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**COLORADO RIVER COMMISSION  
OF NEVADA**

January 7, 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 the revised prototype of Amendment No. 1 to the Parker-Davis Project firm electric service contracts.

Dear Jean:

We have reviewed Western's revised prototype of Amendment No. 1, dated December 21, 2003, (the "Contract Amendment"). CRC commends Western for addressing our concerns about the initial proposed language of the Contract Amendment, particularly the provisions pertaining to advance funding, and we welcome many of the "fixes" reflected in the revised prototype. We especially appreciate your continued willingness to discuss the terms and conditions of the proposed Contract Amendment. CRC does have comments on the revised prototype, and, as in our earlier comments, we will treat first those parts of the Contract Amendment that raise the most acute substantive concerns.

**1. TRANSFER OF INTEREST IN CONTRACT.**

Section 12 of the revised prototype introduces a new provision entitled, "Transfer of Interest in Contract." The redline version of the revised prototype shows that Western first inserted and then deleted a version of this provision that appears as section 19 of Western's Contract No. 87-BCA-10004 with CRC for firm electric service from the SLCA Integrated Projects. That section (the "CRSP Version") was promulgated by Western, effective September 1, 1999, and reads as follows:

Notwithstanding any other provision of this contract to the contrary, Western's Administrator may adjust Western's energy or capacity obligations to the Contractor as the Administrator reasonably determines is appropriate if, (1) the Contractor changes its customer status in some manner including merging with another organizational entity, acquiring or being acquired by another organizational entity, creating a new organizational entity from an existing one, joining or withdrawing from a member-based organization, loses its status as a preference entity, or adds or loses members from its membership

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organization, and (2) the Contractors' obligation to supply electricity to preference entity loads changes as a result.

Section 12 of the revised prototype (the "Prototype Version") reads as follows:

Notwithstanding any other provision of the contract to the contrary, Western's Administrator reserves the right to adjust Western's firm electric service obligations under this contract as he or she deems appropriate if the Contractor's status as a customer changes in some manner, including but not limited to (1) merger with another organization, (2) acquisition of or being acquired by another organization, (3) creating a new organizational entity from an existing one, (4) joining or withdrawing from a member-based power supply organization or (5) if the Contractor is a member-based power supply entity (such as a generation and transmission cooperative), losing one or more members from its membership organization.

As you can understand, the enormous importance of the federal hydropower allocation to Western's customers, including CRC, requires that any provision threatening to reduce that allocation be extremely precise. The language "if the Contractor's status as a customer changes in some manner" is so vague as to make Western's power delivery obligations illusory. The "including" language, particularly with the phrase "without limitation," would be construed to introduce only examples from a potentially unlimited and unknowable universe of "changes in customer status." The changes that could trigger an allocation adjustment are clearly not limited to the enumerated examples, and we, and the courts, are left to wonder what other status changes could lead to such an adjustment.

CRC signed on to the CRSP Version, which has similarly vague "changes" language, because in the CRSP Version a change in customer status was only one of *two* conditions necessary to trigger an allocation adjustment. The second condition ("the Contractor's obligation to supply electricity to preference entity loads changes as a result [of the first condition]") was specific enough to warn us as to what conduct or set of circumstances might result in an adjustment. The Prototype Version removes the second condition entirely, and we are left with the one vague and overly broad trigger: "the Contractor's status as a customer changes in some manner"—whatever that phrase means or might encompass. Surely Western recognizes that to posit a right to make allocation adjustments on such vague and open-ended language is untenable and unfair and, as it appears, unnecessary.

We understand from you and others that the 'transfer of interest' provision is trying to address particular problems in very specific cases. It is not just any change in customer status that troubles Western, but certain changes that result in specific undesirable *consequences* relating to preference, resale of power or membership issues. In the recent cases related to us, it appears that the CRSP Version is sufficient to address the particular problem. Perhaps the second condition in the CRSP Version may need to be carefully and precisely expanded to address other undesirable

consequences, but removing the second condition altogether is clearly the wrong direction to go. And it may be that the contracts of customers who are membership organizations require a more tailored treatment of the 'transfer of interest' provision. (We would suggest, by the way, that since different customers may require different versions of this provision, Western should not include the provision as part of the General Power Contract Provisions, as Western apparently contemplates doing.) You have given us to understand that the language of the Prototype version is not required by Western and that your office is not "married" to it. We strongly urge Western to return to the CRSP Version, which avoids the problems of the Prototype Version and which won customer acceptance in the contract extension for SLCA/IP power.

**2. EXCESS ENERGY.**

The revised prototype deletes the original section 12 of Western's first draft of the Contract Amendment, which pertained to excess energy. In its comments of November 21, 2003, CRC had expressed concern that certain language in the provision was inconsistent with the requirement for a first offer of excess capacity and energy to the firm electric service contractors in subsection 11.14 of Western's P-DP Advancement of Funds Contract No. 98-DSR-10870 (the "Generation AOF Contract"). You have repeatedly affirmed to the contractors that Western does not intend that the Contract Amendment in any way alter the terms and conditions of the Generation AOF Contract. That contract will be thoroughly reviewed and possibly amended by its parties in a separate process. In the meantime, CRC, and we believe the other FES Contractors, would welcome having a response on Western's website that Western intends to continue to offer excess capacity and energy from the Parker-Davis Project first to the FES Contractors as provided in the Generation AOF Contract presently and in any future amendments.

**3. REPLACEMENT ADVANCES RECONCILIATION SURCHARGE.**

In its comments of October 23, 2003, CRC commended Western for following through on its commitment in subsection 15.7 of the Generation AOF Contract to establish an enforceable surcharge adequate to make all Replacement Advances reconciliation payments as provided in that contract. Our concern was that some of the proposed language could be construed as modifying section 15 of the Generation AOF Contract. In the revised prototype, Western has clarified in the first sentence of section 11 that the entitlement is "as provided therein," that is, in the Generation AOF Contract, and we are glad for that clarification.

But the second sentence of the provision still states that the "Contractors . . . shall pay a surcharge "as determined by Western." We remain concerned that this language could be construed as permitting a different result than is required under the Generation AOF Contract, which provides specific formulas for calculating the reconciliation surcharge. See paragraph 2 of exhibits F-1, F-2 and F-3 of the Generation AOF Contract. We recognize that the sentence may contemplate a determination of not only the amount of the surcharge but other aspects of payment as well. Accordingly, we urge that Western replace the phrase "as determined by Western" with "calculated as provided in Contract No. 98-DSR-10870 and in the manner determined by Western." At a minimum, CRC, and we believe the other FES Contractors, would welcome having a response on Western's website that Western intends to calculate the surcharge as provided in the Generation AOF Contract.

**4. GENERAL POWER CONTRACT PROVISIONS.**

Section 9 of the Contract Amendment replaces section 16 of the Original Contract (section 11 in CRC's contract) to incorporate the July 10, 1998, General Power Contract Provisions ("GPCPs"). CRC noted in earlier comments that certain provisions of the GPCPs, specifically Articles 20 through 30, do not apply to the Original Contract. Western agreed, but addressed this matter by inserting the phrase "as they may apply" in subsection 16.1. The phrase begs the question as to which GPCPs apply and which do not. If we know today that certain articles of the GPCPs will not apply during the term of the Original Contract—which is the case with Articles 20 through 30—then the Contract Amendment should say so and not leave the question of their applicability unresolved. We request that Western retain the phrase "as they may apply," but also include our recommended language expressly making Articles 20 through 30 inapplicable, just as Western did in the contract extensions for SLCA/IP power and is doing in subsection 6.1 of the Contract Amendment with subarticle 13.1.

**5. EXHIBITS.**

Section 10 of the Contract Amendment replaces section 15 of the Original Contract (section 12 in CRC's contract) to include Exhibit A-1 as part of the Original Contract. By the terms of subsections 15.2 and 15.3, Exhibit A expires and Exhibit A-1 becomes effective on October 1, 2008. The two exhibits are distinct, having different names, containing different data and operating at different times. Sections 4 and 5 of the Original Contract are replete with internal references to Exhibit A. Unless these sections are amended individually to add in each instance the phrase "or Exhibit A-1, as the case may be," a universal provision is needed to make clear that on and after October 1, 2008, the references to Exhibit A shall be deemed to refer to Exhibit A-1. CRC had recommended this language in its December 4, 2003, redline, and Western at first inserted it in proposed section 10 but then deleted it. Western should fix this problem by amending sections 4 and 5 individually or adopting CRC's recommended language.

6. **EFFECTIVE DATES.**

Subsection 14.1 provides that section 6 of the Contract Amendment becomes effective "as set forth herein." The introductory language of section 14 tells us that the Contract Amendment becomes effective on "the first day of the Federal Fiscal Year following execution," which for most customers means October 1, 2004, or later, but in no case, September 1, 2004. Subsection 6.2 tells us what the September 1, 2004, bill must contain; it does not tell us when section 6 becomes effective. Under section 14, subsection 6.2 does not begin to speak until October 1, 2004, one month after the September 1, 2004, bill must be issued. This problem is solved simply by providing in section 14 that for purposes of the September 1, 2004 billing, section 6 operates as of September 1, 2004, as recommended in CRC's December 4, 2003, redline.

7. **PARAGRAPHS.**

It avoids confusion if the different parts of a section of the contract are given their distinct names. Usually, sections are divided into subsections and subsections are divided into paragraphs and paragraphs into subparagraphs, and so on. The directory replacing subsection 5.1 of the Original Contract should read: "Paragraphs 5.1.1 and 5.1.2 of subsection 5.1 of section 5 are deleted . . . ."

8. **COMMENTS SPECIFIC TO CONTRACT 87-BCA-10086.**

a. **Subsection 2.6.** The internal reference should be to "Section 14 of this Amendment."

b. **Section 3.** Among the indicators of a valid contract is not only mutual assent but consideration as well. That is why most contracts, including Western's, begin this section with the phrase "In consideration of the foregoing recitals and the mutual covenants contained herein" or similar language reciting consideration. CRC requests that its Contract Amendment contain this language.

c. **Subsection 5.2.** The subsection relating to "Point(s) of Delivery, Voltage(s), and Loss Adjustments" is subsection 5.5 in CRC's contract. Thus, the directory of subsection 5.2 of the Contract Amendment should read subsection "5.5".

d. **Interchange of Capacity or Energy.** In our discussions, you have indicated Western's willingness to offer CRC interchange service. We assume that the absence of an interchange provision in the revised prototype reflects only the fact that interchange provisions already appear in other P-DP firm electric service contracts and does not signal a rejection of the interchange provision offered in CRC's December 4, 2003, redline.

Sincerely,



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Executive Director

xc: Tyler Carlson, WAPA  
Tony Montoya, WAPA  
FES Contractors (by E-mail)

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