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The Special Counsel

March 12, 2012

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-10-1231

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), enclosed please find an agency report based on disclosures made by an employee of the Department of Energy, Western Area Power Administration (WAPA), Desert Southwest Region, Phoenix, Arizona. The whistleblower, who has requested anonymity, alleged that WAPA management in the Desert Southwest Region improperly provided 90 megawatts per hour (MWh) of free electric transmission to Griffith Dynegy Energy, LLC (Griffith), a full-service energy provider.[1]

The whistleblower's allegations were referred on March 17, 2011, to the Honorable Steven Chu, Secretary of Energy, to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d). On July 29, 2011, Secretary Chu submitted the agency's report to this office. I received a supplemental report on October 19, 2011. The whistleblower submitted comments on the agency's initial report pursuant to 5 U.S.C. § 1213(e)(1), but declined to comment on the supplemental report. As required by law, 5 U.S.C. § 1213(e)(3), I am now transmitting the report to you.

The whistleblower explained that in April 2009 negotiations began for a new contract between WAPA and Griffith, because Griffith had requested to move out of WAPA's Western Area Lower Colorado (WALC) Balancing Authority (BA). Under Griffith's prior contract, Mutual Services Agreement No. 99-DSR-11010, which was originally negotiated in the 1980s, Griffith paid WAPA a fee to be placed in the WALC BA and receive the BA's services.[2] Griffith also received 90 MWh of free transmission from WAPA as an incentive for joining the WALC BA. According to the whistleblower, WAPA provided this incentive to Griffith to entice customers to join the WAPA transmission system. The whistleblower explained that when Griffith left the WALC BA to create its own BA with the Western

[1] The whistleblower explained that by providing transmission to Griffith, WAPA is transporting Griffith's electric power to Griffith's customers, which are large electric companies. The electric companies then sell electricity to consumers. According to the whistleblower, and based upon Department of Energy Information Administration statistics, 90MWh can provide power to approximately 61,000 homes per month.

[2] This fee was paid to the BA for its services in controlling Griffith's power generation and balancing its energy consumption. This includes regulation and energy reserves for emergencies. The WALC BA also purchased and sold Griffith's power generation. Thus, when Griffith moved out of the WALC BA, WAPA lost significant revenue from its fees to Griffith.

Electricity Coordinating Council, Griffith stopped paying a fee to WAPA for the WALC BA's services. The whistleblower asserted that Griffith's removal from the WALC BA also provided the opportunity for renegotiating WAPA and Griffith's contract.

The whistleblower stated that during the contract renegotiation WAPA planned to move Griffith from its previous Mutual Services Agreement to an Operations, Maintenance, and Replacement (OM&R) contract. According to the whistleblower, OM&R contracts do not include transmission services. Thus, the whistleblower alleged that between April and August 2009, management and WAPA's Transmission Business Unit (TBU) and Legal Department directed that Griffith should no longer receive the free transmission, because it was no longer paying a fee to WAPA and was moving onto an OM&R contract.

The whistleblower alleged that in negotiations with Griffith, which included WAPA attorney Mr. Doug Harness and other members of management, as well as consultation with the TBU, it was reiterated several times that Griffith would no longer receive the free transmission. However, during the final stage of the contract negotiation in August 2009, when the OM&R contract was being finalized, the transmission language was reinserted without explanation. The whistleblower alleged that reinserting the language and continuing to provide the free transmission ran contrary to guidance received from management, WAPA's Legal Department, and the WAPA TBU, and no rationale was provided for its inclusion. The whistleblower stated that there is no precedent for providing transmission services through an OM&R contract and this is contrary to standard practice. The whistleblower alleged that the inclusion of the transmission in this type of contract is therefore improper, and that continuing the free transmission to Griffith represented a loss of $1.1 million a year in potential revenue for WAPA for the contract term of 30 years, or a total loss of $33 million. The whistleblower alleged that this loss represents revenue WAPA would have received if it sold the transmission rather than continue to provide it free to Griffith.

The whistleblower also alleged that allowing Griffith to continue to receive free transmission violated Federal Energy Regulatory Commission (FERC) Order Nos. 888 and 889. The whistleblower explained that these orders require non-discriminatory access to transmission service to ensure that suppliers have equal market access. To facilitate this goal, FERC Order No. 889 requires that available transmission capacity be posted on an electronic bulletin board called the Open Access Same-time Information System (OASIS). The whistleblower explained that when Griffith left the WALC BA, and the original agreement became null and void, the free transmission that Griffith was receiving should have been offered on OASIS on a first come, first served basis to all WAPA's customers still located in the BA.

The agency was unable to substantiate the whistleblower's allegations. In its report, the agency explained that Griffith and WAPA executed transmission service contracts in 1999 in which Griffith purchased 595 MWh of transmission from the Griffith Switchyard to WAPA's Mead Substation. The agency noted that the OM&R between Griffith and WAPA

included an "Additional Delivery Rights" clause, allowing Griffith to deliver 90 MWh to two points of delivery other than the Mead Substation at no additional cost. The report clarified that when Griffith left the WALC BA, the original MSA contract was not considered to be null and void; rather, Griffith's departure nullified a separate contract known as the WALC Control Area Agreement. The original MSA did include provisions related to Griffith's participation in the WALC BA, but it was amended in 2002 to delete those provisions when the WALC Control Area Agreement was executed. The agency stated that in 2009, the terms and conditions of the MSA remained in effect through 2039 regardless of Griffith's continuing participation in the WALC BA.

The agency also found no evidence to support the allegation that providing for transmission services via an OM&R contract was contrary to standard practice. Rather, the agency determined that while including such a provision in an OM&R contract is not standard practice, there is no law, rule, regulation, or policy preventing its inclusion.

The agency also found that WAPA's actions were not in violation of FERC Order Nos. 888 and 889. The report noted that WAPA's official position is that it is not subject to the requirements of FERC Orders, as it is not a public utility under the Federal Power Act. However, the report explained that the Department of Energy has an Open Access Transmission Service Tariff that is comparable to those required by FERC Order No. 888. The agency found that WAPA's Tariff was not violated in this instance, because it considered the transmission provided to Griffith to be free.

In the whistleblower's comments, the whistleblower expressed concern that the report was improperly focused on "free additional transmission" instead of "free transmission and additional delivery rights." The whistleblower clarified the difference and emphasized that the allegation was centered on the additional delivery rights using WAPA's system with no additional cost to Griffith. The whistleblower also noted that Griffith's original MSA included language requiring Griffith to provide six months' written notice prior to termination of the contract, including the date upon which the facilities of Griffith are to be disconnected from the transmission system, or the date upon which any superseding agreement between the parties takes effect. The whistleblower contended that this provision makes Griffith's departure from the WALC BA synonymous with disconnecting from the transmission system.

The whistleblower also reiterated the allegation that provisions for additional delivery rights should not be included in OM&R contracts, regardless of whether the provision was amended and clarified as stated in the report. The whistleblower also stated that including the language is a violation of WAPA's Tariff, as the Tariff specifically provides pro forma documents to be used for transmission services. Finally, the whistlebower took issue with WAPA's assertion that it is not bound to follow FERC Orders because it is not a public utility and expressed concern that the investigators assigned to review the allegations lacked technical knowledge of the electric power industry, and were thus misled.

In its supplemental report, the agency addressed the concern that if Griffith chose to deliver to one of its optional substations, free of additional charge, other customers would be unable to use that transmission system, for which they would pay a fee. The agency explained that under its contract, Griffith did receive a benefit not normally available to other customers; namely, the option to redirect power between WAPA's Intertie and Parker-Davis Systems without additional cost. However, the agency noted that this option was included because in 1999, at the beginning of Griffith's relationship with WAPA, WAPA was having difficulty attracting customers to its new Intertie System. At the same time, Griffith was unable to co-locate its substation with the prior existing McConnico Substation. Griffith, which had financed upgrades to both the Intertie and Parker-Davis Systems, proposed a "common bus" arrangement, wherein Griffith and the McConnico and Peacock Substations would be treated as one entity. WAPA rejected this proposal, but instead inserted the additional delivery rights into Griffith's MSA as an alternative.

The agency further explained that WAPA believed in 1999 that including the additional delivery rights in the MSA would provide little real value to Griffith, and that other customers would be unlikely or unable to transfer power between the Griffith Substation and Peacock or McConnico Substations. Thus, the additional delivery rights included in the OM&R add no additional financial benefit to Griffith above what existed in the prior MSA. Specifically, the agency found that Griffith's delivery requests relying on the OM&R would be evaluated based on the rules in WAPA's Tariff. In reviewing the transmission scheduling system, the agency found that WAPA had not reserved capacity for Griffith to the Peacock or McConnico substations that would give Griffith priority over other customers. The agency also noted that as far as the investigation could discover, Griffith had never exercised its right under the additional delivery rights provision since its inception in 1999.

The agency also noted that even if WAPA had removed the additional transmission rights from the OM&R, Griffith still could have transferred power to the McConnico Substation without additional cost because the right is separately provided for in Griffith's Transmission Service Agreement (TSA-11034). TSA-11034 gives Griffith the right to redirect transmission to any point on the Parker-Davis System, without additional cost, for 30 years.

The agency also clarified its position that, because there were no restrictions on including such a provision in an OM&R, its inclusion was not improper. The agency noted that the MSA was still in effect when the OM&R was executed, and still retained the additional delivery rights provision. In addition, the original provision was included in part because WAPA needed to aggressively market the Intertie System, and including the additional delivery rights allowed the execution of TSAs with Griffith, guaranteeing transmission service fees for 30 years.

In its supplemental report, the agency also further explained its finding that Griffith's departure from the WALC BA did not affect its TSAs, which are still in effect. The agency

found that leaving the WALC BA was not synonymous with disconnecting from WAPA's transmission systems. Thus, Griffith's MSA remained in effect until the execution of the OM&R, with the OM&R considered as superseding agreement as provided for by the original MSA.

I have reviewed the original disclosure, the agency's reports, and the whistleblower's comments. While it does appear that Griffith is receiving a benefit not available to other WAPA customers, the agency demonstrated that WAPA made a legitimate business decision in extending the benefit to Griffith in its original contracts. Further, the inclusion of the transmission benefit in WAPA's newer MSA with Griffith does not appear to have been improperly achieved, particularly as the language was also present in Griffith's TSA, which was not up for renegotiation. Finally, the agency did not indicate that this type of benefit is exclusive to Griffith, or that in the future a similarly-situated customer would be unable to negotiate similar language in its contract with WAPA. Thus, based on my review, I have determined that the agency's reports contain all of the information required by statute, and the findings appear to be reasonable.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency's reports and the whistleblower's comments to the Chairmen and Ranking Members of the Senate Committee on Energy and Natural Resources and the House Committee on Energy and Commerce. I have also filed copies of the reports and comments in our public file, which is available online at www.osc.gov. This matter is now closed.

Respectfully,

Carolyn Lerner

Carolyn N. Lerner

Enclosures