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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-196345

May 1, 1980

The Honorable Abraham Kazen, Jr.
House of Representatives

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Dear Mr. Kazen:

This is in answer to your request for our opinion on whether contracts for the disposition and transmission of power and energy from the Falcon and Amistad hydro-electric projects violate the preference provision of the Falcon-Amistad Dam Act, (Act of June 18, 1954, Pub. L. No. 83-406, 68 Stat. 255, as amended by the Act of December 23, 1963, Pub. L. No. 88-237, 77 Stat. 475), as well as on certain related issues.

We have studied the views of all the parties concerned as well as the relevant statutory provisions and other applicable documents. We do not believe the contracts in question violate either the preference clause or any other applicable statutory provision. This and your other questions are addressed below in the order they appear in your letter.

Background

On August 9, 1977, the South Texas Electric Cooperative, Inc. (STEC) and Medina Electric Cooperative Inc. (MEC) contracted with the United States Bureau of Reclamation, Department of Interior (Bureau), to purchase all of the power and energy (hereafter referred to collectively as power) to be generated at the Amistad and Falcon hydro-electric facilities after the Amistad plant is placed into commercial operation. The Central Power and Light Company (CPL) owns the only transmission lines in the vicinity of either the Falcon or Amistad dams and construction of duplicate transmission facilities is apparently not a desirable alternative for the cooperatives. Accordingly, on April 17, 1978, STEC/MEC contracted with CPL for "wheeling" (a form of transmission) of the power the cooperatives were to receive under their contract with the Bureau. CPL stipulated, as its price for providing such services, that it be granted the right to retain a portion of the Federal hydro-electric energy at STEC/MEC's cost.

The wheeling contract divided the output from the projects into a STEC/MEC entitlement of 65 percent and a CPL entitlement of 35 percent. In addition to providing wheeling service in return for the power, CPL expressly assumed responsibility for payment to STEC/MEC of an amount equal to 35 percent of the annual combined cost of the Amistad-Falcon electricity.

That cost includes a fixed annual payment toward amortization of the Falcon project and an amount necessary to amortize the Amistad investment over a 50-year period, as well as operation, maintenance and replacement costs for the facilities. Should either CPL or the cooperatives have surplus energy remaining from its entitlement, the other party has the right of first refusal on the surplus.

The Board of Public Utilities of the City of Brownsville, Texas, an entity recognized by the United States Department of Energy (DOE) as entitled to "preference" in the purchase of Falcon-Amistad power, has 1/ complained to DOE and to the Western Area Power Administration (WAPA) that the STEC/MEC-CPL wheeling agreement is proscribed by the Bureau contract and also violates the preference provision in the Falcon-Amistad Dam Act because the arrangement constitutes a sale of Falcon-Amistad power to a non-preference customer (the privately-owned CPL), although a preference entity--Brownsville--is actively seeking to purchase the power.

Applicability of the Preference Clause

The language of the Falcon-Amistad legislation addresses only the Secretary's responsibility for disposing of power generated by a Federal facility. It provides:

> "The electric power and energy generated at Falcon Dam and Amistad Dam * * * shall be delivered to the Secretary of the Interior (hereinafter referred to as the Secretary) who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. * * *Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary for the integration of the Falcon and Amistad projects and in order to make the

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1/ Responsibility for marketing of electrical energy from the Falcon and Amistad projects was transferred from the Bureau, under the Secretary of the Interior, to the Secretary of Energy by the Department of Energy Organization Act, 42 U.S.C. § 7152(a)(1)(F) (Supp. I 1977). WAPA is the organizational element within the Department of Energy responsible for discharging the Secretary's power marketing responsibilities.

> power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies." Falcon-Amistad Dam Act, Pub. L. No. 83-406, § 1, 68 Stat. 255 (1954) (as amended by Pub. L. No. 88-237, § 1, 77 Stat. 475 (1963)).

By its terms, the statute governs only the initial sale of power from the Government. The question is whether the preference clause also requires the Secretary of Energy to limit the manner in which preference customers may dispose of the power and energy he sells to them. We believe that the preference clause's applicability to the sale of power from the cooperatives to CPL is questionable.

Preference clauses similar to the language of the Falcon-Amistad Dam Act, appear in many statutes authorizing the construction of the Federal projects from which power is produced. Judicial precedents interpreting some of these other statutes are relied on by WAPA and Brownsville who question the validity of the power sharing agreements in question.

In reply to our inquiry, officials of WAPA informed us that it is the position of DOE and WAPA,

> "that any contractual arrangement, whereby a nonpreference entity receives the benefit of federal power when a preference customer is ready, willing, and able to take and purchase the power, operates to violate the preference clause contained within the Falcon Dam Act."

In support of its position, WAPA relies on the principles articulated by the Attorney General in his Clark Hill Reservoir opinion, 41 Op. Atty. Gen. 236 (1955). The Attorney General concluded that the Secretary of the Interior would not--

> "discharge his statutory duty of giving a preference in 'the sale' of power to public bodies and cooperatives by disposition to a private company under an arrangement whereby the latter obligates itself to sell an equivalent amount of power to preference customers to be designated by the Secretary." Id., 244.

[2/] Santa Clara v. Kleppe, 418 F. Supp. 1243 at 1254, n. 24 (1976), cites the various Congressional enactments containing a preference clause.

WAPA also relies on the decision of the U.S. Court of Appeals for the 9th Circuit in City of Santa Clara v. Andrus, (572 F. 2d 660 (9th Cir. 1978)). The Court noted that the preference clause applicable to the Central Valley Project in California gives the Secretary--

> "a very specific directive to market federal power to preference customers if any are ready and willing to purchase it. It is only if the available supply exceeds the demands of interested preference customers that the Secretary may offer federal power to private entities." 572 F.2d at 670, citing the Attorney General's Clark Hill Reservoir decision, supra.

We agree that the Falcon-Amistad Dam Act gives rise to a statutory duty for the Secretary of Energy to extend a preference to public entities in the sale of power generated by those projects. Likewise, it seems clear that Congress intended the preference in the purchase of federally generated hydroelectricity to inure to the benefit of those entities which are not operated for private profit, and of the people served by them. See e.g., 90 Cong. Rec. 8335 (1944). However, as we read the cases, the courts have construed such preference clauses to require "only that public entities be given preference over private entities in the marketing of power generated by federal reclamation projects." City of Santa Clara v. Andrus, supra, at 667. The clauses do not require that all preference customers be treated equally or that all potential preference customers receive an allotment. Arizona Power Authority v. Morton, 549 F. 2d 1231, 1241, 1252 (9th Cir. 1977) cert. denied, 434 U.S. 835 (1977). We are unable to locate any precedent to suggest that preference clauses which do not expressly govern the disposition which preference customers may make of the power purchased from the United States nevertheless, by implication, prevent resale to a non-preference entity. Both the Attorney General's Clark Hill Reservoir decision and the Santa Clara case, supra, deal only with the applicability of the preference clause as between a preference entity and a non-preference entity for the initial sale. Indeed, the Clark Hill opinion reports an earlier arrangement whereby the Southwestern Power Administration sold power to a preference entity for resale to a non-preference entity, without any indication that this would be inconsistent with the preference clause. 41 Op. Atty. Gen. at 239-40.

The cooperatives contend that their sale to a non-preference entity is not inherently inconsistent with the preference clause. They point out that the benefit they are intended to receive from the purchase of the low cost Federal power has not been restricted by statute, regulation or published judicial authority and that as long as a cooperative realizes the value of the hydroelectric energy for the benefit of its members (in this case, by receiving the proceeds of the subsequent sale to CPL), Congress cannot be presumed to care how it does so.

The cooperatives illustrate this by supposing that, instead of reselling power to CPL, they were to pay cash for the transmission service provided by CPL. Clearly they would receive a benefit from this expenditure. Instead of paying cash, they are in effect paying power but, they suggest, the result is the same; the cooperatives receive the benefit of the transaction. Brownsville, they note, would also have to arrange for wheeling by CPL and would have to pay for such service in some manner too.

Brownsville contends that while the Falcon-Amistad Dam Act preference clause does not expressly limit the manner in which a preference customer may dispose of the power purchased from the Government, it must be read "in pari materia" with other statutes relating to Federal multi-purpose water projects. Specifically, Brownsville cites the following language from section 5 of the Bonneville Project Act of 1937, 16 U.S.C. § 832d(a) (1976):

> "Contracts for the sale of electric energy to any private person or agency other than a privately owned public utility engaged in selling electric energy to the general public, shall contain a provision forbidding such private purchaser to resell any of such electric energy so purchased to any private utility or agency engaged in the sale of electric energy to the general public, and requiring the immediate canceling of such contract of sale in the event of violation of such provision."

However, the language from the Bonneville Act would not preclude resale by a preference entity to a non-preference entity, as is here the case; that Act only prevents "private persons or agencies" (which does not include preference entities) from reselling to private utilities. If anything, the Bonneville Act supports the proposition that resale is unrestricted except to the extent the law expressly limits it. See also section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s.

Moreover, it has been held that, while a preference clause (contained in section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h (c) (1976), provides a standard against which the propriety of Federal sales to non-preference entities can be measured, it does not provide binding precedent which governs the Secretary's power to allocate Federal power among preference customers in one fashion rather than another. Arizona Power Pooling Ass'n v. Morton, supra. In an earlier case, the same Court stated that:

> "If a statute or regulation establishes a rule governing the conduct of the agency with respect to an aspect of the agency action, a court may determine whether the agency

> has complied with that rule, although the court still may not review other aspects of the agency action as to which there are no reasonably fixed rules to apply." East Oakland-Fruitvale Planning Council v. Rumsfeld, 471 F.2d 524, 533 (9th Cir. 1972).

We likewise can find no reasonably fixed rules to apply to the question of whether the preference clause of the Falcon-Amistad Dam Act requires the Secretary of Energy to restrict the manner in which a cooperative may benefit from the preferred purchase of Federal power. Accordingly, we must conclude that the STEC/MEC-CPL wheeling agreement does not violate the Falcon-Amistad preference clause and that the contract is, therefore, not invalid on that ground.

Legal Significance of the Bureau's September 17, 1975, Letter.

During preliminary negotiations for purchase of the Amistad-Falcon Power, STEC/MEC inquired whether the Bureau would permit them to sell their surplus power and energy to CPL. By letter of September 17, 1975, the Bureau responded as follows:

> "Since the cooperatives have generating capacity of their own, there would be no objection to the sale of an equivalent amount of capacity to any entity. In our opinion, the proposed contract does not prohibit such sale since article M of the General Power Contract Provisions 'Resale of Electric Energy' is made inoperative in the contract."

The Bureau apparently incorporates certain "General Power Contract Provisions" into most of its power sale agreements. "Provision M" of these General Provisions reads:

> "Resale of Electric Energy.
>
> "The Contractor shall not sell any of the electric energy delivered to it hereunder to any customer of the Contractor for resale by that customer."

The August 9, 1977 Bureau contract with the cooperatives incorporates by reference the "General Provisions," but with the proviso that "Provision M" is excluded. Paragraph 14 of the basic contract sets out a number of "Distribution Principles" that are to be observed by the cooperatives. Paragraph 14 contemplates both wholesale and retail sale of power by the cooperatives. Since the Bureau did not incorporate "Provision M" in it, the contract contains no express prohibition on

the resale of federally generated power to other entities on a wholesale basis. Therefore, the September 17, 1975 Bureau letter has significance in determining the reason for the exclusion of "Provision M" from the contract.

STEC/MEC contends that the September 17 letter clearly indicates that the Bureau intended the cooperatives to be free to sell power to CPL. WAPA and Brownsville, however, argue that the Bureau contemplated that the cooperatives would sell CPL only an amount of power equivalent to their own generating capacity, and that "Provision M" was omitted only so that STEC/MEC--themselves generating cooperatives--could sell power to their member distribution cooperatives. Further, the STEC/ /MEC inquiry, it is claimed, did not encompass other than "surplus" power "which does not connote a long term commitment" like that provided for by the wheeling agreement.

Under the "parol evidence" rule, the legal principle of contract interpretation that all prior negotiations and communications are merged in the final executed contract, evidence such as the Bureau letter may be resorted to only where the contract instrument is ambiguous or silent. Valley Cement Industries v. Midco Equipment Co., 570 F. 2d 1241 (5th Cir., 1978); 47 Comp. Gen. 627 (1968). While the Bureau power sale contract expressly provides for the wholesale and retail sale of energy from the cooperatives, it is silent as to whether the federally generated power may be resold to an investor-owned utility such as CPL. Accordingly, we think the legal significance of the September 17, 1975 Bureau letter lies only in whatever value it may have as an extrinsic aid in determining and giving effect to the intent manifested by the contract instrument.

The letter establishes that the cooperatives were to be allowed to sell CPL an amount of electricity equivalent to the STEC/MEC generating capacity. In our view, however, the letter does not show that omission of the "Provision M" resale restriction in its entirety operated to allow only resales not exceeding STEC/MEC generating capacity (or, where sales exceeded that capacity, only to other qualified preference entities). That is, the omission of a provision which would have prohibited sale of power by STEC/MEC to anyone who is going to resell it allows STEC/MEC to sell to a customer, such as CPL, who may resell to others. The letter, while it correctly states that the omission allows STEC/MEC to sell surplus power and energy equivalent to its own generating capacity to CPL, does not establish that this was the only purpose of omitting "Provision M". Indeed, WAPA and Brownsville, as mentioned above, recognize that omission of that provision also allows resale to member distribution cooperatives.

This is not to say that the Bureau could not have included a prohibition against resale in the contract in its discretion. However, since the Bureau did not do so, we find no basis to read such a prohibition into the contract.

Validity of the Bureau Power Sale Contract

For the reasons set out above, the STEC/MEC-CPL wheeling agreement cannot in our view be successfully attacked on the ground that it violates the Falcon-Amistad Dam Act preference clause. However, should a court declare the wheeling agreement illegal on that ground, we do not think such illegality would provide a basis for questioning the validity of the power sale contract. Brownsville contends that:

> "In effect, the United States sold 35% to 100% of the hydropower to a private investor-owned company through the medium or veil of a preference customer to the exclusion of other preference customers. While not discriminating on its face, since the sale purports to be to cooperatives, being preferenced customers, the August 9, 1977, contract discriminated against other preference customers including Brownsville, in its operation and effect and is and should be invalid."

It has been held that a contract is not made void by the fact that the agreement or its performance might aid the promisee to violate a law or a public policy when the promisor did not combine or conspire with the promisee to accomplish that result and did not share in the benefits of such a violation. Mechanics' Insurance Co. of Philadelphia v. Hoover Distilling Co., 182 F. 590 (6th Cir., 1910). See also, 6A A. Corbin, Contracts § 1529 (1962).

We have found nothing in the record alleging or suggesting that the Bureau's failure to incorporate the "Provision M" resale limitation was for the purpose of avoiding the preference requirement. Neither does the Bureau appear to have had any reason to believe that in carrying out the contract, STEC/MEC would not conform to the requirements of the law. Accordingly, we cannot conclude that a judicial finding that STEC/MEC violated the Falcon-Amistad Dam Act preference clause would make the Bureau power sale contract to STEC/MEC invalid.

Effect of Legal or Administrative Actions on Progress of Amistad Construction.

Because of the many avenues which administrative or judicial action might follow in this matter, we can only speculate as to the potential that such action may have for delaying construction of the Amistad facility. WAPA, however, has informed us that it plans no legal or administrative action which would force such a delay. WAPA notes, nevertheless, that a delay might arise in the event Brownsville were to succeed in attacking the Bureau contract. The major thrust of WAPA's concern is that

"[w] ithout a contract in hand which assures the recovery of the costs of producing power, transmitting electricity and construction, the construction might have to be delayed." In WAPA's opinion, "[p] roceeding with construction in the absence of a commitment to purchase the power from an eligible customer would violate that portion of the Falcon Dam Act which mandates the recovery of an appropriate share of costs."

Officials of the International Boundary and Water Commission, United States and Mexico, have informally advised us that the Commission intends to continue construction of the Amistad facility unless compelled to stop by the courts, by Congress, or by superior authority in the Executive branch. Should the power sales contract be held invalid, however, the Commission would feel constrained to halt construction until it received adequate assurances that the project would indeed be self-liquidating or at least that construction could be continued without violating that statutory requirement.

The language in section 1 of the Falcon-Amistad Dam Act which gives rise to the self-liquidating feature of the project, reads:

> "Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the costs of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power by the Secretary, in collaboration with the Secretary of State, over a reasonable period of years."

While the specific facts and circumstances existing at the time would certainly bear on our decision if we were asked for a formal ruling in the future, we do not now foresee that voiding the Bureau contract would affect the availability of funds for construction of the Amistad facility so long as Congress continues to make the necessary appropriations. Admittedly, the Secretary of Energy must sell electrical power at rates sufficient to reimburse the Government for the cost of construction over a reasonable time period. Further, pursuant to section 2 of the Act, all receipts from the sale of electric power and energy are to be covered into the Treasury as miscellaneous receipts. Construction funds for the project, however, are made available from the Treasury only in accordance with the terms of the applicable appropriation acts. U.S. Const., art.I, § 9, cl. 6.

We reviewed the language and legislative histories of the fiscal years 1978, 1979 and 1930 acts (Public Laws 95-86, 95-431, and 96-68, respectively) appropriating funds for Amistad construction, and did not find any

indication that Congress intended the availability of Amistad construction appropriations to be contingent upon the existence of an executory power sale contract during the construction period. Accordingly, we would not contemplate that invalidation of the Bureau power sales contract would affect the availability of construction funds and thereby delay construction.

Recommendations

While we see no basis for objecting to the wheeling arrangement on statutory grounds, we think that as a practical matter, the STEC/MEC-CPL arrangement may provide a precedent which, if left intact, could eventually undermine long-standing principles relative to granting preferences in the marketing of federal hydroelectricity. Further, the Secretary of Energy may find in his mandate to market Falcon-Amistad power "* * * in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles * * *" a duty to attempt renegotiation of the contract. In any event, because of the uncertainty, expense, and delay inherent in litigating the matter, we think it would be in the Government's best interest for WAPA first to make a serious effort toward resolution of the controversy without resort to litigation. In this regard, we think that the suggestion made by Brownsville's attorney deserves consideration. In his November 30, 1979, letter to us he stated:

> "[Brownsville] has recommended to WAPA, both orally and in writing, that a conference be arranged among all the parties in interest."

Such a conference would encourage the formulation and consideration of specific proposals for solution. Indeed, it does not seem inconceivable that STEC/MEC and CPL could find some other mutually advantageous basis for compensating CPL for its wheeling services, or that WAPA and STEC/MEC could find amendatory language for the power sale contract which would more clearly define the conditions under which preferences in the sale of federal power are granted.

We trust that the above is responsive to your inquiry and will assist you in your efforts to encourage resolution of this controversy.

Sincerely yours,

Comptroller General
of the United States

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-196345

May 1, 1980

The Honorable Kika de la Garza
House of Representatives

Dear Mr. de la Garza:

You recently wrote me expressing interest in our ongoing review of certain contractual arrangements relative to the sale of hydroelectric power from the Falcon and Amistad Dams which we initiated at the request of Congressman Abraham Kazen, Jr. We are forwarding our views on the matter to Congressman Kazen by letter of today and, as promised, are enclosing a copy for your information. Please do not hesitate to contact us should you have any further questions or need additional information.

Sincerely yours,

Rollee Efros

Mrs. Rollee Efros
Associate General Counsel

Enclosure