

**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.