

**GOVERNOR’S REGULATORY REVIEW COUNCIL (GRRC)
MINUTES OF THE
FEBRUARY 11, 2015 SPECIAL COUNCIL MEETING**

The Governor’s Regulatory Review Council special meeting was held on **Tuesday, February 11, 2015, at 10:00 a.m.**, at the Pharmacy Boardroom located at 1616 West Adams, Suite 120, Phoenix, Arizona 85007, in the Land Department building.

PRESENT:

Council Chair:	Bret Parke
Council Member:	Marc Osborn (arrived at approximately 10:20 a.m.)
Council Member:	Lori Daniels
Council Member:	Warde Nichols
Council Member:	Connie Wilhelm
Council Member:	Michael Preston Green

Attorney General Representative: Christopher Munns

GRRC Staff Economist:	Allen Malanowski
GRRC Staff Attorney:	Scott Cooley
GRRC Staff Attorney:	Christopher Kleminich
GRRC Intern:	Patricia Grant

ABSENT:

Council Member: Jason Isaak

A. CALL TO ORDER:

Council Chair Parke called the Council Meeting to order at approximately 10:12 a.m. and led the pledge of allegiance.

B. DISCLOSURE OF CONFLICTS OF INTEREST:

None

C. CONSENT AGENDA

None

D. CONSIDERATION AND APPROVAL OF FIVE-YEAR-REVIEW REPORTS:

The Council will consider five-year-review reports filed under A.R.S. § 41-1056 and may approve or return the reports, in whole or in part. The Council may request information from the agency or members of the public.

None

E. CONSIDERATION AND APPROVAL OF RULES:

The Council will consider rule packages filed under A.R.S. § 41-1052 and may approve or return the packages, in whole or in part. The Council may request information from the agency or members of the public.

1. ARIZONA POWER AUTHORITY (R-15-0106)

Title 12, Chapter 14, Article 6, Conferences; Appeal of Agency Action

Repeal: R12-14-602

New Section: R12-14-603, R12-14-604, R12-14-605, R12-14-606, R12-14-607, R12-14-608, R12-14-609, R12-14-610, R12-14-611, R12-14-612, R12-14-613, R12-14-614, R12-14-615, R12-14-616, R12-14-617, R12-14-618, R12-14-619, R12-14-620, R12-14-621, R12-14-622, R12-14-623, R12-14-624, R12-14-625, R12-14-626, R12-14-627, R12-14-628, R12-14-629, R12-14-630, R12-14-631, R12-14-632

GRRC Staff Attorney Scott Cooley informed Council that GRRC received two public comments to the rulemaking: one from Grand Canyon State Cooperative Association and another from Riley, Carlock & Applewhite. He also informed Council of the procedural status of the rule package and provided a summary of the issues at hand.

Council Chair Parke recommended that the Power Authority articulate its position as to whether allocations are different kinds of adjudications or determinations with regard to actions under Article 10 of A.R.S. § 41-1092.

That is where a large part of this discussion now lies: whether the Power Authority believes it has direct authority to conduct those direct hearings and whether they are subject to different procedures because they are determinations that are not subject to Article 10 of A.R.S. § 41-1092. That is my set up for where we go from here.

Douglas Fant: Thank you Council Members for taking the time for the special meeting and thank you, Chairman Parke. An agency conducting its own hearings does not necessarily impinge the right to an independent hearing under the regulatory bill of rights. With regard to power purchase certificates, the Power Authority has express separate legislation to handle disputes with power purchase certificates. They are under A.R.S. §§ 30-151 – 155 and that piece of our organic legislation has been intact since 1944. I would consider power purchase certificates separate and independent from this debate. Those are expressly handled by the Power Authority under those sections.

Under federal law, allocation decisions, the actual allocating of power to individual parties, are unappealable. The decision in *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir.) makes allocation a federal preference power, non-reviewable.

So the Power Authority is going above and beyond the standard rule which applies to allocations here at the state level in providing and attempting to provide an appeals process. The final issue you wanted some input on was qualification decisions. Quite frankly, we are not sure where the qualification decisions fall. There is no case law on this, but if we put our appeals regulations in place then we will cover the qualification decisions either under the new allocation appeals regulations or under the standard non-allocation issues being covered under the Office of Administrative Hearing ("OAH") rules.

Robert Lynch, counsel for the Irrigation and Electrical Districts' Association of Arizona, stated the Power Authority started this exercise when a number of attorneys, including myself, posed to them the question when you make an allocation, what happens if there is somebody that wants to make an administrative appeal? There are only six entities in the United States that do this. Four of them are federal agencies, one is the Colorado River Commission of Nevada and the other is the Power Authority. The reason those two state agencies are in this business is because the 1928 Boulder Canyon Project Act which allocated Hoover Power to the states with right of first refusal. Arizona and Nevada took them up on it; California did not. And so, it is a very unusual situation, but an allocation of power, when they make that decision, is an offer. Therefore, in the sense of our state administrative procedure act, it lacks finality. So since the *Santa Clara* case in 1975, the issue has not been addressed. The decision basically said that the allocations made among preference entities that qualify were judicially non-reviewable so there was no law to apply. We are assuming that law can have some influence and accord here in Arizona because there isn't any other law.

The next thing that has to happen is that whoever gets the allocation has to be able to prove they can get the power delivered to them and if they can't, the allocation is taken away. This is a very unusual situation and as we read the definition of an appealable agency action, in statute it says it applies to controversies, contested cases or adjudications. It does not fit. So the Power Authority felt that it should fill that gap. That is exactly what this is intended to do. The definitional adjustment for these rules makes it clear that's where they are focused. So now you are in the middle of this process and if someone is unhappy and they want to appeal something, they now have two sets of rules. They are both going to the Commission. So you have two paths to get to the same place: a hearing in front of a governing body. That is a failsafe. You cannot lose. You can appeal under both sets of rules. All you are trying to do is get to those five people, but you don't get into a situation where some nasty lawyer like me says you are in the wrong jurisdiction, and if they don't back down, goes to court and gets a temporary restraining order and knocks them down. Because that is what will happen and that is what we are trying to avoid.

Council Chair Parke: Mr. Lynch can you articulate that? You say you have two different paths you can take and then you say someone can get a temporary restraining order and knock it down. I don't understand that logic.

Robert Lynch: If we don't get the rules to fill the gap, and somebody specifically wants to appeal the allocation decision as it affects them, in my legal judgment, they have no administrative recourse at OAH or at the Commission using OAH rules because it is not a contested case. It is not an adjudication; it is an offer. We and the Power Authority are trying to ensure that any unhappy applicant gets a chance to express itself in front of the Commission under either rule. We don't know, for instance, if a determination would fall into one set of rules or not. It has never been litigated, but it does not make any difference here. If we have both sets of rules, a prudent attorney would use both sets to get to the Commission. Getting to the Commission is the objective. You do not run the risk of forcing somebody to try to go to court under Article 10 to air their grievance because they have another path. Ultimately, all of this can end up in court, but we are hoping to have a failsafe administrative process in which there is no risk of someone being in a gap where they do not have administrative review. This will give the process an opportunity to resolve disputes without parties having to go to court. It is my experience that administrative reviews tend to lessen the risk by people airing their differences and seeing if there is a solution short of litigation.

There are some unanswered questions. That is why we have focused on the change in the definition of the allocation process so that it is clearly the problem we are trying to solve. If something else comes up it may heard under OAH rules. The Commission is hoping that it will have the opportunity to hear anybody who is disgruntled, regardless.

Council Chair Parke: Again, you are talking about two paths, and I am trying to clarify, that if the rules pass, people who fall in the gap could either go the hearing procedure rules that are effective, if approved today, or go to court?

Robert Lynch: No. If we get these rules to fill this gap, then there are two administrative paths that are possible.

Council Chair Parke: And those paths are?

Robert Lynch: The OAH rules if there is something that constitutes a final adjudication of a right. For example, somebody, in the front of the process is told "I am sorry, but you do not qualify under the statutes. Don't bother making an application."

Council Chair Parke: So if it does fit within Article 10, then they have a path with OAH. If it does not fit within Article 10, it fits under your hearing rules. But then you say the allocation determination via the *Santa Clara* case says it is not even judicially reviewable and there is no hearing process necessary.

Robert Lynch: I am saying what we are trying to do is guard against the risk because it has never been litigated: whether the words in the statutes that give them the role they are playing, will fit under the four corners of the federal decision. We don't want to have to have that fight. What the Power Authority is trying to do, and I think it is good public policy, is to ensure people have a procedure that allows someone who is unhappy a path to the Commission directly to air that grievance.

Council Chair Parke: Because it is not subject to Article 10?

Robert Lynch: As to the allocation, that is true.

Council Chair Parke: And these rules cover just allocations?

Robert Lynch: That is true. If in fact something else decided by the Commission were deemed to be an adjudication...

Council Chair Parke: Appealable agency action or contested case subject to Article 10...

Robert Lynch: Then you already have OAH rules. Frankly I would rather proceed under these because they are OAH-plus. We have added some things I think OAH ought to consider in its rules, but either way, nobody gets left out. That is the operative principal is that nobody gets left out.

Christopher Munns: Mr. Chair and members of the Council, at the risk of confusing things, I agree with staff's analysis. If the issue is whether the Power Authority has the ability or authority to make rules, then I agree with staff. It is a murky area but there are a lot of agencies out there that have done this. The statute gives a director of OAH the power to make these procedural rules that bind anyone doing an adjudication under Article 10. But looking at Ariz. Admin. Code R2-19-102A, the rules are just applicable to any matter heard by the office of administrative hearings.

So there is a narrow set of rules that govern matters referred to the Office of Administrative Hearings, and if you look at all the rules, they talk about filing with the office and everything sworn to the office, so if these rules were to govern, say, a hearing at the Power Authority, literally, they would have to file their pleadings at the Office of Administrative Hearings, which be inconsistent. I know a lot of agencies that when they refer matters to OAH, the matters are considered under OAH rules. If the agency considers the matter itself, it applies rules it has made that are consistent with Article 10.

There is still an unclear issue about how much or whether an agency rule could contradict an OAH rule, but most of the OAH rules are consistent and deal with things like who you file with, the agency, timelines to get materials from the agency, and such. Since the rules at issue are not dealing with the substantive matters of allocations and

determinations, I think that procedural rules of these sort of matters heard by an agency are likely be consistent with Article 10 and the Administrative Procedure Act.

Council Chair Parke: It is very much appreciated. Something I want to raise with the Power Authority is the definitional adjustment that keeps being referenced here in the rules and whether that causes confusion with parties by having a statutory definition for appealable agency action and then a different rule definition of appealable agency action limited to the Power Authority and the Power Authority's hearing process.

Robert Lynch: No. If you look at this rule with the modification to narrow it to the task at hand, and you look at the rest of it, you do the same thing we have done. You look at the definitions in A.R.S. § 41-1092, you look at this, you see the difference, you have two different processes, you may file some paperwork with OAH but still end up at the Arizona Power Authority Commission ("Commission") because the Commission will conduct the hearing. Again, both paths lead you back to where you want to be in the end, which is a chance to take your grievance to the five members of the governing body, the Commission.

Council Chair Parke: Thank you Mr. Lynch.

Douglas Fant: The federal hydro-power world is a small world. Folks will be familiar with that definition of appealable agency action who are active in the hydropower areas so it shouldn't confuse anyone. Based on federal law, which is the Hoover Power Allocation Act of 2011, which gave Arizona its current allocation from 2017 until 2067, we need to get this power under contract by late 2016, and if we do not, it reverts back to, the language is the "allocees", but what that means is we lose our allocation to California and Nevada, which is something we don't want to do.

Council Chair Parke: Is there a federal requirement that the Power Authority establish these rules in order to be eligible for that allocation?

Douglas Fant: No, there is not a federal requirement.

Council Chair Parke: In playing out a worst case scenario for you, if the rules do not pass, the other processes are Article 10, or if the Power Authority argues they are not subject to Article 10 because of the *Santa Clara* case, to make sure the state doesn't lose its allocation?

Douglas Fant: Probably Article 10. The issue here is you will have 60 or 70 applicants and maybe 40 or 50 successful parties. There will be roughly 410 megawatts of federal hydropower allocated to parties in Arizona. The problem is, let's say a party gets no allocation, and appeals that, as an aggrieved party. Let's say that party who has no power appeals and wins. In order to give them power you have to take it from another allocee. It is a zero sum game that we are dealing with. It is unusual in that sense and there is going to be potentially many aggrieved parties and we need to make sure their

issues get heard in a timely fashion. I commit we will make sure these issues are handled fairly but we also need to handle them expeditiously to make sure we retain this asset.

Council Chair Parke: There is an important exercise going on here with regard to statutory authority and that is within GRRC's role, but I think I am most interested in the state's best interest with regard to those aggrieved parties and that rule package isn't procedurally vulnerable. I do not think that is in the best interest of the state and it would also cause confusion and delay so that is why there is a lot of emphasis on the validity of this process. It is not for the Power Authority's benefit or the awarded parties benefit. It is so the Power Authority has the benefit of having substantive decisions that stand as opposed to being challenged procedurally.

Council Chair Parke invited comment from other speakers:

Ms. Sweeney: Thank you Mr. Chairman and members of the Council. I am an attorney with Riley Carlock & Applewhite. I represent a number of irrigation and electrical districts who are current contractors with the Power Authority and who will be making application for this power, and I guess if we do not like what we get, maybe we will be the potential folks who will appeal. I do not wish to address these dense legal issues that the other lawyers are talking about, rather I wanted to make sure the Council knew that the Power Authority worked cooperatively with its existing customers and with its potential customers. There was a group of lawyers who worked to collaboratively put together these rules and we are very much in support of them.

Council Chair Parke: Thank you.

Council Member Green: The issue I still am troubled by is the difference in these rules versus the OAH rules and whether the same rules should apply in this case. I am interested as to why they varied from the rules. What is their justification for the changes they made in the OAH rules?

Douglas Fant: The rules we are trying to get approved basically wove in some statutory rights which are implicit with the OAH rules, such as subpoenas, etc. and clarified that and brought them into one location so it became a little clearer what the total road forward is. Otherwise it pretty much tracks the OAH regulations for the routine procedural purposes.

Council Chair Parke: Thank you Mr. Fant.

Council Member Osborn: Mr. Chairman, while am going to support this package I do suggest the Power Authority should go back to the legislature to clarify this authority so it is unambiguous.

ACTION:

Council Member Daniels moved to approve agenda item E-1. **Council Member Osborn** seconded the motion. Motion passed unanimously.

F. ADJOURNMENT

Council Chair Parke adjourned the Special Council Session at approximately 10:50 a.m.

Respectfully submitted,
/S/epc
GRRC Program Specialist