WIRAB Comments on Peak’s Redline Version of the Alternative Funding Agreement for Peak Reliability

February 11, 2015

The Western Interconnection Regional Advisory Body (“WIRAB”) appreciates the opportunity to comment on Peak Reliability’s redline markup of the proposed Alternative Funding Agreement for Peak Reliability.

WIRAB’s offers the follows recommendations to the Peak Board:

1. The Peak Board should take no action on an alternative funding mechanism until the Court issues a ruling on the use of Section 215 funding for Peak Reliability functions.

2. If the Peak Board considers the red-lined alternative funding agreement, it should reject provisions in Section 4.1.5 and Section 15.9 discussed below.

BOARD ACTION

WIRAB remains opposed to the Peak Board taking action to switch to a new funding mechanism before the Court issues a ruling on the use of Section 215. Section 215 funding meets all of the criteria we set forth in previous comments for evaluating a funding mechanism for Peak Reliability. It works and until a court acts, it should be retained. Action now based on mere conjecture serves no purpose. If the Peak Board feels it may need to act quickly, then it should develop an Alternative Funding Agreement that would be shelved and later adopted if and only if there is an adverse ruling by the court.

GENERAL COMMENTS ON RED-LINED DRAFT

Peak’s redline markup of the proposed Alternative Funding Agreement includes significant revisions to the original agreement. Peak’s revisions address many of the concerns raised by WIRAB. WIRAB supports the changes made in the following sections:

- Lowest Practical Cost (Section 4.1.1)
- Secondary Services (Section 2.3)
- No Funding Under Section 215 of Federal Power Act (Section 4.2)
- Payment of Penalties (Section 5.4 and Section 8.3.3)
- Approval Threshold for Adjustment of Final Funding Amount (Section 4.1.7)
- Use of Revenues from Intellectual Property (Section 7.2)
WIRAB also supports the continued inclusion of the List of Funding Parties, BA Funded TOPs and Associated TOPs as an attachment to the agreement.

WIRAB, however, continues to oppose the following provisions in the redline agreement and will oppose any agreement that includes either of these provisions:

- Funding Party Objection Forum (Section 4.1.5)
- No Third Party Beneficiaries (Section 15.9)

**Funding Party Objection Forum (Section 4.1.5):**

Peak’s redline markup of Section 4.1.5 does not address WIRAB’s original concerns. WIRAB opposed the original 75% objection threshold because it gave Class 1 and 2 members decision-making say over the level of Peak’s budget. Peak’s revisions continue to give undue influence in the budget process to Class 1 and Class 2 members. We disagree with all arguments made by Class 1 and Class 2 members to justify giving them any decision-making say or budget control.

Peak’s revisions to this section create a forum comprised of the Finance and Audit Committee of the Peak Board, the Peak Chief Executive Officer, and the Funding Parties’ highest ranking financial officers. The purpose of the forum is to consider objections to the Proposed Funding Amount and to make changes to the Proposed Funding Amount to submit to the Board for approval. Class 1 and Class 2 are the only membership classes represented in the objection forum. WIRAB strongly opposes this provision because it fails to ensure the independence of the Peak Board. Further, as all classes, Class 1 and Class 2 members have to opportunity to make their case in public comments to the board.

It is not clear in Peak’s redline markup of this section if the intent is to have an up-or-down vote by the Board on the funding amount submitted by the objection forum. Furthermore, if this is the intent, then it is also unclear what funding amount would go into effect if the proposed funding amount is voted down. Peak’s proposal in this section is incomplete.

WIRAB opposes Peak’s revisions to Section 4.1.5 to create an objections forum. As we said in our previous comments, all decision-making authority should remain with the independent board. No class should have any decision-making say or influence over the level or scope of Peak’s budget.

**No Third Party Beneficiaries (Section 15.9):**

Section 15.9 states that the Funding Agreement is solely for the benefit of the Class 1 and Class 2 Funding Parties and not for the benefit of others. This provision is inconsistent with Peak’s mission, which is to promote social welfare by endeavoring to ensure reliability of the Bulk Electric System within Peak’s footprint for the benefit of end-use customers. We disagree strongly with the arguments to justify this provision.
The first argument is that this is standard boilerplate language that any good attorney includes in any contract. That might be a true statement about good attorneys, but that does not make the beneficiary statement a true statement. The funding of peak is intended to confer benefits upon third parties, namely the end-use customers within Peak’s footprint. If there is a conflict between Peak’s mission and purpose and this legal boilerplate language, then the legal boilerplate language ought to be adjusted. WIRAB suggests that this language can be modified to admit that there are third party beneficiaries and to still provide that no third party shall be entitled to enforce the agreement against a signatory to the agreement or have recourse for alleged injury or damages.

The second argument used to justify this section is that the core services funded by this agreement are not part of Peak’s social welfare mission and that Peak achieves its social mission solely through its additional services. Peak’s social mission is foundational and runs through the provision of all of its reliability services.

WIRAB recommends that when the Peak Board takes up the red-lined agreement that it direct Peak management to revise this language to accurately represent its status and mission as a 501(c)(4) corporation.