

Discussion from May 4, 2004 P-DP Customer Meeting re: Review and Adjustment of Federal Allocations, Section 12 of FES Amendment

The comments provided by the Customers at the May 4, 2004 meeting included restatements of comments received in letters, as well as new information. In order to get a full sense of customer comments on the Review and Adjustment language, this document should be read in conjunction with the customer comment letters posted on Western's Desert Southwest Region website.

Bob Lynch: Is there a conflict between Section 37 of the GPCPs and Section 12. Not clear that 12.2 and 37 really talk about separate things. It should be made clear. Bob later stated that he did not see a conflict.

Jay Moyes: The Section 12.1 phrase "in his or her sole judgment" adds nothing in terms of meaning or clarity to the section. Also, Western should move the "under Reclamation Law" phrase to read "If the Administrator of Western determines, under Reclamation Law, . . .". This would make it clear that the Administrator is bound to act in accordance with Reclamation Law.

Tyler Carlson: The purpose of our discussions here today is to capture the essence of your comments, but not to wordsmith the language as a group.

Bob Lynch: Subsection 12.1 adds the requirement that preference status be maintained during the entire life of the contract, which is beyond the requirements of Reclamation Law.

Jean Gray: Requested that Bob Lynch send the citation of the case he cited wherein this concept was adjudicated.

Jean Gray: Why should the baseline in Section 12.1 be "October 1, 2008" instead of "execution of Contract"?

Bob Lynch: Because of financing. Banks are unfriendly about changing an existing deal and adding risk to an existing contract. Banks understand that the extension is a new deal.

Gerry Lopez: We want to make sure that the language of Section 12 does not in effect waive our right to judicial review of a determination made or action taken by the Administrator under subsections 12.1 or 12.2. Once a 'final decision' is made under subsection 12.4, we may need to seek judicial review of that decision.

Jay Moyes: The language of Section 12.2 "changes in some manner" creates an illusory contract because "what manner" cannot be predetermined.

Walter Bray: Even though a member becomes a partial requirements customer, we (AEPCO) still have the obligation to serve load. As the Section 12 language now reads, he sees no danger to AEPCO or its members.

Tyler Carlson/Jean Gray: The Section 12.2 customer-recommended language --- "materially diminish" and "significant reduction" --- doesn't further clarify or add anything to the language.

Gerry Lopez: In subsection 12.2, there should be a specific impact trigger linking the "change in some manner" to some undesired consequence or impact of the change that is of federal interest,

such as inability to serve a preference load. The language "changes in some manner" --- as a sole trigger, isolated from consequence or impact --- is sweepingly open-ended and vague.

Charles Reinhold: In discussing "appropriate action", is there some lesser action possible besides terminating the contract?

Michael Curtis: How about including the phrase "including but not limited to"?

George Caan: Western should list "other appropriate action" first and "terminate this Contract" second at the end of Section 12.1.

Michael Curtis: The DOD provision (to allow the bases to maintain their allocations even though they privatize their distribution systems) should be expanded to incorporate entities like Cortaro-Marana, which doesn't possess a distribution system but is a Boulder Canyon Project customer.

Dennis Delaney: What if the Bureau of Indian Affairs gets legislation similar to DOD in regard to their distribution systems. Are we then going to do a special exception for the BIA?

Gerry Lopez: What are the requirements for preference status under Reclamation Law? Where can we find a definitive and comprehensive description of those requirements? What is Western's answer to the proposed privatization of the distribution systems of the DOD P-DP customers? Does it affect their preference status? Ownership and operation of a distribution system appears to be a requirement of "utility responsibility", which has been an element of preference status. The DOD P-DP contractors are not statutorily required to privatize their distribution systems. If Western waives the distribution system ownership and operation requirement for the DOD entities, what would be the rationale for not similarly waiving the requirement for nonfederal customers as well?

Jean Gray: We will post on the website the Western Policy on DOD Utility Privatization.

Scott Johansen: Clarified that 10 U. S. C. 92688 authorizes, not mandates, privatization of electrical distribution systems of military bases.

George Caan: Section 12.1 is an after-the-fact determination and doesn't allow for a 90-day notice.

Charles Reinhold: Section 12.3 should be re-written for Western to act as an Advisor, not that the Contractor "shall give notice" to Western within 90 days of a contemplated change.

Jay Moyes: The 5 examples of Section 12.2 should be moved to Section 12.3.

Michael Curtis: The 5 examples listed in Section 12.2 are necessary as a "stimulant" for a customer in considering a change. They could be repeated in Section 12.3.

George Caan: How can a contractor provide notice to Western within 90 days in the event that a member decides to "walk away" or terminate membership with no notice? Does the 90-day notice put the contractor in jeopardy when it is beyond their control?

George Caan: Is it possible to get a waiver to the 90-day notification rule?

Gerry Lopez: What information or other materials is the Administrator evaluating when he is deciding whether to take action against a Contractor under Section 12? Who supplied these materials and why? A Contractor, notified of an intended action by the Administrator under Section 12, will need to know the answers to such questions. And isn't the Administrator acting as any judge presented with allegations, weighing evidence, and considering penalties? We believe, as in any such matter, due process requires a meaningful opportunity to defend oneself and one's allocation. A mere request for reconsideration does not give that opportunity. We would like Section 12 to require the Administrator to provide the Contractor, against whom the Administrator intends to act under Section 12, with the same information and other materials on which the Administrator is basing his intended action and to explain the basis of that action. And the Contractor should have an opportunity for a hearing before the Administrator to respond fully to the allegations and the materials the Administrator is relying on.

Gerry Lopez: Complying with the requirement of subsection 12.3 to provide at least 90 days' notice to the Administrator of actions that might have the effect of abrogating one's preference status or of any "changes in some manner" before they are implemented may not be possible. The requirement forces the Contractor at his peril to decide which of numerous operational and other actions proposed by the Contractor over the 20-year term of the contract could trigger either subsection 12.1 or 12.2. The Administrator could be deluged by these notices and would have to respond yea or nay to each. And even if the Contractor knew with reasonable certainty what actions are relevant, the actions may occur outside the Contractor's control before the Contractor can give the required notice. The language of subsection 12.3 needs to address these problems.

Michael Curtis: The Administrator should send a notice to a contractor that some change which would precipitate an action under this Section is believed to have occurred. This advisory notice should be applicable to both Sections 12.1 and 12.2.

Jay Moyes: We need to have some "due process". The trigger should be some Administrator action to notify the contractor of a belief in some change to or violation of a contractor's status.

Bob Lynch: Wants a mechanism to seek an opinion and get an opinion.

Jay Moyes: Administrator should give notice of initiation of inquiry.

Jean Gray: We have two potential options for moving forward with the P-DP Contract Extensions:

- (1) If the GPCP 's are done before the execution of the contracts, then they will be incorporated at the time of execution.
- (2) If the GPCP's are not done, then we will proceed with inclusion of "Review and Adjustment" language in Section 12 of the P-DP FES Amendment.

Jean Gray: At this time, the GPCP's revisions are close to being done, and it does not appear that any of the changes have been major or significant.

Bob Lynch: Recommend that we proceed with putting Section 12 language into the P-DP Contract Amendment. There is a possibility that the GPCP discussions could get bogged down.

Michael Curtis: Discussion of the Multi-Species Conservation Program and question as to whether all of the environmental requirements associated with the contract extensions have been satisfied.

Jean Gray: Western believes that all NEPA requirements have been satisfied and is in the process of determining whether any additional action is required to satisfy the Endangered Species Act.

Michael Curtis: Will Western keep the customers informed of any issues or impending threats they become aware of which may jeopardize the decisions set forth in the May 2003 FRN and/or which may cause delay in getting the contract extensions signed for the P-DP resources?

Jean Gray: Yes. Western will keep the customers informed of any issues or concerns that we become aware of.

George Caan: His observation is that "Review and Adjustment" language is different for CRSP contracts than they will be for P-DP contracts. He points out that this could cause problems or conflicts between contracts.