



October 26, 2004

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J. Tyler Carlson
Regional Manager
Western Area Power Administration
Desert Southwest Region
P. O. Box 6457
Phoenix, AZ 85005-6457

Dear Mr. Carlson:

This letter is intended to respond to the letter of September 27, 2004 from the Assistant Regional Manager for Power Marketing, Desert Southwest Customer Service Region, Western Area Power Administration, stating that if no further comments were received, Parker-Davis Project Firm Electric Service Contract Extension Amendments would be offered in executable form within 30 days. The Assistant Regional Manager's letter further stated that previous customer comments to Western indicated that a dialogue between Western and its Parker-Davis Customers has resulted in workable language for Section 12, the section dealing with Western's unilateral right to determine whether to terminate a customer's contract or adjust its allocation of Parker-Davis power based upon certain unspecified events and determinations.

We have stated our deep concerns with the positions espoused by the Assistant Regional Manager for Power Marketing to you and to Western's Administrator in correspondence dated [August 6 2004] and September 24, 2004 and in our meeting with you and Western's Administrator October 18, 2004. While we are not a Parker-Davis contractor, we reiterate our concerns here and our opposition to the positions espoused by Western in proceeding to confront Parker-Davis customers with executable Parker-Davis contract extensions because we believe such positions could become precedent for us in future negotiations with Western.

A. Western's ~~Proposed Unilateral Right~~ to Terminate the Parker-Davis Contract and Adjust the Parker-Davis Power Allocation Should Be Deleted from Western's Power Contracts

Western seeks the unprecedented and extraordinary authority to unilaterally determine whether a customer has "abrogated" its preference status or changed its "status ... in a manner that results in a change in the beneficiaries of the preference allocation ..." and, if so, to terminate the

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customer's contract or adjust its power allocation. The most current version of this language was circulated as an attachment to the Assistant Regional Manager for Power Marketing's letter of September 27, 2004 and intended to comprise a new Section 12 of the Parker-Davis contracts, entitled "Review and Adjustment of Federal Power Allocation."

The new Section 12 contains no criteria or standards to describe or limit the Administrator's exercise of discretion. There is no definition or criteria to indicate what "abrogation" of preference status means in Section 12.1, however, the customer must agree in advance that once the Administrator finds it has occurred, the Administrator can terminate the customer's contract. There are also no criteria or standards in Section 12.2 to limit what could constitute a change in status "in a manner that results in a change in the beneficiaries of the preference allocation" because the list of possible changes in status is only an "including, but not limited to" list of examples. Nevertheless, the customer would be required to agree that once the Administrator makes such a determination, the Administrator could unilaterally adjust the customer's allocation of Parker-Davis power.

When asked on October 18 why Western is proposing to its customers that they give Western this unprecedented authority to unilaterally terminate contracts and alter power allocations, Western responded that it doubted it had such authority under current law or that it could depend on courts to enforce its exercise of the authority if it had it. Western is, therefore, seeking the authority from its customers by proposing that they agree Western can unilaterally exercise the termination and allocation adjustment of Parker-Davis power. Western's proposal is wrong for several reasons.

First, Western has more than adequate authority to enforce the Reclamation Laws, including preference power resale limitations. Our counsel has advised us that this was amply demonstrated when the federal government successfully sued to enjoin the City of San Francisco from allowing Pacific Gas and Electric Company to benefit from preference power granted the City under the Raker Act of December 19, 1913 (one of the nation's first preference laws), instead of the City distributing Raker Act power directly to its citizens. *United States v. City and County of San Francisco*, 310 U.S. 16 (1940).

Western advised us on October 18 that it has confronted only two instances of changes in customer status which have led it to be concerned about changes in status under Reclamation Law. One occurred in Arizona and the other in Montana. Western also advised us that it believes both instances have been resolved satisfactorily. Western obviously took whatever action it deemed necessary in those situations to resolve whatever Reclamation Law enforcement concerns it had. The successful resolution of those two instances of change in customer status under Western's existing enforcement authority demonstrate that Western is not justified in seeking unprecedented, unilateral authority to adjust power contract allocations from Parker-Davis customers.

Second, while we believe Western has more than adequate authority to carry out and enforce the Reclamation Laws, if Western believes it needs additional enforcement authority, Western should seek that authority from Congress, not from its customers. Congress enacted the

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Reclamation Laws. If Western were to try to acquire power to enforce the Reclamation Laws by requiring its customers to agree in advance to critical, unilateral determinations by Western, Western would deprive the customers of the right subsequently to challenge Western's unilateral determinations. At the very least, when combined with Western's broad discretionary authority under federal administrative law, requiring customers by contract to acquiesce in Western's unilateral decision-making in certain yet-to-be-revealed circumstances would create the negative implication that a customer could never meaningfully challenge the grounds upon which Western based a contract termination or power allocation adjustment decision. This would result in a serious diminution of existing customer rights.

Third, the legal underpinnings for the proposed Section 12 are substantially in doubt as demonstrated by Bob Lynch's comment letter to Jean Gray this week.

Fourth, the addition of Section 12 to power contracts would invite opportunists – some would say “bounty hunters” – to exploit legitimate actions by customers over the life of their contracts to try to obtain Parker-Davis power. These opportunists could be expected to seek out Parker-Davis customers who might be considering legitimate business restructuring plans and threaten to harass them before Western unless such customers met their demands.

The kinds of restructuring of business relationships referred to in Western's “including but not limited to” list of possibly impermissible changes in status (such as engaging in a merger or joining or withdrawing from member-based power supply entities) are good examples of the kind of private business organization matters with which Western has no legitimate concern. If a customer acts in a manner which implicates the Reclamation Laws or its preference status under them, Western has a proven remedy to pursue with the customer, as the federal government did against the City of San Francisco. In short, the broad, unlimited powers Western seeks through Section 12 to meddle in customer affairs would constitute not only an open invitation to meddling by Western, but also an invitation to opportunists seeking short term gain to inject themselves and possibly Western into matters which are of no concern to Western. We see no practical reason why Western should invite itself into general oversight of matters under control of the customers and other regulatory agencies.

B. Western's Advance Funding Provisions For Parker-Davis Customers Should Remain Voluntary

Western appears to be proposing that its existing, successful Parker-Davis advance funding program be converted from a voluntary program to a mandatory one. We infer this could be Western's intention from the text of Western's 2003 “Notice of Decision” (68 Fed. Reg. 23709 at 23712 (2003)), wherein Western stated, “Western received no comments on this requirement, so advance funding will be included as a requirement in the contracts.”^{1/} If it is Western's intention

^{1/} “The requirement to advance fund will be included in the Parker-Davis Project firm electric service contract as a condition for receiving an allocation of P-DP power.” See Western's Answer to Question 9, “Frequently Asked Questions,” (September 2003, <http://www.wapa.gov/dsw/pwrmtkt/PDPremarkFAQ.pdf>)

Western is
proposing to
change to
the existing
ACF.

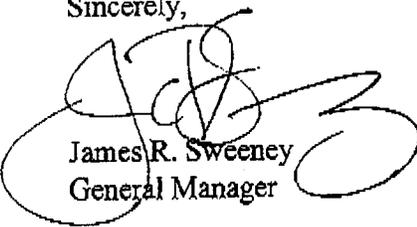
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to convert the current voluntary advance funding program into a mandatory one for current Parker-Davis customers, Western must withdraw the proposal for mandatory advance funding.

Voluntary advance funding has worked well since 1996 as a customer supported vehicle to provide needed operation and maintenance funds for the Parker-Davis project. A large part of the success of advance funding is attributable to the outside oversight provided by the independent Funding Board, established in the currently effective Parker-Davis Advancement of Fund Contract. Any departure from the voluntary nature of the current advance-funding program would threaten the integrity of the program and the independence of the oversight accorded it by the Funding Board.

We appreciate this opportunity to comment and look forward to working with you further to develop appropriate language to extend the Parker-Davis Firm Electric Service Contracts.

Sincerely,



James R. Sweeney
General Manager

cc: Mr. Michael Hacskaylo, Administrator
Western Area Power Administration