



Department of Energy
Western Area Power Administration
Desert Southwest Customer Service Region
P.O. Box 6457
Phoenix, AZ 85005-6457 **OCT 05 2004**

Dear Parker-Davis Project Electric Service Customer:

The Western Area Power Administration (Western) recently sent a letter dated September 27, 2004 which included the revised "Review and Adjustment of Federal Power Allocations" language (Section 12) for the Parker-Davis Project Electric Service Contract Extension Amendments.

Western has become aware that there is considerable discussion among the customers about the Section 12 language. A recurring theme is concern that the Section 12 language has the effect of causing customers to waive their right to challenge or review Western's decisions. Similar comments were received during the May 4, 2004 Parker-Davis Project customer meeting with regard to waiving the right to challenge and seek judicial review. As a result of these comments, Western removed the "in his or her sole judgment" and the "in his or her sole discretion" language from Section 12. In addition, the following customer comment and response was posted to Western's Parker-Davis Project Remarketing Effort website located at www.wapa.gov/dsw/pwrmtk as part of the document entitled "Western Responses to May 4, 2004 Customer Meeting Comments":

Comment: 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.

Response: A Contractor's right to seek judicial review of an Administrator's decision is not waived and is not affected by either the language of Section 12.1 or Section 12.2."

It is not Western's intent to preclude any Contractor from challenging, as they may feel is necessary and appropriate, the exercise of discretion by Western's Administrator. If there is language in Section 12 that you feel still conveys waiver of the right to seek review, please identify the specific language with your recommended revision.

For your reference, another copy of the revised Section 12 language for the Parker-Davis Project Electric Service Contract Extension Amendment is enclosed. We have also enclosed copies of the "Western Responses to May 4, 2004 Customer Meeting Comments" and the "Western Responses After July, 16, 2004" comment and response documents for your reference and review.

Western is prepared to offer executable Parker-Davis Contract Extension Amendments no later than 30 days after the date of the September 27, 2004 letter if no further comments are received. Thereafter, you will be given 60 days to return the signed contracts to Western for final execution.

Western appreciates your continuing efforts to bring the Parker-Davis Project Contract Extension Amendment process to conclusion. If you have any questions, or would like further discussion of any issues, please call me at (602) 352-2555.

Sincerely,

A handwritten signature in black ink that reads "Jean Gray".

Jean Gray
Assistant Regional Manager
for Power Marketing

Enclosures

**Western Area Power Administration Response to
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.

Comment: 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.

Response: Western has removed "in his or her sole judgment" from Section 12.1. The phrase "under Reclamation Law" is intended to apply to the determination of a change in a Contractor's preference status and therefore is retained in its current position in the section.

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

Response: As of September 24, 2004, Western has not received supporting documentation for this opinion.

Comment: Why should the baseline in Section 12.2 be "October 1, 2008" instead of "date of execution of Contract"? Banks are unfriendly about changing an existing deal and adding risk to an existing contract. Banks understand that the extension is a new deal.

Response: Customers have the certainty of a firm electric service contract from the date of execution. Risk is introduced only if the customer implements a change in status or obligation to supply electricity to preference entity loads. In order to mitigate any risk associated with implementing change, Western is available, upon request from the customer, to discuss the consequences of a customer-proposed change prior to implementation. Implementing this provision as of the date of execution of the amendment provides notice of the Administrator's intention to act, consistent with Reclamation Law, under the circumstances described in Section 12.

Comment: 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.

Response: A Contractor's right to seek judicial review of an Administrator's decision is not waived and is not affected by either the language of Section 12.1 or Section 12.2.

Comment: 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.

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

Response: Western has addressed this concern by adding language, which requires that the change result in a change in beneficiary in order to trigger an adjustment.

Comment: Even though a member becomes a partial requirements customer, a cooperative still has the obligation to serve load. As the Section 12 language now reads, we see no danger to a cooperative or its members.

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

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

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

Response: Western proposes the language of Section 12 to read "...then the Administrator may take appropriate action, which may include termination of this Contract."

Comment: 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.

Comment: 10 U. S. C. 92688 authorizes, not mandates, privatization of electrical distribution systems of military bases.

Comment: 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?

Response: Western will make no special exceptions in the language of Section 12. If there were a change in legislation affecting the BIA, Western would respond to legislative requirements as necessary and appropriate.

Comment: 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?

Response: Western's Policy on Department of Defense Privatization Issues has been posted to the P-DP Remarketing Effort page of Desert Southwest Region's website, under the "Customer Meetings", "May 4, 2004 Customer Meeting" links.

Comment: What are the requirements for preference status under Reclamation Law? Where can we find a definitive and comprehensive description of those requirements?

Response: The Reclamation Act of 1939 and other statutes within the body of Reclamation Law refer generally to preference entities. These requirements are further defined through Western's power marketing criteria.

Comment: 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.

Comment: 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 subsections 12.1 and 12.2.

Comment: 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.

Comment: 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?

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

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

Comment: 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.

Response: The language of Section 12.3 now provides that the Contractor give notice 120 days in advance or as soon thereafter as the Contractor becomes aware of a proposed change. Section 12.4 requires the Administrator to give notice of his or her intended action and the reasons for such action. Additional provisions have been added to provide assurance that the Contractor is aware of the process and has an opportunity to respond.

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

Comment: The 5 examples listed in Section 12.2 are necessary as a "stimulant" for a customer to consider a change. They could be repeated in Section 12.3.

Response: Section 12.3 refers to the examples of "changes" found in Section 12.2. Western sees no need to restate them in Section 12.3.

Comment: 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.

Comment: Wants a mechanism to seek and get an opinion.

Comment: Administrator should give notice of initiation of inquiry.

Response: Although Western's Power Marketing Authority gives the Administrator broad discretion, he may not act arbitrarily and capriciously. Although every detail of the process is not spelled out in the language of Section 12, it does not preclude Western from providing further information. Western understands the necessity to work closely with the Contractors to resolve these issues and has added notice language in the event that the Administrator undertakes a review other than because of notice by the Contractor.

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

Response: Western believes that all National Environmental Policy Act and Endangered Species Act requirements have been satisfied and is in the process of further clarifying Western's actions as described in the MSCP documents.

Comment: 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?

Response: Western will keep the customers informed of any issues or concerns that we become aware of. There is a possibility that the MSCP could delay getting contract extensions signed for the P-DP resource.

Conclusion of Discussion:

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

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

Comment: 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.

Response: The Desert Southwest Region is moving forward with the P-DP contract amendment process independent of the GPCP process.

Customer Comment	Customer Proposed Language	Western Response
<p>[Lynch] In subsection 12.1, I have suggested adding a reference to actions taken after execution of the amendment as being subject to the Administrator's determination. It is clear that subsection 12.2 operates prospectively. It should be clear that subsection 12.1 does also. I have also altered the reference to preference law because it is an entitlement to preference not an actual preference that is, in fact, a contractor's "status" in this subsection. I would note that this provision does not work in any contract executed with a non-preference entity and thus, this exact language may not work in a different context, including a GPCP.</p>	<p>12.1 If the Administrator of Western determines that actions taken by the Contractor, the Contractor, have abrogated the Contractor's status as an entity entitled to a preference under Reclamation Law to purchase Federal hydropower, then the Administrator may take appropriate action, which may include termination of this Contract.</p>	<p>Western agrees that this provision is not intended to be retroactive and will add the following language to the contract:</p> <p>Western will further revise the 12.1 as follows: "have abrogated the Contractor's status as an entity entitled to a preference" to more accurately describe the Contractor's "status".</p>
<p>[Lynch] Subsection 12.3. I have deleted language in lines 2 and 4 that I believe make the provision vague and troublesome. I have inserted a trigger on line 3 that I believe helps make this notice provision clear and workable. I hope you agree.</p>	<p>12.3 The Contractor shall give Western written notice prior to implementing any changes that may be covered by Section 12.2. Such notice shall be provided at least 120 days in advance of proposed implementation of any such change or receipt of the proposed change. Western will respond in writing within 90 days of receipt of such notice, indicating whether the Administrator intends to take action.</p>	<p>Western agrees that that language is unnecessary and will delete the language.</p> <p>The additional language is accepted, however, "...or as soon as..." will not be deleted. This language was added to address the customers' concern that they may not be aware of a change 120 days in advance. This language will be changed to read "or as soon thereafter as the Contractor becomes aware of the proposed change".</p>
<p>[Lynch] In subsection 12.4, I have altered the notice mechanism for Western because the request for reconsideration to the Administrator is keyed to "receipt" of notice. Thus, the timeframe in the giving of the notice must also be keyed to that same event to make things work. I have also changed the timeframe so as to allow 60</p>	<p>12.4 In any case in which the Administrator determines to take action because the Contractor's status will change or has changed in a manner addressed in subsections 12.1 and/or 12.2, Western will notify the Contractor in writing of the Administrator's intended action(s) and the reasons for taking the</p>	<p>Western will use the suggested language in an independent sentence as follows: the following actions. Implementation of the Administrator's action shall take place no earlier than 30 days from the Contractor's receipt of such notice.</p>

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<p>days for a contractor to request reconsideration because additional time for preparation may bring out factors that allow matters like this to be resolved and benefit the process.</p> <p>Finally, I have noted that any final decision by the Administrator will include the effective date of that action.</p>	<p>intended in this regard. The Administrator will not be required to provide a written response to the Contractor's request for reconsideration. If the Contractor disagrees with the Administrator's determination, the Contractor may request reconsideration from the Administrator. Requests for reconsideration to the Administrator shall be made in writing, and must be received by the Administrator within 30 days of the Contractor's receipt of the notice from the Administrator. The Administrator will provide the Contractor with written notice of Western's final decision within 45 days of receipt of the request for reconsideration including the effective date thereof.</p>	<p>Western has retained the 30 day time frame in order to bring closure to the process. There is ample lead time in the process prior to a decision for all parties to understand and address the issues so that they are able to respond to a decision or appeal within 30 days.</p> <p>Western agrees that <u>including the effective date of the decision</u> is clarifying.</p>
<p>[SRP] Endorses Lynch comments re GPCPs</p>		<p>See responses to Lynch comments above.</p>
<p>[CRC] We believe this procedure could save time and expense on all sides by promoting early understanding and solution before the Administrator commits to some course of action. ... The potential severity of the intended action and the need to prepare an adequate defense in a matter that may be complex and where the stakes are high justifies the longer time for response.</p> <p>In cases where the Administrator nonetheless determines to take action, the Contractor should have at least 120 days to respond to the notice.</p>	<p>We urge that subsection 12.4 provide that where the Administrator undertakes an investigation of a Contractor pursuant to subsection 12.1, or pursuant to subsection 12.2 in the absence of notice from the Contractor provided under subsection 12.3, the Administrator must notify the Contractor of the investigation and offer the Contractor a reasonable opportunity to provide comments and other information on the matter.</p>	<p>Western will add the following language: <u>If the Administrator decides to pursue a review for reasons other than in response to a notice from the Contractor, the Administrator will notify the Contractor and offer the Contractor a reasonable opportunity to provide comments and other information on the matter.</u></p> <p>Western has retained the 30 day time frame in order to bring closure to the process. See above.</p>

[WELTON-AJOHAWK IRRIGATION AND DRAINAGE DISTRICT] Concur with both Lynch and Colorado River Commission. Could be difficult to respond in 30 days if Administrator determines to take action, but not a point of contention Ready to sign as it stands.

[AEPSCO] ...the language in subpart 12.2 must be modified to preserve certainty, for the purpose of future resource planning, by more clearly specifying the parameters triggering re-examination and adjustment with respect to member-based power supply entities. Within AEPSCO's system, a partial requirements distribution cooperative member has the right, at any time, to withdraw as a member of AEPSCO, which may or may not affect existing contractual obligations regarding power and energy. Consequently, AEPSCO could "lose one or more members" without any impact on its contractual obligation to serve that former member. It is therefore our position that a unilaterally imposed "adjustment" in allocation by the Administrator is warranted only when a member withdraws and such member's contract with AEPSCO is terminated or modified resulting in a material impact on AEPSCO's obligation to supply power and energy as measured against the obligation recognized by the Administrator in approving AEPSCO's present allocation.

12.2 Western's Administrator reserves the right to ~~adjust~~ adjust Western's firm electric service obligations under this contract as ~~may be necessary~~ administratively deems reasonably appropriate, if, the Contractor's ~~status~~ of firm and after the date of execution of this Amendment, changes in a manner that results in ~~adjusting~~ the ~~beneficiaries~~ the ~~power and energy that is materially different from that recognized by the Administrator in approving the Contractor's present allocation,~~ including but not limited to: (1) merging with, acquiring, or being acquired by another entity; (2) creating a new entity from an existing one; (3) joining or withdrawing from a member-based power supply entity; (4) if the Contractor is a member-based power supply entity, losing ~~the~~ the ~~contractual~~ its ~~relationship with such member;~~ or (5) selling, leasing, or otherwise disposing of its, or a member's, electric distribution system.

It is clear in the context of Section 12 that the Administrator will "re-examine" Western's firm electric service obligations.

"The word 'status' will be substituted for 'the or she'"

"Reasonably" was deleted from the proposed language based on customer's comments that it added nothing of substance to the provision. A standard of reasonableness will be used to evaluate the Administrator's exercise of discretion. Use of the word reasonable does not change the review standard.

"...As of the date of..." is meant to be a baseline against which changes thereafter are measured. The commentor's proposed language does not represent a baseline.

Western believes "...a change in beneficiaries..." is more specific and more easily determined than "materially" and has provided that language in response to a need for a trigger."

Western will maintain the option to review. If termination or modification of the contractual relationship does not result in a change in beneficiary, then 12.2 is not triggered.

PARKER-DAVIS PROJECT ELECTRIC SERVICE CONTRACTS
REVIEW AND ADJUSTMENT OF FEDERAL POWER ALLOCATION
Draft Revised September 27, 2004

12. **Review and Adjustment of Federal Power Allocation:**

12.1 If the Administrator of Western determines that actions taken by the Contractor, after the date of execution of this Amendment, have abrogated the Contractor's status as an entity qualified for preference under Reclamation Law to purchase Federal hydropower, then the Administrator may take appropriate action, which may include termination of this Contract.

12.2 Western's Administrator also reserves the right to adjust Western's firm electric service obligations under this Contract as the Administrator deems appropriate, if the Contractor's status, as of the date of execution of this Amendment, changes in a manner that results in a change in the beneficiaries of the preference allocation, including but not limited to: (1) merging with, acquiring, or being acquired by another entity; (2) creating a new entity from an existing one; (3) joining or withdrawing from a member-based power supply entity; (4) if the Contractor is a member-based power supply entity, losing one or more members; or (5) selling, leasing, or otherwise disposing of its, or a member's, electric distribution system .

12.3 The Contractor shall give Western written notice prior to implementing any changes covered by Section 12.2. Such notice shall be provided at least 120 days in advance or as soon thereafter as the Contractor becomes aware of the proposed change. Western will respond in writing within

90 days of receipt of such notice, indicating whether the Administrator intends to take action.

12.4 If the Administrator decides to pursue a review for reasons other than in response to a notice from the Contractor, the Administrator will notify the Contractor and offer the Contractor a reasonable opportunity to provide comments and other information on the matter.

12.5 In any case in which the Administrator determines to take action because the Contractor's status will change or has changed in a manner addressed in subsections 12.1 and/or 12.2, Western will notify the Contractor in writing of the Administrator's intended action(s) and the reasons for taking the intended action(s). Implementation of the Administrator's action shall take place no earlier than 30 days from the Contractor's receipt of such notice.

12.6 If the Contractor disagrees with the Administrator's determination, the Contractor may request reconsideration from the Administrator. Requests for reconsideration to the Administrator shall be made in writing, and must be received by the Administrator within 30 days of the Contractor's receipt of the notice from the Administrator. The Administrator will provide the Contractor with written notice of Western's final decision within 30 days of receipt of the request for reconsideration, including the effective date thereof.