after receiving a notice of eligibility, a prospective Purchaser must apply for a Power Purchase Certificate. *Id*. § R12-14-202(C). The Authority must then hold a hearing on a prospective Purchaser's Power Purchase Certificate not earlier than 10 days but not later than 30 days after the prospective Purchaser files its Power Purchase Certificate application. A.R.S. § 30-152(C). The Authority must also issue a "draft form of contract" to each eligible prospective Purchaser not later than 90 days after notifying each prospective Purchaser of its eligibility to receive Long-term Power. A.A.C. § R12-14-201(G). The Authority must then commence contract negotiations and prepare a power sales contract upon completion of negotiations. *Id*. § R12-14-201(H).

The regulations do not state in which order the Authority must schedule the public information Conference and presentation of a preliminary proposal, and the due date for applications. Additionally, some commenters have suggested that it may be possible to "continue" the public information Conference and public comment Conference in order to provide additional flexibility in the timeline for the Formal Process. However, the more rigid deadline is the one triggered by the due date for applications; not more than 60 days later, the Authority must "notify all interested parties . . . of the prospective Purchasers that are eligible to

enter into a Power Sales Contract" and "include in the notice a proposed allocation of Long-term Power to the eligible prospective Purchasers." A.A.C. § R12-14-201(F).

The Commission shall separately develop a proposed timeline for the Formal Process and will provide adequate time for public review and comment prior to the time that the final timeline for the Formal Process is adopted.

b. Preliminary Proposal at the Public Information Conference

Pursuant to A.A.C. section R12-14-201(A) and the regulatory timeline described above, the Authority must provide a "preliminary proposal for the allocation and marketing of available Long-term Power" at the public information Conference. A.A.C. § R12-14-201(A). Although the Authority intends to have received and responded to public comments and have refined its proposals prior to initiating the Formal Process, the Authority may still revise its preliminary proposal before releasing a final allocation plan under A.A.C. section R12-14-201(F). The "preliminary proposal" is a preliminary offer for consideration leading up to the final offer, or final allocation of Long-term Power. The preliminary proposal will be subject to oral and written comments from interested parties at the public comment Conference held under A.A.C. section R12-14-201(B). Thus, the Authority is not tied to one course of action once it presents its preliminary proposal at the public information Conference, and it may modify the proposal in response to further deliberation and public comments.

c. Application Requirements

Application requirements are set forth in A.A.C. section R12-14-202. "A Qualified Entity that desires to purchase Long-term Power" must file a written application for electric service. A.A.C. § R12-14-202(A). Interested parties have asked whether joint applications are permitted. The regulation is phrased in singular terms stating that "[a] Qualified Entity" that wants to purchase Hoover power must file "an application." *Id*. § R12-14-201(E); *see also id*. § R12-14-202(A). In turn, a "Qualified Entity" is "any Entity eligible to purchase Power from

the Authority . . . ." *Id*. § R12-14-101(18). Although the regulation does not strictly preclude a joint application, the language implies that each entity will file a single application. The definition of a Qualified Entity, however, may encompass broader organizations. "Qualified Entities" include a "person" or "operating unit" under Title 30, and municipalities, districts, and public utilities under Title 45. These are broad categories, and 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.

A separate concern arises if one Qualified Entity overlaps with another Qualified Entity and both request allocations of Hoover power. For example, a joint powers authority that is a Qualified Entity may include a district, and both the district and the joint powers authority 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 . . . ." Therefore, if the two Qualified Entities are seeking an allocation, then they would need to adjust their respective service territories to ensure they remain eligible for a Power Purchase Certificate.

Accordingly, the Authority will not accept joint applications from more than one Qualified Entity. 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, and it should not include, in the application, a member unit even if that member unit is also a Qualified Entity.

The regulations state that an application "shall include the following," and then lists key items of information. This list represents minimum requirements. Considering the Authority's broad powers to "take such steps as may be necessary . . . to dispose of electric power," A.R.S. § 30-124(A), the Authority may reasonably ask for information (or data) in addition to the information required in the regulations. Accordingly, when the Formal Process begins and the Authority announces that it will receive applications for electric service, applicants will be asked to include the following information in addition to the information required by the regulations:

(1) A description of the boundaries of the applicant's service area;
(2) Power sources (capacity and energy) available to the applicant from the federal government under contract, allocation, or other arrangement, including Hoover power;
(3) Non-federal power contracts for electric service;
(4) A narrative description of the applicant's electric utility system, or if the applicant does not own an electric utility system, a statement to that effect;
(5) Load data (capacity and energy) for the previous five (5) calendar years;
(6) "Pumping equivalent load" for the previous five (5) calendar years, including methodology and relevant information used to calculate pumping equivalent load;
(7) Details related to the point or points of delivery where the applicant would receive electric service, including the name of the substation(s) and the voltage required for delivery.

This list is not exhaustive, and the Authority may add other application requirements that it finds reasonably necessary to aid in its allocation decisions.

Applicants may also be required to provide documentation that substantiates the applicant's responses to certain questions. These requirements will be evident on the application form, which a prospective purchaser will be able to obtain from the Authority's business office or download from the Authority's website. Prior to the due date for applications, the Authority and its Consultants will also hold a workshop on how to prepare an application and will answer questions on filling out the application. It is the Authority's intent to resolve questions regarding the application before the due date, through workshops and other opportunities for preliminary review, in order to avoid the submission of incomplete or otherwise deficient applications.

Once applications for electric service are due, the Authority will perform an initial review to determine if the applications are complete. If the Authority does not identify any deficiencies within 14 calendar days, then the applications will be deemed "administratively complete." An applicant's failure to include required information or documentation, however, will result in an initial determination that an application is incomplete. The applicant will be notified of any deficiency with its application and will be given seven calendar days to cure the deficiency. If

the applicant fails to cure the deficiency within the specified time, the Commission will find the application to be deficient and will not further consider the application for electric service.

d. Power Purchase Certificates

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. "If the Authority determines that an applicant is eligible to enter into a Power Sales Contract for Long-term Power offered under A.R.S. Title 30, Chapter 1, the applicant, within 30 days after receipt of notice of eligibility, shall file an application for a Power Purchase Certificate under [section] R12-14-203." A.A.C. § R12-14-202(C). The application requirements for a Power Purchase Certificate are set forth in A.A.C. section R12-14-203. Once the application is filed, the Authority will proceed with a hearing and other procedures as required by A.R.S. sections 30-152, 30-153, and 30-154.

The Power Purchase Certificate requirement only applies to applicants that receive an allocation of Schedule A power. Title 45 controls the disposition of Schedule B power, and Title 45 does not contain a similar requirement. *See* A.R.S. § 45-1722. The Authority's regulations include the same interpretation and require a certificate from an eligible purchaser of "Long-term Power offered under A.R.S. Title 30, Chapter 1." A.A.C. § R12-14-202(C). Applicants that receive an allocation of Schedule B power are not required to obtain a Power Purchase Certificate. Whether entities that receive an allocation of D-1 or D-2 power must also obtain a Power Purchase Certificate is discussed further below in Section IV.C.

Once a person or operating unit becomes a purchaser of electrical energy from the Authority, it necessarily must have a Power Purchase Certificate, and need not obtain a new one, except in the following circumstance. The Authority's 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, unless the Purchaser wants to use Long-term Power in a territory that differs from the Service Territory described in the Purchaser's existing Power Purchase Certificate.

e. Timing of Power Sales Contracts

As the Formal Process progresses and the Authority begins contract negotiations with entities that receive allocations of post-2017 Hoover power, the Authority will also negotiate the terms of its federal contract for electric service with Western ("Post-2017 Western Contract"). Although these processes will occur concurrently, the Authority's governing statutes provide that the Authority must sign contracts with its customers before executing the Post-2017 Western Contract.

Specifically, under A.R.S. section 30-121(C), the Authority "shall not by definitive contract or agreement obligate or bind itself to take or purchase power from any source until it has previously or simultaneously procured purchasers therefor." The term "purchasers" is not defined in Title 30. However, the statutory provisions in Title 30 suggest that a "purchaser" is one who has a power purchase certificate and has entered into a power sales contract. *See* A.R.S. § 30-151 ("No person or operating unit . . . shall become a purchaser of electrical energy" unless it obtains a Power Purchase Certificate); *id*. § 30-155(A) ("The holder of a certificate may enter into a contract or contracts for the purchase of electrical energy . . ."); *id*. § 30-124(D) ("The authority may provide that the purchaser will pass along to its customers" costs savings "which result[ ] from its purchase of electrical energy covered by its contract with the authority"). The Authority's regulations also define "Purchaser" as a Qualified Entity that contracts to purchase power from the Authority. A.A.C. § R12-14-101(17).

It is thus reasonable to interpret A.R.S. section 30-121(C) to mean that the Authority must have power sales contracts with its customers in place before the Authority can execute the

Post-2017 Western Contract and obligate itself to take post-2017 Hoover power. Negotiations with Western will presumably take some time as the Authority meets with Western and other Hoover Contractors. The Authority intends to have its power sales contracts executed by fall of 2015 thereby enabling it to sign the agreed upon Post-2017 Western Contract by the end of 2015.

IV. KEY LEGAL ISSUES

Over a period of time, the Consultants have reviewed all of the correspondence and comments provided to them by interested parties regarding key legal issues influencing the Authority's allocation of power. The Consultants have also met with and discussed many of these key issues with various interested parties. The following is an analysis of the most significant legal issues, explaining the rationale for conclusions that were reached on these issues, as well as how these conclusions were factored into the draft proposals. As explained in the Introduction, Section IV is written as the Consultants' recommendation to the Authority regarding the legal requirements affecting the final allocation plan. Final determinations with respect to all of these legal requirements will be made by the Authority.

A. Schedule A Power

1. Eligible Entities

Schedule A power is power derived from the Authority's initial contracting for Hoover power, and it is allocated pursuant to the provisions of Title 30. Pursuant to Title 30, the Authority may transmit and deliver electric power to "qualified purchasers." A.R.S. § 30-121(C). A "qualified purchaser" is any person or operating unit privileged to purchase power from the Hoover Powerplant. *Id*. § 30-101(10). A "person" is any natural person engaged in the distribution of electric power, mutual and cooperative concerns or organizations, corporations, firms, business trusts, and partnerships. *Id*. § 30-101(6). An "operating unit" is any district, state agency, federal Indian agency, city, or town. Thus, to be eligible for an allocation of Schedule A power, an applicant must be a person or entity in one of these categories.

2. Preference Provisions

Preference means the priority of entitlement to power according to statute. *See* A.A.C § R12-14-101(16). Title 30 sets forth the preference provision that applies to the disposition of Schedule A power. "When available power supplies are insufficient to meet pending power applications, preferences shall be given to . . ." (1) districts; (2) incorporated cities or towns, or cooperatives subject to a limitation; (3) applicants other than districts using power primarily for irrigation or drainage or both; or if none of the first three categories apply, (4) any qualified applicant. A.R.S. § 30-125(A). The Authority anticipates that demand for post-2017 Hoover power will exceed the available power supplies and that it will have to apply this preference provision. Thus, the definition of "district" for purposes of Title 30, and specifically for purposes of A.R.S. section 30-125, is of significant importance.

a. Definition of "District"

As used in Title 30, "[d]istrict . . . means power organizations comprehended in [Title 30] or water organizations comprehended in Title 45, or both." A.R.S. § 30-101(4) ("Section 30-101(4)"). Section 30-101(4) evolved from a prior statute, and the legislation that enacted the predecessor statute indicates that the phrase "power organizations comprehended in this title or water organizations comprehended in Title 45" includes only those entities formed under a governing act that was included in Titles 30 or 45. This prior legislation defined a "District" as "power or water organizations comprehended in Articles 2 to 10 inclusive, Chapter 75, Arizona Code Annotated 1939 ["A.C.A. 1939"] and amendments and supplements thereto." Laws of Arizona 1944, Ch. 32, § 1. Articles 2 to 10 inclusive of Chapter 75 of the A.C.A. 1939 contain the governing acts for the following entities:

(1) Irrigation Districts. Articles 2, 3, and 4 of Chapter 75 of the A.C.A. 1939 provided for the formation of irrigation districts by landowners that desired to provide for irrigation of their lands. A.C.A. 1939 § 75-201.
(2) Irrigation Water Delivery Districts. Article 5 of Chapter 75 of the A.C.A. 1939 provided for landowners entitled to or capable of receiving irrigation

water to form a district to provide for the delivery of irrigation water to their lands. A.C.A. 1939 § 75-501.

(3) Electrical Districts. Article 6 of Chapter 75 of the A.C.A. 1939 provided for the formation of a district to distribute power to land primarily for the pumping of water for irrigation. A.C.A. 1939 § 75-601.

(4) Agricultural Improvement Districts. Article 7 of Chapter 75 of A.C.A. 1939 provided for the formation of a district by owners of agricultural lands that may have been recognized within the exterior boundaries of any federal reclamation project. A.C.A. 1939 § 75-701.

(5) Drainage Districts. Article 8 of Chapter 75 of the A.C.A. 1939 provided for the formation of a district by owners of land susceptible of drainage by the same system of works. A.C.A. 1939 § 75-801.

(6) Flood Control Districts. Article 9 of Chapter 75 of the A.C.A. 1939 provided for the formation of a district by owners of improved lands that are subject to overflow or threatened by the overflow waters of any natural watercourse. A.C.A. 1939 § 75-901.

(7) Power Districts. Article 10 of Chapter 75 of the A.C.A. 1939 provided for the formation of a district by owners of agricultural lands susceptible to cultivation by any power generation or distribution system. A.C.A. 1939 § 75-1001.

The legislation that originally adopted the definition of the word "District" referred specifically to the enabling statutes of specific entities. This same group of enabling statutes would ultimately be transferred to Titles 30 and 45, prior to their transfer to Title 48 in 1985.

In 1947, the Legislature retained the same definition of the word "District." Laws of Arizona 1947, Ch. 140, § 1. In 1952, the Arizona Legislature supplemented Chapter 75 of the A.C.A. 1939. The Legislature again retained the same reference to Articles 2 to 10 of Chapter 75 of A.C.A. 1939. A.C.A. 1939 § 75-1901. In 1956, Arizona overhauled its statutory scheme. The Arizona Legislature adopted the Arizona Revised Statutes, thereby creating what are now Titles 30 and 45. At that time, the Arizona Legislature drafted Section 30-101(4) to read "District . . . means power organizations comprehended *in this title* or water organizations comprehended *in title 45*, or both. A.R.S. Ann. § 30-101 (West 2002) (emphasis added).

The definition of the word "District" changed slightly when the Arizona Legislature moved A.C.A. 1939 section 75-1901 to Title 30. The Arizona Legislature necessarily modified the definition of "District" to reflect the relocation of the power and water organization

governing acts to Titles 30 and 45. Although a considerable amount of time passed between the original enactment (1944) and the subsequent amendment (1956), the slight revisions accounted for the relocation of the statutes and did not constitute a clear and distinct change in the substantive language defining "District."

The history of Section 30-101(4) shows that "Districts" are entities formed under specific enabling statutes. Because statutes operate prospectively unless the Legislature specifically provides otherwise (which is not the case here), Section 30-101(4) encompasses within the definition of "District" entities formed pursuant to subsequent governing acts included in Title 45 after the enactment of Title 30 in 1956. Since 1956, the Legislature has added acts governing water organizations to Title 45. Most importantly, in 1971, the Legislature enacted Chapter 13 of Title 45, providing for the formation of Multi-County Water Conservation Districts. A.R.S. Ann. § 45-2601 et seq. (West 2012).

In 1985, the Legislature passed Senate Bill ("SB") 1139. SB 1139 transferred the governing acts of all power and water organizations from Titles 30 and 45 to Title 48, as follows:

(1) Power Districts: Moved from Title 30, Chapter 2, Articles 1-5 to Title 48, Chapter 11, Articles 1-5. Laws of Arizona 1985, Ch. 190, § 12.
(2) Electrical Districts: Moved from Title 30, Chapter 3, Articles 1-4 to Title 48, Chapter 12, Articles 1-4. Laws of Arizona 1985, Ch. 190, § 13.
(3) Agricultural Improvement Districts: Moved from Title 45, Chapter 4, Articles 1-7 to Title 48, Chapter 17, Articles 1-7. Laws of Arizona 1985, Ch. 190, § 18.
(4) Drainage Districts: Moved from Title 45, Chapter 5, Articles 1-9 to Title 48, Chapter 18, Articles 1-9, and renamed "Drainage and Flood Protection Districts." Laws of Arizona 1985, Ch. 190, § 19.
(5) Irrigation Water Delivery Districts: Moved from Title 45, Chapter 7, Articles 1-4 to Title 48, Chapter 20, Articles 1-4. Laws of Arizona 1985, Ch. 190, § 21.
(6) Irrigation Districts: Moved from Title 45, Chapter 6, Articles 1-12 to Title 48, Chapter 19, Articles 1-12, and renamed "Irrigation and Water Conservation Districts." Laws of Arizona 1985, Ch. 190, § 20.
(7) Flood Control Districts: Moved from Title 45 Chapter 10, Article 1.1 to Title 48, Chapter 18, Articles 10-11, and renamed "Flood Protection Districts." Laws of Arizona 1985, Ch. 190, § 22.

(8) Multi-County Water Conservation Districts: Moved from Title 45, Chapter 13, Articles 1-2 to Title 48, Chapter 22, Articles 1-2. Laws of Arizona 1985, Ch. 190, § 24.

As of 1985, Titles 30 and 45 no longer contain any governing acts for either power organizations or water organizations. Even though the governing acts are no longer in Titles 30 and 45, Section 30-101(4) must be interpreted in a manner that makes the statute meaningful. Section 30-101(4) can be read so that the power and water organizations that were historically included by construction in Titles 30 and 45 are included in the definition of a "District." Interpreted any other way, the statute would be meaningless because there are no longer any acts governing power organizations in Title 30 or water organizations in Title 45.

Consistent with the Red Book issued in 1985, and the Authority's non-substantive revisions to its regulations in 2003, the Authority concludes that the definition of "District" in Section 30-101(4) refers to only those power and water organizations formed pursuant to governing acts that were in Titles 30 and Title 45, and were transferred to Title 48. The "Districts" that are eligible for an allocation of post-2017 Hoover power from Schedule A and also qualify for preference status under A.R.S. section 30-125 include:

(1) Power Districts: Moved from Title 30, Chapter 2, Articles 1-5 to Title 48, Chapter 11, Articles 1-5.
(2) Electrical Districts: Moved from Title 30, Chapter 3, Articles 1-4 to Title 48, Chapter 12, Articles 1-4.
(3) Agricultural Improvement Districts: Moved from Title 45, Chapter 4, Articles 1-7 to Title 48, Chapter 17, Articles 1-7.
(4) Drainage Districts: Moved from Title 45, Chapter 5, Articles 1-9 to Title 48, Chapter 18, Articles 1-9, and renamed "Drainage and Flood Protection Districts."
(5) Irrigation Water Delivery Districts: Moved from Title 45, Chapter 7, Articles 1-4 to Title 48, Chapter 20, Articles 1-4.
(6) Irrigation Districts: Moved from Title 45, Chapter 6, Articles 1-12 to Title 48, Chapter 19, Articles 1-12, and renamed "Irrigation and Water Conservation Districts."
(7) Flood Control Districts: Moved from Title 45 Chapter 10, Article 1.1 to Title 48, Chapter 18, Articles 10-11, and renamed "Flood Protection Districts."

(8) Multi-County Water Conservation Districts: Moved from Title 45, Chapter 13, Articles 1-2 to Title 48, Chapter 22, Articles 1-2.

b. Limitations Applicable to Cities, Towns, and Cooperatives

The second preference class includes: "[a]ny incorporated city or town, or any cooperative serving its own members only, to the extent of the difference between its existing contracts for purchase of power generated by the waters of the main stream Colorado River from whomever purchased and seventeen million five hundred thousand kilowatt hours per annum." A.R.S. § 30-125(A)(2). The Authority interprets this statutory language to mean three types of entities are eligible for the second preference class: (1) an incorporated city; (2) a town; or (3) a cooperative serving its own members only. That is, the qualification "serving its own members only" applies to cooperatives, not cities and towns. The limitation on the amount of power applies to all three types of entities, and "preference" applies only "to the extent of the difference." Thus, after "Districts," preference for Schedule A power is given to:

- an incorporated city for the amount of power equal to 17,500,000 kWh minus existing contracts for purchase of power from Hoover Dam, Parker-Davis Project, Glen Canyon Dam, or another federal power project on the main stream Colorado River;
- a town for the amount of power equal to 17,500,000 kWh minus existing contracts for purchase of power from Hoover Dam, Parker-Davis Project, Glen Canyon Dam, or another federal power project on the main stream Colorado River; and
- a cooperative serving its own members only for the amount of power equal to 17,500,000 kWh minus existing contracts for purchase of power from Hoover Dam, Parker-Davis Project, Glen Canyon Dam, or another federal power project on the main stream Colorado River.

3. Allocating within a Preference Class

Although the Authority has discretion to allocate electricity within each preference category under A.R.S. section 30-125(A), several statutory and regulatory provisions provide guidance or factors for the Authority to consider. Pursuant to A.R.S. section 30-124(B), the Authority shall dispose of electric power "in an equable manner so as to render the greatest

public service and at levels calculated to encourage the widest practical use . . . ." A.R.S. § 30-124(B). These factors guide the Authority's discretion to allocate electricity within each preference category. Furthermore, A.A.C. section R12-14-201(J) provides that the Authority "shall allocate Long-term Power equitably among Qualified Entities in the same preference class based on the needs of the Entities and the type of use of Long-term Power." The "needs of the Entities" and "the type of use of Long-term Power" are additional factors that the Authority must consider when allocating power among entities in the same preference class.

B. Schedule B Power

1. Eligibility Under A.R.S. Sections 45-1708 and 45-1710

a. Reconciling Provisions in the State Water and Power Plan

For purposes of allocating post-2017 Hoover power, the Authority concludes that entities eligible for a Schedule B allocation include municipalities, districts, or public utilities as those terms are defined in A.R.S. section 45-1702, but not groundwater replenishment districts established under Title 48, chapter 27. *See* A.R.S. § 45-1710. The Authority understands that it employed a more restrictive interpretation of eligibility in 1985. Specifically, the Authority stated in the Red Book that only public utilities providing electrical service and districts organized to provide electrical service were eligible for a Schedule B allocation. After additional analysis, and taking into account other provisions of the State Water and Power Plan, the Authority finds the interpretation offered in the Red Book to be inaccurate. As explained above, the Red Book is not legal precedent, and the Authority does not consider its 1985 interpretation to be appropriate or applicable to the post-2017 allocation process.

"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." *Kriz v. Buckeye Petroleum Co.*, 701 P.2d 1182, 1185 (Ariz. 1985) (citations omitted). A 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*.

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. When all of these provisions in the State Water and Power Plan are examined together, these statutes are not clear. 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.

If the statute 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." *State v. Simmons*, 240 P.3d at 280 (internal quotations omitted). Furthermore, "[c]ourts 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, "interpret statutes to give meaning to every word").

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. Rather than interpreting statutes in a manner that renders one section meaningless, the Authority should adopt an interpretation that harmonizes the related provisions in the State Water and Power Plan. *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' ").

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. For example, Section 45-1708 sets forth the limitations applicable to the contracts for uprating power: the power must be sold at "wholesale," to power purchasers in the state and at rates to cover the Authority's bond issuance. 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 gives operative effect to the two related sections.

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. The Legislature added this prohibition on contracts with certain groundwater replenishment districts when it amended Section 45-1710 in 1991. 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.

This clause also 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 on eligibility in the State Water and Power Plan. *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.").

To reconcile both provisions, the Authority interprets Section 45-1710 as allowing the Authority to enter into contracts with municipalities, districts, and other public bodies, but not groundwater replenishment districts organized under title 48, chapter 27, for the sale and transmission of power under the State Water and Power Plan. Section 45-1708 provides the specific terms for such contracts, including terms for contracts with public utilities providing electrical service and districts organized to provide electrical service. As an additional eligibility requirement, Schedule B/Hoover uprating power must be sold to power purchasers within the state of Arizona. A.R.S § 45-1708(B). 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.

b. Accounting for "Wholesale"

Power from "power projects in the state water and power plan shall be sold at wholesale only." A.R.S. § 45-1708(B). 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 power under Title 45 to entities that do not resell power but "distribute." Any other interpretation would not give meaning to the disjunctive "or" utilized in the statute.

The interpretation of Section 45-1710 provided above does not violate the unambiguous mandate to sell Hoover uprating power at "wholesale." 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).

Based on the above analysis, municipalities, districts, and other public bodies are eligible to contract for Hoover uprating power under Section 45-1710, as provided in Section 45-1708. "Municipalities" and "districts" are defined terms in Section 45-1702; "public bodies" is not a defined term. Due the limitation in Section 45-1708, the Authority's contract with a "public body" for the sale of Hoover uprating 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.

c. Summary

To give effect to all the relevant provisions of Title 45, the Authority interprets 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.

2. Preference Provision

Under A.R.S. section 45-1708(B), the Authority must grant non tax-exempt public utilities an option to purchase the maximum amount of said capacity permitted by federal regulations governing the issuance of tax-free bonds. For allocating post-2017 Hoover power from Schedule B, the Authority will assume that current regulations allow non tax-exempt public utilities to purchase up to 25 percent of the Schedule B resource.

C. Schedule D Power

1. D-1 Power

Western allocated D-1 power to new allottees located in the marketing area for the Boulder City Area Projects according to its Final Marketing Criteria. Western's Final Marketing Criteria do not apply to the Authority's allocation of D-2 Power, or any other power allocated to the Authority in the 2011 Act for further allocation in the State of Arizona. Western accurately explained that the Final Marketing Criteria only apply 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." 79 Fed. Reg. 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*.

2. Eligibility under Federal Law for D-2 Power

Unlike Schedule A and Schedule B, the 2011 Act includes conditions for eligibility for allocations of Schedule D power, which differ slightly based on whether Western is allocating power from Schedule D (D-1) or the Authority is making the allocation (D-2). According to the language of the 2011 Act and principles of express federal preemption, these conditions for D-2 power control the types of entities that may receive allocations from the Authority. To be eligible for a D-2 allocation under federal law, an entity must be a "new allottee" in the State of Arizona and must use Schedule D capacity and energy "in the marketing area for the Boulder City Area Projects." 43 U.S.C. § 619a(a)(2)(D).

The 2011 Act defined "new allottees" as "entities not receiving contingent capacity and firm energy under subparagraphs (A) and (B) of paragraph (1) . . . ." § 2(d), 125 Stat. at 779. The only "subparagraphs (A) and (B) of paragraph (1)" that could have been referenced in the 2011 Act were those that are now contained at 43 U.S.C. sections 619a(a)(1)(A)-(B). Because the term "new allottees" is defined, and the definition is unambiguous, under most circumstances, it would be appropriate for the Authority to conclude that "new allottees" are those entities not receiving contingent capacity and firm energy under either Schedule A or B of the 2011 Act (post-2017 A or B power). Such a reading would mean that any entity, including an entity that received either Schedule A or B power under the 1984 Act, is eligible for D-2 power unless and until it receives an allocation of post-2017 A or B power. This reading, however, 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. *See* H.R. Rep. No. 112-159 at 3 (2011). It would be nearly impossible to guarantee that Hoover power would be available to new customers if all of the entities that received capacity and energy under either Schedule A or B of the 1984 Act (post-1987 A or B power) could compete for a relatively small Schedule D pool. In order to interpret the statute in a manner that is logical, "new allottees" must mean

entities not receiving post-1987 A or B power. As a matter of federal law, therefore, "new allottees" are those entities that are not receiving an allocation of post-1987 A or B power.

Having reached this conclusion, one must also consider whether sub-paragraphs (A) and (B) of paragraph (1) of the 2011 Act, 43 U.S.C. § 619a(a)(1)(A)-(B), have further application to the allocation of post-2017 Hoover power. In other words, is an entity a "new allottee" if it receives an allocation of post-2017 Schedule A or B power?

In the broader statutory scheme, the term "new allottees" may have different meanings. The Authority, when allocating D-2 power, can coherently apply the term "new allottees" such that the phrase "under subparagraphs (A) and (B) of paragraph (1)" logically refers to post-2017 A or B power. That, of course, is what it has done here. However, the term "new allottees" need not have the same meaning in all sections of the statute. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997).

While the legislative history directs a conclusion that "new allottees" means entities not receiving post-1987 A or B power, *see* H.R. Rep. No. 112-159 at 3, this same legislative history also supports an interpretation that "new allottees" means entities not receiving post-2017 A or B power. Again, the legislative purpose of Schedule D—to distribute Hoover power more broadly—is served by interpreting the term "new allottees" to mean entities not receiving post-2017 A or B power. This interpretation precludes an entity from receiving D power if it is receiving post-2017 A or B power. *See* 157 Cong. Rec. H6476, 6479 (2011). In light of this legislative history, it is reasonable to conclude that Congress intended the term "new allottees" to mean entities not receiving post-1987 *and* post-2017 A or B power.

This result is appropriate as a matter of statutory construction. A term may have more than one meaning from a temporal perspective, particularly when such an interpretation is more consistent with the statutory scheme. *See Robinson,* 519 U.S. at 345. Again, the purpose of the Schedule D statutory scheme is to more broadly distribute Hoover power. With respect to the Authority's allocation of D-2 power, if "new allottees" also includes entities not receiving post-

2017 A or B power, this purpose is achieved. Therefore, it is reasonable to conclude that the term "new allottees" means entities not receiving post-1987 A or B power *and* entities not receiving post-2017 A or B power. This would mean that if an entity receives either post-2017 A or B power, it cannot also receive D-2 power. It also means that if an entity receives D-2 power, it cannot also receive post-2017 A or B power. With respect to D-1 power allocations, an entity that receives D-1 power from Western may not receive post-2017 A or B power from the Authority.

While this conclusion is supported by the legislative history of the relevant statutory provisions, because of the ambiguity inherent in these statutory provisions, the Authority could decide to address this issue as a matter of policy. The policy consideration and associated discussion is found below at Section V.D.

3. Application of State Law to D-2 Power

In addition to implementing the federal eligibility conditions, the Authority must comply with state law when it allocates D-2 power. State law provides two different statutory schemes for allocating power under the Authority's jurisdiction: Title 30 and Title 45. Because state law provides no specific guidance on how to allocate Schedule D power, one must explore the various means by which the Authority could do so.

One analysis attempts to understand how to allocate Schedule D power by tracing how that pool of power was created. Schedule D power was created from adjustments to the amounts of the Contractors' allocations of power from Schedules A and B in the 1984 Act. In turn, the capacity and energy in Schedules A and B of the 1984 Act are attributable to non-uprating facilities and uprating facilities, respectively. Therefore, as a method of complying with the requirement that the Authority sell and contract for uprating power pursuant to Title 45, the Authority could use the percentages of 1984 Act Schedule A and B capacity and energy relative to the total 1984 Act capacity and energy as the basis for subdividing D-2 power.

The 503 MW of capacity and 767,214,000 kWh of firm energy in Schedule B of the 1984 Act constitute the capacity and energy associated with the uprating project. *See* 1984 Act § 105(a)(1)(B), 98 Stat. at 1336 (authorizing "contracts for delivery commencing June 1, 1987, or as it thereafter becomes available, of capacity resulting from the uprating program and . . . associated firm energy . . . as specified in the following table"). All 1448 MW of capacity and associated firm energy in Schedule A of the 1984 Act was associated with non-uprating facilities. *See* General Consolidated Power Marketing Criteria or Regulations for Boulder City Area Projects, 48 Fed. Reg. 20,872, 20,875 (May 9, 1983) ("Reclamation has published a special report, entitled 'Hoover Powerplant Uprating Special Report,' U.S. Department of the Interior, Bureau of Reclamation (May 1980), that indicates the powerplant will actually produce 1450 MW at rated head.") The capacity and energy in Schedule A in the 1984 Act reflected the capacity and energy that Congress allocated for renewal contract offers to the original contracting parties, including the Authority. *See* 1984 Act § 105(a)(1)(A), 98 Stat. at 1336. The capacity associated with these renewal contracts existed prior to, and was distinct from, the uprating program authorized in the 1984 Act. *See* 48 Fed. Reg. at 20,885 (Western identified the capacity "in excess of renewal offers to be reserved for allocation . . . within Arizona, California and Nevada" as 503 MW).

In 2011, Congress used the 1984 Act Schedule A and B percentages to develop the Schedule D pool. The House Report for the 2011 Act states that Section 2(a) of the 2011 Act amends the 1984 Act "to increase the Schedule A contingent capacity at Hoover Dam proportionally based on the maximum dependable operating capacity [2074 MW], and then reduces the Schedule A summer and winter firm energy by 5% of the amount to be provided after October 1, 2017, to existing Schedule A contractors." H.R. Rep. No. 112-159 at 2. Further, the House Report states that Section 2(b) of the 2011 Act amends the 1984 Act "to increase the Schedule B contingent capacity proportionally based on the maximum dependable operating capacity [2074 MW], and then makes a 5% reduction in summer and winter firm energy after October 1, 2017, to existing Schedule B contractors." *Id*. at 3. Finally, the House Report states that Section 2(d) of the 2011 Act amends the 1984 Act by "directing the Secretary of Energy to

create a new Schedule D from the *apportioned allocation* equal to 5% of Schedules A and B of contingent capacity and firm energy after October 1, 2017." *Id*. (emphasis added).

With respect to the difference between the maximum dependable operating capacity identified by Congress (2074 MW), and the total capacity allocated in the 1984 Act (1951 MW), the legislative and regulatory history supports a determination that the difference is proportionally attributable to non-uprating and uprating facilities. First, the capacity and energy in Schedule A of the 1984 Act was attributable to non-uprating facilities as Schedule A of the 1984 Act represented renewal offers to the existing contractors. *See* 48 Fed. Reg. at 20,875 ("The energy offered for renewal is generally the present allocated percentage of 3665 MkWh, the average of total Boulder Canyon Project energy sales . . ."). The 503 MW of additional capacity in Schedule B of the 1984 Act was attributable to the uprating project. Further, it was documented that under the right circumstances, maximum dependable operating capacity may have been higher than original ratings. *See* 48 Fed. Reg. at 20,875 (Reclamation's determination that the original facilities could produce 1450 MW instead of 1340 MW). It is therefore reasonable to assume that both the non-uprating facilities and the uprating facilities contribute proportionally to the maximum dependable operating capacity of 2074 MW.

In the 1984 Act, Schedule A included 1448 MW, or about 74% of the total allocated capacity of 1951 MW. Schedule B contained 503 MW, or about 26% of total capacity. For energy, Schedule A contained 3,759,787,000 kWh, and Schedule B contained 767,214,000 kWh. As a percentage of the 4,527,001,000 kWh total, Schedule A and B included about 83% and 17%, respectively.

Applying these proportions to the 11,510 kW of D-2 capacity that the Authority will allocate results in 8542 kW attributable to Schedule A/non-uprating facilities, and 2968 kW attributable to Schedule B/uprating facilities. Applying these percentages to the 25,113,000 kWh of energy results in about 20,856,975 kWh attributable to Schedule A/non-uprating facilities, and 4,256,025 kWh to Schedule B/uprating facilities. Under this analysis, for the pool of D-2 capacity and energy attributable to adjustments in Schedule A ("D-2/A"), the Authority would

apply the eligibility and priority requirements in Title 30 discussed in section IV.A. For the pool of D-2 power attributable to adjustments in Schedule B ("D-2/B"), the Authority would use the eligibility requirements in Title 45 discussed in section IV.B.

An alternative means of allocating D-2 power has been suggested by representatives of the electric cooperatives (Co-ops). Noting that Arizona law does not define "uprating" it has been suggested that rather than tracing the source of how Congress created Schedule D power to Schedules A and B, and thus making a legal determination that allows federal law to govern Arizona's allocation of D-2 power, it would be more appropriate to disregard this link to the federal statutory structure and instead determine, as a matter of fact, the quantity of power that was made available from uprating. If the total power allocated to Arizona within Schedules B and D does not exceed the amount of power factually generated and attributable to the uprating project or program, or decrease the amount available to be allocated pursuant to Title 30, then the Authority should allocate all of its D-2 power pursuant to Title 45. Proceeding as is proposed by the Co-ops will provide a greater amount of flexibility to the Authority because Title 45 provides the Authority with a greater degree of discretion in making allocations than does Title 30.

The Co-ops make a factual showing (with reference to documents generated by Western, dated May 6, 2008) that 123 MW of uprating power were available in 1984, but not allocated under Schedule B. They further note that since only 104 MW were allocated to Schedule D in the 2011 Act, then factually all of the 2011 Act Schedule B and D power can be attributable to the uprating and consequently allocated pursuant to Title 45. The Consultants do not recommend proceeding based upon this "factual" alternative because the documents relied upon by the Co-ops do not necessarily support the factual assertions that are made. This factual argument rests on the assumption that the nameplate capacity of the original Hoover powerplant was 1340 MW, and all power generated above 1340 MW up to the 2074 MW allocated under the 2011 Act is uprating power. However, it is documented that the original Hoover powerplant operated at approximately 1450 MW capacity prior to the construction of the uprating facilities, and this was the approximate capacity amount allocated in Schedule A of the 1984 Act and put under contract with the Schedule A Contractors. *See* 48 Fed. Reg. at 20,875.

Notwithstanding the foregoing and assuming that greater flexibility in the allocation of Schedule D-2 power is a good thing, an alternative to both of the above described analyses would seem appropriate. This alternative begins by taking a step back to view the issues in a broader context.

Title 30 provides all of the general authority associated with the APA, but there is no specific direction about what kind of power is to be allocated under Title 30. This is not surprising since at the time of its enactment, there was only one kind of Hoover power that was available.

Title 45 was the vehicle the Legislature utilized when it determined how a new kind of Hoover power was to be allocated. Title 45 deals with the State Water and Power Plan and the allocation of Schedule B Power, then called "uprating" project or program power. Schedule B Power was clearly to be allocated pursuant to its provisions with the so-called Schedule A Power remaining allocated pursuant to Title 30. *See* § 45-1703(C) (excluding Schedule A Power from allocation pursuant to Title 45, and providing that power made available from Hoover power plant modifications and the Hoover power plant uprating project will be allocated pursuant to Title 45.)[6]

Notwithstanding the fact that Congress created Schedule D by taking power away from what otherwise would have been included in Schedules A and B, this "fact" makes no material

[6] Note that the 1984 Act describes Schedule A as "Long Term Contingent Capacity and Associated Firm Energy Reserved for Renewal Contract Offers to Current Boulder Canyon Project Contractors" and Schedule B is described as "Contingent Capacity Resulting From the Uprating Program and Associated Firm Energy." *See* 1984 Act, § 105(A), (B). These descriptions fairly well track the language of Titles 30 and 45. The 2011 Act amended the description of Schedule A power as " Long-term Schedule A Contingent Capacity and Associated Firm Energy for Offers of Contracts to Boulder Canyon Project Contractors" and the description of Schedule B power was described as "Long-Term Schedule B Contingent Capacity and Associated Firm Energy for Offers of Contracts to Boulder Canyon Project Contractors." *See* 2011 Act, §2 (a), (b). As noted in the basic analysis within the Revised Draft Plan, the Consultants believe that these two schedules need to be read in historic context.

difference when one seeks a state law mandate to understand how to allocate Schedule D Power. That is, Schedule D Power is new and it is distinct from Schedule A or B Power.[7] Because it is neither Schedule A nor B power, no state statute addresses how Schedule D power is to be allocated. Because state law is silent in this regard, the determination of how to allocate Schedule D power is left to the discretion of the Authority to determine. The Authority's sole legal limit is the combined statutory authority and limits provided for in Titles 30 and 45. In this regard, the Authority, would determine whether to allocate Schedule D power pursuant to Title 30, pursuant to Title 45, or through a hybrid of both titles.

It has been argued that if the power being allocated is not "uprating" power it must be allocated pursuant to Title 30. A.R.S. section 30-121 provides, for example, the APA's general powers related to power made available from the main stream of the Colorado River, and section 30-124 provides, in general, for the disposition of electric power within APA's jurisdiction. However, these general propositions, while enumerating important powers and limitations of power, do not mandate that Schedule D power be allocated solely pursuant to Title 30. Indeed, these provisions apply equally to the allocation of power pursuant to Title 45.

Title 45 has been characterized as applying only to the allocation of power derived from the uprating project. This characterization stems from the language in A.R.S. section 45-1703(C), which provides that uprating power shall be sold by the authority pursuant to this article, i.e., Title 45. There is nothing, except the requirement that power sold under the original contract, or Schedule A Power, be allocated pursuant to Title 30 (*see* first clause in section 45-1703(C)), that precludes another kind of power from being allocated pursuant to Title 45. Since Schedule D power is not Schedule A power, there is nothing to preclude it from being allocated by the Commission pursuant to Title 45.

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[7] The description of Schedule D power found in the 2011 Act is "Long-term Schedule D Resource Pool of Contingent Capacity and Associated Firm Energy for New Allottees". This description is new and distinct from the Schedule A and B pools which trace back to the original pre-1984 Contractors and to the uprating program, respectively.

In looking for direction on how to best proceed, it is striking that the Title 30 mandate includes:

- The ability to take steps as may be necessary, convenient or advisable to dispose of electric power within its jurisdiction; and
- The direction to dispose of electric power in an equable manner so as to render the greatest public service and at levels calculated to encourage the widest practical use of electrical energy.

It would appear, therefore, that if these Title 30 mandates can be met by allocating Schedule D power pursuant to the provisions of Title 45, then, that is within the authority and discretion of the Commission. Likewise, if meeting the mandates of Title 30 are best met by allocating Schedule D power pursuant to the provisions of Title 30, then, it would appear that proceeding in that manner would likewise be within the discretion of the Commission. Finally, there would seem to be no bar to it doing so, if the Commission deems that the mandate of Title 30 can be best met by allocating some Schedule D Power pursuant to Title 30 and some pursuant to Title 45.

Neither Title 30 nor Title 45 contemplates Schedule D power. Since there is no actual mandate on how Schedule D Power is to be allocated, the Commission could exercise its discretion to allocate D-2 Power either under Title 30 or Title 45 or both. It could be argued that a hybrid approach would be best. In this context, the Commission could allocate a specific quantity of Schedule D power to qualifying Districts pursuant to Title 30, and then allocate the remaining power pursuant to Title 45. In this way the Commission can both honor the preferences provided for in Title 30 and also utilize the greater allocation flexibility provided for in Title 45. Allocation pursuant to Title 45 can be justified because, among other things, the exact amount of power that is attributable to "uprating" is, at best, unclear.

The Commission will need to decide if it will exercise its discretion as outlined above in allocating D-2 Power.

4. Contracting and Power Purchase Certificates for D-1 or D-2 Allocations

Regardless of the methodology used to allocate D-2 power, the Authority will determine whether its allocation is being made pursuant to Title 30 or Title 45, or both. If the Authority determines the allocation of D-2 power is made pursuant to Title 30, then the Authority will require the entity receiving the allocation to obtain a Power Purchase Certificate under the necessary procedures. Conversely, if D-2 power is allocated pursuant to Title 45, then a Power Purchase Certificate will not be required

D-1 power allocated to non-tribal, new allottees in Arizona will be offered through the Arizona Power Authority. 43 U.S.C. § 619a(a)(2)(C)(ii). If the Authority contracts with a non-tribal D-1 allottee pursuant to Title 30, then the entity must obtain a Power Purchase Certificate from the Authority. The power purchase certificate requirements apply to a "Purchaser." A.R.S. § 30-151. A "Purchaser" is an entity that contracts to purchase Power from the Authority under either A.R.S. Title 30 or 45. A.A.C. § R12-14-101(17). If the Authority contracts with a non-tribal D-1 allottee under Title 30, then the non-tribal D-1 allottee is a Purchaser, and must obtain a Power Purchase Certificate.

D. Other Criteria and Requirements for Allocation and Contracting

1. Generally Applicable Provisions in Title 30

Certain provisions in Title 30 are generally applicable to the Authority's allocation and contracting processes for both non-uprating and uprating power, including D-2/A and D-2/B resources. This section contains an exhaustive list of these generally applicable provisions. Any Title 30 provision that is not identified is either superseded by Title 45, generally applicable but irrelevant to the post-2017 Hoover power allocation process, or does not apply because the statute is exclusive to Title 30.

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). 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. Title 45 also controls the disposition of Hoover uprating power and any matter related to contracts for Hoover uprating power. A.R.S. § 45-1703(C). The Title 30 provisions that are not superseded by Title 45 and are relevant to the Hoover power disposition and contracting process are as follows:

- 30-121(A): The Authority's ability to receive power developed from the Colorado River in the Authority's sovereign capacity is not addressed in Title 45;
- 30-121(C): This provision (excluding the contracting provision) is related to A.R.S. section 30-121(A) and the receipt and distribution of power resulting from section 30-121(A);
- 30-122(A): This provision deals with cooperation with agencies in the acquisition, construction, or operation of electrical transmission systems;
- 30-122(B): The issue of "operating units" and "persons" handling systems or facilities not under the jurisdiction of the authority is not addressed in Title 45;
- 30-123(A): The obligation to develop plans for the use of power applies to all power under the Authority's control, including Hoover uprating power;
- 30-124(B): The general mandate that the Authority must dispose of power, as nearly as practical, in an equable manner to render the greatest public service and at levels calculated to encourage the widest practical use of electrical energy generally applies because Title 45 does not contain qualitative principles affecting the disposition of Hoover power;
- 30-124(C): This provision establishes mandatory requirements for rates. Other than the rate requirement for public utilities providing electric service and districts organized to provide electric service in A.R.S. section 45-1708, Title 45 does not contain general rate requirements similar to those set forth in section 30-124(C);
- 30-124(D): The authority to adopt rules and regulations for the disposition of Hoover power generally applies to Hoover allocations;
- 30-124(D): The provision authorizing the Authority to require a purchaser to pass along the reduction in cost of service that results from its purchase of electrical energy covered by its contract with the Authority applies generally;

- 30-126: Title 45 does not contain any provisions concerning transmission lines upon which the uniform transmission voltage rate applies; and
- 30-127(A)-(D): Title 45 does not address transmission lines upon which the uniform transmission voltage rate applies.

2. Regulatory Criteria for Allocating Long-Term Power

The Authority's regulations provide that when allocating Long-term Power, the Authority "shall consider" the financial interest and obligation of the Authority, and the needs and interests of the Purchaser, the customers of the Purchaser, and prospective Purchasers. A.A.C. § R12-14-201(I). The Authority's regulations also provide that "[i]n deciding whether to allocate or reallocate Long-term Power, the Authority shall consider other sources of Power available to the prospective Purchaser from the federal government." *Id*. § R12-14-201(K). These criteria apply to the allocation of power from all schedules, and consideration of these criteria is mandatory.

V. KEY POLICY DECISIONS

The following sections represent various policy considerations that the Consultants have identified and that interested parties have raised during the Preliminary Process. The sections identify the relevant considerations and outline the options for the Commission. Moreover, interested parties have requested the opportunity to present their policy arguments to the Commission before the Formal Process begins. Currently, it is anticipated that this will take place in January of 2015. For purposes of this Revised Draft Plan, the Consultants have not offered a recommendation on these policy decisions. When the Authority presents its preliminary proposal, at that time, the Commission will indicate its initial decisions on these policy issues.

A. Financial Considerations

Under the Authority's regulations, the Authority, when allocating Long-term Power, shall consider the "financial interest and obligation of the Authority." A.A.C. § R12-14-201(I) This

regulatory mandate is consistent with the Authority's statutory obligations to operate as a self-sufficient agency. *See, e.g.*, A.R.S. §§ 30-121(C), 30-122(C). These mandates also become significant when considering the Authority's current and future bond issuances.

When adopted in 1967, the State Water and Power Plan Act was intended to provide the statutory authority for the State of Arizona, by way of the Authority, to finance the construction of the CAP. Attempts to pass federal legislation financing the project had been unsuccessful for several years. For this reason, A.R.S. section 1707 grants the Authority the power to issue bonds in an amount sufficient to fund the construction, reconstruction, and improvements of the CAP. *See* A.R.S. § 45-1707(A). Ultimately, it was unnecessary for the Authority to issue bonds to finance the CAP as Congress passed the Colorado River Basin Project Act in 1968.

Instead, in response to the requirements under the 1984 Act for advanced funding from the states, the Authority used its powers under Title 45 to issue multiple bond series to finance the Hoover uprating project. For each bond series, the Authority pledged its power sales contracts for post-1987 Hoover power as security.[8] The amounts paid by the Authority's Customers provided the primary source of revenue for the repayment of the bonds. As the Official Statements for the bond issues note, a Customer's ability to make payments under its power sales contract depends on the Customer's ability to collect rates, fees, and charges from its customer base, which in turn depends on the agricultural economy in Arizona. Many of the Authority's Customers are irrigation and electrical districts with agricultural users. The Authority continues to pay its current debts according to past bond issues using revenues from power sales contracts.

During the post-2017 period, the Authority will undoubtedly consider future bond issues to finance improvements to electrical grid infrastructure and the Hoover Powerplant. Thus, the

[8] Although the Authority's bonds were issued under Title 45, Title 45 makes clear that all power sales contracts may be pledged as security for bonds, not just contracts for sale of power from the uprating project. *See* A.R.S. §§ 45-1707(C).

Authority may consider a potential Customer's ability to make payments under a power sales contract a factor of paramount importance. *See* A.A.C. § R12-14-201(I). The Authority may also require, similar to the Red Book,[9] a letter of creditworthiness or comparable information as a condition of the power sales contract offered to a potential Customer.

B. Schedule B Power

In addition to the legal requirements, there are certain policy considerations specific to Schedule B allocations based on the relationship between Hoover power and the operation of the CAP. The Authority must allocate Schedule B/uprating power according to the State Water and Power Plan, which consists of CAP, its appurtenant works and facilities and the Hoover power plant uprating project. A.R.S. § 45-1702. Other provisions in Chapter 10 of Title 45 demonstrate the Legislature's intent to use the State's power resources to support the State's water resources, and vice versa. A.R.S. § 45-1701(3)-(4) (declaring that the state's power resources must be developed to provide effective support for the state's water program); § 45-1704(A); § 45-1708(B) (authorizing the sale of uprating power in the manner and on the terms and conditions that effectuates the purposes of the State Water and Power Plan). According to these statutory directives, the power resources in the State Water and Power Plan (i.e., Hoover uprating power) must be employed to support the water projects in the State Water and Power Plan (i.e., the CAP).

C. Schedule C Power

The State of Arizona is entitled to a certain amount of excess energy from "Schedule C," that is, the energy that is available respectively to the States of Arizona, Nevada, and California in excess of 4,501.001 million kilowatt-hours in any year of operation. 43 U.S.C.

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[9] In the allocation of post-1987 power, the Authority required, "[i]n connection with the Authority's power purchase contracts and its financing program for the Hoover Uprating Project, each purchaser . . . to provide financial data and certification regarding such financial data." Red Book 25.

§ 619a(a)(1)(C). Interested parties were asked to comment on how the Authority should allocate excess energy that becomes available from Schedule C, i.e., as part of this allocation process or a more short-term process.

One commenter suggested that the process to allocate Schedule C power will depend on how much time the Authority will have to act in response to a notice that excess energy is available. If there is a considerable amount of time, then a subsequent allocation is feasible. If there is less time, then allocating excess energy should be addressed in this process. Another commenter suggested that Schedule C should be allocated equally to all Customers based on the power allocated during this allocation process. Other commenters proposed a structure for allocating Schedule C where Schedule B Customers are given a right of first refusal for an amount of Schedule C energy to bring the Schedule B capacity factor equal to the Schedule D capacity factors. Then, Schedule B and D Customers should have a right of first refusal to Schedule C, until each has a capacity factor equal to the Schedule A capacity factor. Thereafter, any excess energy from Schedule C should be offered proportionately to all APA Customers.

D. Schedule D Power

1. New Entities

Many commenters have expressed views on whether new entities that did not receive a post-1987 allocation should be permitted, as a matter of policy,[10] to compete for post-2017 Schedule A and B power. Stated differently, new entities are those that did not receive a post-1987 allocation of Schedule A and B power. These entities are eligible for post-2017 Schedule D power, but existing customers, with post-1987 allocations, are not eligible for the Schedule D pool. The argument continues by asserting that if existing customers cannot compete for post-

[10] The alternative legal arguments are discussed *supra* in Section IV.C.2.

2017 Schedule D power, then new entities should not be permitted to compete for post-2017 Schedule A and B power.

The converse argument has also been made. New entities have advocated for as much flexibility and discretion in the allocation process as possible, which they argue that the Authority may achieve by allowing the new entities that did not receive post-1987 power to apply for post-2017 power from Schedules A, B, and D.

The Authority may resolve this conflict as a matter of policy. For example, the Authority may find that entities receiving post-2017 A or B power may not also receive Schedule D power, and that any entity receiving either D-1 or D-2 power may not receive post-2017 A or B power because the Authority is more likely to achieve wider use by broadly distributing the Hoover power resource at its disposal to as wide a customer base as possible. *See* A.R.S. § 30-124(B).

2. D-2 Power

As has been articulated above in Section IV.C.3, the Authority may determine that D-2 power must be divided into D-2/A and D-2/B pools, allocated pursuant to Titles 30 and 45, respectively. In the alternative, the Authority, as a matter of discretion may allocate all of Schedule D power under its jurisdiction pursuant to Title 30, Title 45, or both.

E. Power Sales Contracts

1. Length of Contract Term

Under the 2011 Act, the Authority's contract with Western for power allocated to the State of Arizona for the post-2017 period will expire on September 30, 2067. 43 U.S.C. § 619a(a)(5)(A). The Authority may enter into contracts with its customers for the same term, i.e., 50 years. The Authority also has discretion to enter into contracts for a shorter duration. *See*

A.R.S. § 30-124(d) ("The Authority may fix and prescribe the terms and conditions of its electric sales contracts . . . ."); *see also id*. § 45-1708(B).

In the written comments submitted in response to the Draft Plan, many commenters supported a 50-year term for the power sales contracts that the Authority will enter into with its customers. The commenters explained that the Authority's contracts with its customers should match the term of the Authority's contract with Western. The customers spent significant amounts of time, effort, and resources to support the federal legislation and bring about its enactment, and they should benefit from the provision permitting a 50-year contract. Entities that contract for Hoover power in California and Nevada will also have 50-year contracts, and the entities in Arizona should be treated similarly. The commenters emphasized that the Authority's bond rating depends on long-term power sales contracts in place. The commenters also pointed out that the Authority's Resource Exchange and Banking Programs as well as the recapture and relinquishment provisions in the power sales contracts have adequately managed fluctuations in demand and other risks. The Authority does not need to use shorter contract terms as a tool for managing changed circumstances.

On the other hand, some commenters advocated for a shorter term of 25 years, citing the fact that the power industry has changed significantly over the last 30 years and will continue to change, and the customers' load base will continue to change. A shorter contract term may also be advisable given the possible, and perhaps significant, changes in the Authority's operations[11] and in the Authority's Customers' operations[12] in the upcoming years.

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[11] For instance, the Bureau of Reclamation currently operates Lake Mead according to the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, 73 Fed. Reg. 19,873 (Apr. 11, 2008). The interim guidelines terminate on December 31, 2025. *Id*. at 19,872.

[12] Under the Arizona Water Settlement Agreement, and the Arizona Water Settlement Act of 2004, Pub. L. No. 108-451, 118 Stat. 3478, a number of districts (and current Customers of the Authority) agreed to relinquish their long-term CAP subcontracts for non-Indian agricultural priority water in exchange for other relief. As a result of the agreement, by 2030, these districts will no longer have contractual rights to their short-term supply of CAP water and will rely solely on groundwater.

2. Modification/Termination Clause

For contracts governed by Title 30, 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 termination provision is a mandatory requirement, but "reasonable notice" is not strictly defined. For instance, in the power sales contracts for post-1987 Hoover power, the Authority's right to terminate was conditioned upon five years written notice to the customer. One commenter suggested that the Authority should address the termination requirement in A.R.S. section 30-127 in the same manner for power sales contracts for post-2017 Hoover power.

F. Minimum Allocation Requirement

In its Final Marketing Criteria, Western established a minimum allocation of 100 kW for each applicant. Final Marketing Criteria, 78 Fed. Reg. at 79,443. Western noted, however, that scheduling protocols require a one-megawatt minimum, and "smaller entities will likely need to formulate aggregation arrangements to facilitate deliveries." *Id*. at 79,441. The Authority may implement a similar minimum allocation requirement for this application process, depending on the limits imposed by the scheduling entity.

G. Substantiation of Data in Applications

The Authority's regulations provide that a written application for electric service shall include certain information. A.A.C. § R12-14-202(A). The regulations do not dictate whether the applicant can simply supply the information, or whether the Authority must require the submission of documentation to substantiate the information in the application. This is a decision for the Authority, acting within its discretion.

Some commenters expressed that the Authority should require that all substantive data dealing with power or water usage, loads, or power resources be substantiated using the most credible and informative documentation reasonably available to the applicant. The Authority could implement this suggestion and require an applicant to submit documentation to substantiate the reported data for power or water usage.

For D-1 power, Western followed a somewhat different process. In its Final Marketing Criteria, Western required the applicant to submit information, including geographic service area, type of customers, transmission arrangements, and the actual monthly maximum demand (kW) and energy use (kWh) experienced in one of the last three calendar years. 78 Fed. Reg. at 79,444. Western then issued its proposed allocation on August 8, 2014. Following the proposed allocation, prospective allottees had to provide documentation of actual load, such as meter verification reports, historical billing reports, or host utility reports, by October 3, 2014. Final D-1 Allocation, 79 Fed. Reg. at 75,546. Western published its final allocation on December 18, 2014, and "[a]ll final allocations are based on substantiated historical loads." *Id*.

Because of the restricted timeline for the Formal Process, the Authority cannot similarly allow applicants to supply information and then verify the load data with documentation several weeks after it issues its Preliminary Proposal. By this time, the Authority must have issued the notices of eligibility and proposed allocations. If it does not want to require documentation with the application, the Authority could ask the applicant to verify the application and then make entities that receive allocations of post-2017 power subject to an audit and recapture of any power that is not being used. Of course, this method requires more resources after the allocation process concludes.

H. Transmission Arrangements

Many of the D-1 allottees in Arizona are not utilities that own an electric system (transmission or distribution). Rather, they are located in the service area of another "host utility," such as the Arizona Public Service Company (APS) or the Salt River Project (SRP). *See*

Final D-1 Allocation, 79 Fed. Reg. at 75,545 (describing the methodology for applicant's within a host utility). Complicating this factor, host utilities (as well as the Authority) have limits on retail or wheeling agreements. APS and SRP are discussing with D-1 allottees the possibility of "benefit credit arrangements" where APS and SRP take delivery of Hoover power at the transmission level, on behalf of the allottee, use Hoover power to serve their total load, and then provide a credit to the allottee on its bill to reflect the cost savings. If these arrangements are finalized, then the Authority may decide to approve similar arrangements, assuming the Authority allocates D-2 power to entities that do not own electric systems.

I. Power Purchase Certificates

Commenters identified an issue related to, though distinct from, the general requirements for obtaining a Power Purchase Certificate. The Power Purchase Certificates issued by the Authority in March 1987 contain the following termination provision: "This certificate shall terminate upon termination of the Authority's Power Sales Contract with the above-named entity . . . ." ("PPC Termination Provision"). The PPC Termination Provision in the 1987 Power Purchase Certificates refers to the Power Sales Contract that the Authority signed with each customer dated September 15, 1986. The 1986 Power Sales Contracts terminate on September 30, 2017. The Authority must determine whether entities that hold a 1987 Power Purchase Certificate with the PPC Termination Provision must obtain a new Power Purchase Certificate prior to the Authority entering into a contract with these same entities for post-2017 Hoover power.

The Authority could interpret the PPC Termination Provision as referring to the 1986 Power Sales Contract, with the result that the 1987 Power Purchase Certificates expire on September 30, 2017. Alternatively, the Authority could, consistent with its regulations, adopt a policy that those entities holding 1987 Power Purchase Certificates with the PPC Termination Provision need not reapply for a Power Purchase Certificate. After 1987, the Authority adopted the following regulation: "[a] Power Purchase Certificate is in effect only during the time the holder of the Power Purchase Certificate has an existing Power Sales Contract". A.A.C. § R12-

14-203(E). A "Power Sales Contract" is defined as a contract under which the Authority sells Long-Term Power to a Purchaser. *Id*. § R12-14-101(15). These regulations provide the Authority the flexibility to adopt a policy that entities holding 1987 Power Purchase Certificates with the PPC Termination Provision need not reapply for a Power Purchase Certificate so long as the entity holds an existing Power Sales Contract.

A.A.C. section R12-14-203(E) establishes a condition precedent to a Power Purchase Certificate being effective. The holder of a Power Purchase Certificate must have an existing Power Sales Contract for a Power Purchase Certificate to be effective. The regulation is written in general terms referring to any certificate and any power sales contract, and does not specifically mention the 1987 Power Purchase Certificates. Thus, A.A.C. section R12-14-203(E) does not limit the Authority's power to adopt a policy that entities holding 1987 Power Purchase Certificates need not obtain new Power Purchase Certificates. In fact, the Authority may determine by resolution or some other action that, consistent with A.A.C. section R12-14-203(E), the 1987 Power Purchase Certificates with the PPC Termination Provision will remain effective so long as the holder is a party to any Power Sales Contract.

J. Treatment of Existing Customers

Customers with post-1987 Schedule A and B allocations explained their position that the Authority continues to be entitled to a statutory allocation of Hoover power because these Customers expended substantial amounts of time, effort, and money to protect and maintain the State's entitlement to Hoover power. The existing Customers successfully reached an agreement with California and Nevada, which formed the principles and basis of the 2011 Act, and then supported its enactment by Congress. 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. However, the existing Customers have expressed in numerous verbal and written comments their belief that, as a matter of policy, the Authority should renew these Customers' allocations, less five percent, for the post-2017 period.

K. Reimbursement

Some commenters have suggested that new allottees that receive a D-2 power allocation from the Authority should: (1) reimburse existing Customers a pro rata share of the Hoover Dam repayable advances paid by the Authority, relying on power sales from existing Customers; and (2) reimburse existing Customers for the cost of the post-2017 Hoover power allocation process, including expenses for legal and technical consultants.

Regarding the first matter, historically, the Bureau of Reclamation obtained appropriations from Congress to fund capital replacement at Hoover Dam. In 1995, Western, Reclamation, and the Hoover Contractors executed the "Implementation Agreement." In the Implementation Agreement, Hoover Contractors agreed to advance capital, a portion of which is to be repaid to the Hoover Contractors when existing Hoover contracts expire. As explained above, the 2011 Act requires the Authority's Post-2017 Western Contract to "authorize and require Western to collect from new allottees a pro rata share of Hoover Dam repayable advances paid for by contractors prior to October 1, 2017," and then "remit such amounts to the contractors that paid such advances in proportion to the amounts paid by such contractors as specified in section 6.4 of the Implementation Agreement." 43 U.S.C. § 619a(a)(5)(D). Thus, "new allottees" will be required to pay some share of repayable advances to Western, who will pass on those payments to the federal Hoover Contractors. The policy issue for the Authority is how to distribute the share of repayable advances paid to Western by the new allottees and then remitted to the Authority. The Authority may decide, in turn, to remit those funds to the Customers with post-1987 Schedule A and B allocations. Alternatively, the Authority may choose to use those funds for some other operations purpose, which in turn will reduce the Authority's expenses and the rates charged to all post-2017 Customers.

Regarding the second item, the Authority is currently incurring expenses for implementation of the post-2017 Hoover power allocation process, including costs for both legal and technical consultants. The rates paid by the Authority's existing Customers are funding this process. The policy issue for the Authority is whether "new allottees" that receive D-2 power

from the Authority should reimburse existing Customers for some proportionate share of the cost of the post-2017 Hoover power allocation process.

A.R.S. section 30-124(C) sets forth the Authority's powers with respect to electric rates. 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 . . . ." A.R.S. § 30-124(C). Under this provision, the Authority has broad discretion to require existing customers to pay proportionately for anything it deems *necessary* or *advisable* to deliver electricity. 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]." *Id*. § 45-1708(B). The Authority may impose charges for Hoover uprating power. *Id*. § 45-1709(4). These Title 45 statutes similarly provide broad contracting and rate-setting authority.

Relying on the statutes, the Authority could require new allottees to pay a proportionate share of the costs of the post-2017 Hoover power allocation process. Neither A.R.S. section 30-124(C), 45-1708(B), nor 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.

VI. DRAFT PROPOSED ALTERNATIVES

This section describes several different allocation methodologies that the Authority could use when it allocates post-2017 Hoover power. The descriptions refer to attached spreadsheets.

A. Background

As an initial step in the allocation process, the Authority requested that current Customers and interested, prospective Customers submit a Data Request form. Using this voluntarily

submitted data, the Consultants developed alternative allocation methodologies and presented some of these methodologies at the April 8, 2014 workshop. Later in the Preliminary Process, the Consultants developed a draft application based on the data standardization and submission topics raised at the public workshops and comment letters and addressed in the Issue Papers. The Authority and the Consultants asked interested parties to submit voluntary data consistent with the requirements in the draft application. This latter voluntary data request allowed the Consultants to test allocation methodologies based on data reported according to common standards.

Furthermore, the Commission has given some direction on certain policy issues. After observing the Consultants and interested parties discuss the difficulties associated with certain allocation methodologies, the Commission asked interested parties to comment on two policy issues: (1) should the Authority provide special consideration to agricultural uses of Hoover power in the final allocation plan, and (2) should the Authority recognize "pumping equivalent" loads, and adjust an applicant's historical load data to reflect monthly peak demands and energy consumption that would have occurred if the applicant were pumping groundwater to meet water demand. The Commission accepted comments on these issues at the September 16, 2014 Commission meeting and reviewed written comments as well.

As a result of this discussion with interested parties, the Commission adopted Resolution 14-7 on November 18, 2014. In Resolution 14-7, the Commission found that Titles 30 and 45 inherently provide special consideration for agriculture; in their application, the statutes sufficiently encourage and support irrigation and agricultural uses; and as a consequence, the preparation of an "agricultural load methodology" is not necessary in the Post-2017 Hoover Power Allocation Process. In addition, the Commission directed the Consultants to consider the use of "pumping equivalent" loads[13] for the purpose of determining if an applicant has excess,

[13] The alternatives and allocation methodologies herein sometimes refer to "normalized load." "Normalized load" is synonymous with "pumping equivalent" load, and means the peak demand and energy consumption that would have occurred if the applicant were pumping groundwater to meet water demand. Parties that submitted voluntary data have supplied this information.

permanent federal power resources, and adjust an applicant's historical load data to reflect peak demands and energy consumption that would have occurred if the applicant were pumping groundwater to meet water demand. Accordingly, the allocation methodologies presented in this Revised Draft Plan reflect the policy direction provided in Resolution 14-7.

With respect to determining whether an applicant has excess federal resources, some commenters raised the issue that because of environmental constraints, the power actually available to Colorado River Storage Project (CRSP) Contractors is the amount of Sustainable Hydro Power, which is less than the allocation amount or Contract Rate of Delivery. The commenters recommended that the Authority consider this SHP amount made available to the contractor versus some other amount. In the methodologies presented here, the Consultants used the CRSP allocation amount to determine "Federal Resource Test Needs." In the Formal Process, the Authority may decide to use the alternative SHP amount in this calculation when it issues its Preliminary Proposal.

Additionally, there are several methodologies presented for allocating D-2 power. Some of the methodologies rely on the analysis where D-2 power is split according to the proportion of power allocated under Schedules A and B; the portion attributable to Schedule A is allocated under Title 30 (D-2/A), and the portion attributable to Schedule B is allocated under Title 45 (D-2/B). Other methodologies rely on the analysis where the Authority allocates D-2 power under its combined statutory authority provided in Titles 30 and Title 45. With these methodologies, there are no references to "D-2/A" or "D-2/B." As explained above, the Authority must decide which analysis it will adopt and use in its Preliminary Proposal once the Formal Process begins.

These methodologies are not exclusive. Rather, the methodologies included in this draft document are intended to foster discussion that will aid the Authority in developing a methodical, well-reasoned final allocation plan.[14]

B. Alternative 1

Allocation Methodology for Schedule A and B: All entities currently receiving post-1987 Hoover power according to allocations in the Red Book receive the same allocations for post-2017 Hoover power, with a one percent capacity increase and a five percent energy decrease for both schedules.[15] An excess federal resource test is shown. Specifically, the term "Federal Resource Test Needs" refers to the entity's five-year normalized load minus the sum of the entity's allocations of federal hydropower from the Parker-Davis Project, CRSP, and post-2017 Hoover power allocated by Western (D-1). If the entity has excess resources, for Alternative 1, the entity's allocation of Schedule A power has not been reduced. In essence, Alternative 1 shows the "Customers' Proposal."

Allocation Methodology for Schedule D-2/A: Schedule D-2/A lists all entities that are not currently receiving Schedule A or B and that have provided voluntary data. "Districts," as that term is defined for purposes of Title 30, have priority. The districts' total requests are less than the 8.542 MW available in Schedule D-2/A; therefore, all "districts" receive their requested allocation. For the remaining power available in Schedule D-2/A, *all* of the remaining entities' five-year, averaged normalized loads, less any federal hydropower resources that they receive, are totaled. Each entity's proportional share of total load is shown as "% of Total 5 Yr Avg Load." The entity's proportional percentage is multiplied by the remaining D-2/A power (4.294

[14] It should be noted that the methodologies were developed with the assumption that the voluntary data submissions were accurate and verifiable. To the extent that the data relied upon are inaccurate, the Authority may need to modify its analysis of alternatives.

[15] The 2011 Act increased the amount of power available for allocation by one (1) percent while reducing the amount of energy available by five (5) percent. In some alternatives, the Authority's methodology parallels this respective increase and decrease in capacity and energy.

MW). If the product of this calculation is less than 0.100 MW, the entity is moved to Schedule D-2/B. The load for the remaining entities in Schedule D-2/A is retotaled, the percentage of load is recalculated, and the proportional percentage is applied to the 4.294 MW pool to determine the capacity and energy allocation for the post-2017 period.

Allocation Methodology for Schedule D-2/B: Schedule D-2/B lists the entities that were moved from Schedule D-2/A because they would not have received a 0.100 MW allocation after totaling all of the entities' loads and multiplying the proportionate percentage by the available pool of power. The five-year average normalized loads for these entities, less any federal hydropower resources that they receive, are totaled. Each entity's proportional share of total load is shown as "% of Total 5 Yr Avg Load." The entity's proportional percentage is multiplied by the total D-2/B power available (2.968 MW) to determine the capacity and energy allocation for the post-2017 period.

C. Alternative 2

Allocation Methodology for Schedule A: An excess federal resource needs test is performed. Specifically, the term "Federal Resources Test Needs" refers to the entity's five-year average normalized load minus the sum of the entity's allocations of federal hydropower from the Parker-Davis Project and CRSP. If the entity's "Federal Resource Test Needs" do not exceed the entity's post-1987 allocation, then the entity is initially allocated the same amount as its post-1987 allocation, with a one percent capacity increase and a five percent energy decrease. If the entity's "Federal Resource Test Needs" exceed the entity's post-1987 allocation, then the entity's post-2017 allocation is capped at the amount equivalent to its "Federal Resource Test Needs." This calculation results in 3.437 MW and associated energy. The 3.437 MW and associated energy are distributed equally among entities that pass the excess federal resources test, resulting in an additional 0.156227 MW of capacity to each entity.

Allocation Methodology for Schedule B: All entities currently receiving post-1987 Schedule B power according to allocations in the Red Book receive the same allocations for

post-2017 Schedule B power, with a one percent capacity increase and a five percent energy decrease.

Allocation Methodology for Schedule D-2/A: Schedule D-2/A lists all eligible new allottees that did not receive Schedule A or B above and that provided voluntary data. "Districts," as that term is defined for purposes of Title 30, have priority. The districts' total requests are less than the 8.542 MW available in Schedule D-2/A; therefore, all "districts" receive their requested allocation. For the remaining power available in Schedule D-2/A, *all* of the remaining eligible new allottees' five-year average normalized loads, less any federal hydropower resources that they receive, are totaled. Each entity's proportional share of total load is shown as "% of Total 5 Yr Avg Load." The entity's proportional percentage is multiplied by the remaining D-2/A power (4.294 MW). If the product of this calculation is less than 0.100 MW, the entity is moved to Schedule D-2/B. The load for the remaining entities in Schedule D-2/A is retotaled, the percentage of load is recalculated, and the proportional percentage is applied to the 4.294 MW pool to determine the capacity and energy allocation for the post-2017 period.

Allocation Methodology for Schedule D-2/B: Schedule D-2/B lists the entities that were moved from Schedule D-2/A because they would not have received a 0.100 MW allocation after totaling all of the entities' loads and multiplying the proportionate percentage by the available pool of power. The five-year average normalized loads for these entities, less any federal hydropower resources that they receive, are totaled. Each entity's proportional share of total load is shown as "% of Total 5 Yr Avg Load." The entity's proportional percentage is multiplied by the total D-2/B power available (2.968 MW) to determine a preliminary capacity and energy allocation. In this preliminary allocation, three entities did not meet an allocation of 0.100 MW. To increase these three entities' allocations to 0.100 MW, preliminary allocations for the other listed entities are reduced by 0.045 MW.

D. Alternative 3

Allocation Methodology for Schedule A: An excess federal resource needs test is performed. Specifically, the term "Federal Resources Test Needs" refers to the entity's five-year average normalized load minus the sum of the entity's allocations of federal hydropower from the Parker-Davis Project and CRSP. If the entity's "Federal Resource Test Needs" do not exceed the entity's post-1987 allocation, then the entity is initially allocated the same amount as its post-1987 allocation, with a one percent capacity increase and a five percent energy decrease. If the entity's "Federal Resource Test Needs" exceed the entity's post-1987 allocation, then the entity's post-2017 allocation is capped at the amount equivalent to its "Federal Resource Test Needs." This calculation results in 3.437 MW and associated energy. The 3.437 MW and associated energy are distributed equally among new "districts," i.e., districts that meet the definition of "district" under Title 30, that did not receive a post-1987 Hoover power allocation, and that provided voluntary data. This allocation methodology assumes that new districts would prefer an allocation from Schedule A that is less than their requested capacity allocation, rather than an allocation from Schedule D that is equal to their requested capacity allocation (less federal resources) because of the higher energy associated with Schedule A.

Allocation Methodology for Schedule B: All entities currently receiving post-1987 Schedule B power according to allocations in the Red Book receive the same allocations for post-2017 Schedule B power, with a one percent capacity increase and a five percent energy decrease.

Allocation Methodology for Schedule D-2/A: New districts have been moved to Schedule A. The remaining eligible new allottees' five-year average normalized loads, less any federal hydropower resources that they receive, are totaled. Each entity's proportional share of total load is shown as "% of Total 5 Yr Avg Load." The entity's proportional percentage is multiplied by the available D-2/A power (8.542 MW). If the product of this calculation is less than 0.100 MW, the entity is moved to Schedule D-2/B. The load for the remaining entities in Schedule D-2/A is retotaled, the percentage of load is recalculated, and the proportional

percentage is applied to the 8.542 MW pool to determine the capacity and energy allocation for the post-2017 period.

Allocation Methodology for Schedule D-2/B: Schedule D-2/B lists the entities that were moved from Schedule D-2/A because they would not have received a 0.100 MW allocation after totaling all of the entities' loads and multiplying the proportionate percentage by the available pool of power. The five-year average normalized loads for these entities, less any federal hydropower resources that they receive, are totaled. Each entity's proportional share of total load is shown as "% of Total 5 Yr Avg Load." The entity's proportional percentage is multiplied by the total D-2/B power available (2.968 MW) to determine a preliminary capacity and energy allocation. In this preliminary allocation, three entities did not meet an allocation of 0.100 MW. To increase these three entities' allocations to 0.100 MW, preliminary allocations for the other listed entities are reduced by 0.021 MW.

E. Alternative 4

Allocation Methodology for Schedule A: An excess federal resource needs test is performed. Specifically, the term "Federal Resources Test Needs" refers to the entity's five-year average normalized load minus the sum of the entity's allocations of federal hydropower from the Parker-Davis Project and the Colorado River Storage Project. If the entity's "Federal Resource Test Needs" do not exceed the entity's post-1987 allocation, then the entity is initially allocated the same amount as its post-1987 allocation, with a one percent capacity increase and a five percent energy decrease. If the entity's "Federal Resource Test Needs" exceed the entity's post-1987 allocation, then the entity's post-2017 allocation is capped at the amount equivalent to its "Federal Resource Test Needs." This calculation results in 3.437 MW and associated energy. The 3.437 MW and associated energy are allocated to Aguila Irrigation District, and Aguila Irrigation District does not receive any allocation from Schedule B for the post-2017 period.

Allocation Methodology for Schedule B: First, the post-1987 Schedule B capacity allocations (from the Red Book) are increased by one percent, and the energy allocations are

decreased by five percent. The Districts with post-1987 Schedule B allocations receive this amount for the post-2017 period, except for Aguila Irrigation District, which receives additional Schedule A power described above. The 3.88 MW and associated energy that is left is redistributed to the cities with post-1987 allocations of Schedule B power based on percentage of total normalized loads. The cities with post-1987 Schedule B allocations receive this amount in addition the amount of their respective post-1987 allocations, increased by one percent for capacity and decreased by five percent for energy.

Allocation Methodology for Schedule D-2: D-2 power is not split into D-2/A and D-2/B, and is allocated as one pool. All remaining eligible new allottees that have provided voluntary data are included. The 11.510 MW of capacity and associated energy are distributed according to proportional percentage of total five-year average normalized load. That is, the entities' five-year averaged, normalized load is totaled, each entity receives a percentage of total load, and the percentage is applied to the available pool of power to determine the capacity and energy allocation for the post-2017 period. Two Schedule D-2 spreadsheets are provided for this alternative. One spreadsheet shows the capacity and energy D-2 allocations, assuming there is no minimum allocation requirement. For the second spreadsheet, all preliminary allocations that are less than 0.100 MW are increased to a 0.100 MW allocation by reducing other entities' receiving preliminary allocations over 0.400 MW by 0.15 MW each.

F. Alternative 5

Allocation Methodology for Schedule A: An excess federal resource needs test is performed. Specifically, the term "Federal Resources Test Needs" refers to the entity's five-year average normalized load minus the sum of the entity's allocations of federal hydropower from the Parker-Davis Project and the Colorado River Storage Project. If the entity's "Federal Resource Test Needs" do not exceed the entity's post-1987 allocation, then the entity is initially allocated the same amount as its post-1987 allocation, with a one percent capacity increase and a five percent energy decrease. If the entity's "Federal Resource Test Needs" exceed the entity's post-1987 allocation, then the entity's post-2017 allocation is capped at the amount equivalent to

its "Federal Resource Test Needs." This calculation results in 3.437 MW and associated energy. The 3.437 MW and associated energy are allocated to Aguila Irrigation District, and Aguila Irrigation District does not receive any allocation from Schedule B for the post-2017 period.

Allocation Methodology for Schedule B: First, the post-1987 Schedule B capacity allocations (from the Red Book) are increased by one percent, and the energy allocations are decreased by five percent. The Districts with post-1987 Schedule B allocations receive this amount for the post-2017 period, except for Aguila Irrigation District, which receives additional Schedule A power described above. For the cities that received post-1987 Schedule B allocations, the 3.88 MW and associated energy that is left is added to the cities' post-1987 allocations, increased by one percent for capacity and decreased by five percent for energy, to create a pool of 10.4 MW and associated energy. The 10.4 MW and associated energy are distributed proportionally among these cities based on their percentage of total normalized load.

Allocation Methodology for Schedule D-2: D-2 power is not split into D-2/A and D-2/B, and is allocated as one pool. All remaining eligible new allottees that have provided voluntary data are included. New Districts receive a preference, and are allocated power in an amount equivalent to their respective "Federal Resource Test Needs." The remaining new allottees receive allocations based on proportional percentage of total five-year average normalized load. That is, the entities' five-year averaged, normalized load is totaled, each entity receives a percentage of total load, and the percentage is applied to the available pool of power (7.262 MW) to determine the capacity and energy allocation for the post-2017 period. Two Schedule D-2 spreadsheets are provided for this alternative. One spreadsheet shows the capacity and energy D-2 allocations, assuming there is no minimum allocation requirement. For the second spreadsheet, all preliminary allocations that are less than 0.100 MW are increased to a 0.100 MW allocation by reducing other entities' preliminary allocations in the total amount of 0.749 MW.