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COLORADO RIVER COMMISSION
OF NEVADA

April 13, 2004

Ms. Jean Gray
Assistant Regional Manager for Power Marketing
Western Area Power Administration
Desert Southwest Customer Service Region
P.O. Box 6457
Phoenix, Arizona 85005-6457

Re: Comments on March 31, 2004, version of proposed Section 12

Dear Jean:

We have carefully examined the latest version of proposed Section 12, now entitled "Review and Adjustment of Federal Power Allocation," and Western's "Responses to Comments Received after January 16, 2004," which focus on Section 12. We appreciate the opportunity to offer these further comments on that provision.

The vital importance of the federal hydropower allocation to the State of Nevada requires that any provision that allows for a reduction or elimination of that allocation be narrowly and precisely drawn so as to minimize the uncertainty such a provision surely creates. The disentanglement triggers in Section 12 are disturbingly open-ended and vague. A balance must be found between Western's need for flexibility to address problems created by changes in a customer's status and the need we all share for certainty and repose in our firm electric service contracts. We believe Section 12 does not yet strike that balance, and we are still trying to understand what federal interests are served by such broad triggers.

The disentanglement trigger of former versions now found in subsection 12.2—changes in the Contractor's status "in some manner"—remains sweepingly open-ended and vague. What changes can we avoid or plan for? Are the five enumerated changes intended as examples of the type of change that will trigger this subsection? If so, the phrase "including, but not limited to" should be replaced with "such as." Otherwise, we cannot rely on the enumerated changes for notice of what the term "changes in the Contractor's status" encompasses. As the subsection points out, the trigger "changes" is "not limited to" the enumerated changes; they would not be examples, but only five in an unbounded universe that could include dissimilar changes as well.

Moreover, we have yet to hear why a mere change in status or structure should justify an adjustment in allocation. What federal interest is being served here? We understood that interest in

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the SLCA/IP version, which we have accepted, because it ties the “change” to some “result,” some named consequence: a resulting change in the Contractor’s obligation to supply electricity to preference entity loads. Surely not just any change in status should concern Western, let alone justify an adjustment of allocation. Whatever in the universe of changes in the Contractor’s status justifies such an adjustment should be spelled out in subsection 12.2 so we, and the people who finance us, have fair notice. As we and many other Parker-Davis customers have urged in earlier comments, this trigger should be tied to a resulting change in the Contractor’s obligation to supply electricity to preference entity loads, as it is in the SLCA/IP version, or to some other result. We believe it is some *consequence* of change that is Western’s concern, and not the change itself.

This point is illustrated by the trigger for termination of the contract in subsection 12.1. The trigger is not just any action taken by the Contractor, but action which has a specified consequence, namely, the abrogation of the Contractor’s preference status. CRC’s problem with this trigger is that we are uncertain as to what “actions” the State of Nevada, acting through a state agency, could take that would “[abrogate its] status under Reclamation law to purchase federal hydropower.” The preference status of a State under that law is clear. We share similar understandings of preference law expressed by Mr. Lynch in his comment letter of this week, and we are interested in Western’s answers to the questions he asks there. In CRC’s comment letters dated, respectively, November 4 and 22, 2002, submitted to Tyler Carlson during the remarketing process, Nevada fully described the basis for its preference status and the identity of, and the nature of its sales to, its Parker-Davis customers. We respectfully request that you tell us what “actions” Western contemplates CRC could take that would abrogate Nevada’s preference status. We expect to be asked this by our commission, our customers and others who are vitally concerned about Nevada’s power allocation. As we said in our comment letter of February 9, 2004, “if there is a problem related to Nevada that this provision seeks to address, that problem should be fully made known to us and resolved through immediate and thorough discussions at all appropriate levels of Western.”

For the same reasons Western has added a “baseline” to subsection 12.2, one should be added to subsection 12.1 as well. It would help to mitigate uncertainty if the phrase “on or after October 1, 2008,” were inserted following “actions taken” in the second line of subsection 12.1.

Our experience during the recent P-DP remarketing effort suggests that Section 12 will encourage those who seek to create a pool of “repossessed” power by promoting the disentanglement of others through inaccurate, incomplete or unsubstantiated claims or allegations made to Western’s Administrator. The hapless allottee will be forced to expend considerable time and resources defending against them. We find nothing in Section 12 that prevents this kind of abuse or its vexatious repetition many times over the term of the contract.

We are concerned that Section 12 may become fertile ground for litigation. We urge that the procedural processes of subsections 12.3 and 12.4 be fleshed out to promote dispute resolution with additional notice, response, and exchange of information. CRC supports the revisions to these subsections offered in Mr. Lynch’s comments. The Contractor should be entitled to have a copy of

the information upon which the Administrator is basing his intended action and should be afforded an opportunity for an evidentiary hearing before the Administrator, not simply a request for reconsideration.

In its responses to earlier comments on Section 12, Western has offered to meet and confer with its customers "to discuss the consequences of a customer-proposed change prior to implementation." Such discussions and the procedural process afforded in Section 12 will be crucial safeguards in avoiding surprises or results that promote litigation. Even with these safeguards, Western's customers must wonder to what extent their sound business judgments and decisions, and those of the Contractor's customers or members, are now as a practical matter subject to the prior evaluation and approval of Western's Administrator.

The March 31, 2004, version of Section 12 is a substantial rewrite of former versions, and you have indicated that this revision has involved contracting officers Western-wide. As you can see from our comments and those we believe you will receive from others, we need more time to discuss the meaning and purposes of Section 12, its applicability in specific situations, and how its procedures will work. We ask that you provide the necessary time for this process before finalizing our individual contract extensions.

Thank you, Jean, for all your help.

Sincerely,



George M. Caan
Executive Director

GMC/GAL

Cc: Tyler Carlson
Michael HacsKaylo
FES Contractors (by E-mail)