Legal

by Richard Lorenz

Show me the money

Although the fights over the allocation and pricing of BPA power roll on unabated, one issue that all stakeholders in the industry can agree on is that the capital markets are not doing well. These capital markets are, of course, essential for the significant investment that is needed to maintain, improve, and expand our region's electricity generation and transmission infrastructure. This article offers a quick look at some of the legal tools that may be available now, or in the near future, to either restore or bypass altogether traditional sources of capital for regional utilities.

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American Recovery and Reinvestment Act

The United States Congress is currently working on negotiating and revising an $825 billion economic stimulus package called the *American Recovery and Reinvestment Act* (ARRA). The ARRA includes numerous proposals that relate directly to energy investments. The initial versions of the ARRA reportedly include all of the following:

- $11 billion to modernize the nation's electrical grid
- $8 billion in loans for renewable energy projects
- $2 billion for research into advanced vehicle battery systems
- A three-year extension of the production tax credit
- Nearly $2.5 billion for carbon capture and sequestration projects
- $1.5 billion for energy-efficiency projects by local governments
- Almost $30 billion for other weatherization and energy-efficiency programs

The ARRA will also reportedly include another $20 billion for energy-related tax provisions, including funding for Clean Energy Renewable Bonds and Qualified Energy Conservation Bonds.

BPA's borrowing and purchasing authority

Another key provision of the ARRA is a provision that would increase BPA's borrowing authority by $3.25 billion. BPA uses its borrowing authority primarily to invest in transmission projects, but it also may use a portion of that borrowing authority to invest in conservation and renewable energy projects. BPA's current borrowing authority is capped at $4.45 billion. Utility groups and other interested parties have been advocating for an expansion of this borrowing authority as a means of infusing capital into regional energy infrastructure projects. It looks like Congress is listening. Under the proposed legislation, BPA's borrowing authority would be expanded to $7.65 billion.

In addition to BPA's borrowing authority, it is also worth noting that BPA has another important legal authority that may be used to help consumer-owned utilities finance their own generation projects on a tax-exempt basis. In general terms, power produced by a generating facility that is financed with tax-exempt bonds must be sold to another government entity — which is called a "qualified purchaser." Although BPA is not a qualified purchaser, it is authorized under Section 9(f) of the *Northwest Power Planning and Conservation Act* to apply to the United States Treasury Department for a certification that any power purchased by BPA from the facility will be resold only to qualified purchasers. With this 9(f) certification, BPA may purchase power from the facility without adversely affecting the tax-exempt status of the bonds. The result is that a consumer-owned utility (working alone or in concert with others) may finance its own generating facility with tax-exempt bonds that are very well secured by a long-term power sales agreement with BPA.

Emergency Economic Stabilization Act of 2008

It is also possible that the now-maligned lending institutions will even become a renewed source of capital sooner than most people think. The reason for optimism is the relaxation of a quirky financial accounting standard known as "mark-to-market." Mark-to-market is an accounting methodology that requires an entity to assign a value to a position held in a financial instrument based on the current market price for the instrument. Federal Accounting Standards Board Statement 157 (FAS 157) made mark-to-market accounting effective for

financial instutitions after November 15, 2007.

There are those who believe that mark-to-market accounting, and FAS 157 in particular, are substantially responsible for causing, accelerating, and/or exacerbating the current credit crisis by requiring financial instutitions to overstate losses associated with derivitive securities. For example, former FDIC chair, William Isaac, is reported as saying that, "The SEC has destroyed $500 billion of bank capital by its senseless marking to market of these assets for which there is no marking to market, and that has destroyed $5 trillion of bank lending." Without assigning blame, it is clear that mark-to-market accounting has dramatically affected the balance sheets of lending institutions that might otherwise have the means and the motivation to invest in energy projects.

The SEC and FASB have since relaxed the application of mark-to-market accounting when the underlying market is disfuntional or disorderly. The *Emergency Economic Stabilization Act of 2008* restates the SEC's authority to suspend the application of FAS 157 if the SEC determines that it is in the public interest and protects investors. The *Emergency Economic Stabilization Act of 2008* was passed and signed into law on October 3, 2008. The hope is that this act will revitalize lending, at least in part, by freeing up capital that has been otherwise frozen by draconian accounting requirements. NWPPA

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