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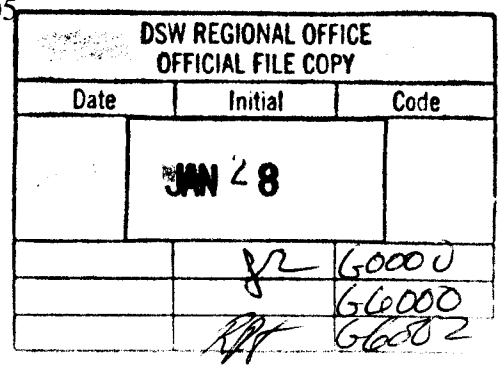

Mr. J. Tyler Carlson
Regional Manager
Desert Southwest Region
Western Area Power Administration
P.O. Box 6457
Phoenix, Arizona 85005-6457

Re: Parker-Davis Project; Post-2008 Resource Pool Allocation Procedures; 69 Fed.Reg. 58900-58903 (October 1, 2004) and 69 Fed.Reg. 78408-78409 (December 30, 2004)

Dear Tyler:

As the above Federal Register notices invite, the following are comments on the proposed allocation procedures for the 2008 resource pool of Parker-Davis power created by the decision of Western to extend contracts of the existing Parker-Davis firm electric service contractors. My comments will address four subjects: the dissolution of the resource pool after the closing date for contract execution; the sole determination provision; the requirement to pay in advance for firm electric service; and the anticipated refund to existing customers.

USE OF FIRM POWER NOT CONTRACTED

The October 1 Federal Register notice provides at Section III, subsection H that any firm power of this supplemental resource pool "not under contract by the closing date will be used as determined by Western."

10 C.F.R. Section 905.32(e)(1) provides as follows:

> "If power is reserved for new customers but not allocated, or resources are offered but not placed under contract, this power will be offered on a pro rata basis to customers that contributed to the resource pool through application of the extension formula in section 905.33."

In its final allocation procedures, Western should make it clear that any uncontracted power will be put under contract in the fashion required by this regulation.

CROD "SOLE DETERMINATION"

I have previously addressed the subject of "sole determination" provisions in comments I have submitted on proposed language for the extension of Parker-Davis contracts to existing firm electric service contractors. Let me merely repeat the essence of what I said in that prior comment.

Actions by a federal official under a contract provision are either required or discretionary. Actions taken by federal officials with regard to contracts, as distinguished from allocations, have generally been considered by the courts to be judicially reviewable. Brazos Electric Power Cooperative, Inc. v. Southwestern Power Administration, et al., 819 F.2d 537, 544 (5th Cir. 1987); City of Santa Clara v. Andrus, 572 F.2d 660, 669 (9th Cir. 1978), cert. denied 439 U.S. 859; Arizona Power Pooling Association v. Morton, 527 F.2d 721, 727-8 (9th Cir. 1975), cert. denied sub nom. Arizona Public Service Co. v. Arizona Power Pooling Association, 425 U.S. 911 (1976).[1] Under generally accepted principles of contract law, courts would still review a discretionary decision made within the context of a provision exercising "sole judgment" utilizing the implied covenant of good faith and fair dealing. This covenant would impose on the decision the obligation of Western to demonstrate that it made an informed choice, based on an honest belief, preceded by due diligence against a backdrop of real rather than fancied prospects of availability, impelled and constrained by authority deriving from the agreements or other rules governing the relationship between the parties, taken for the stated reason as opposed to some pretextual purpose, consistent with the motive to effectuate the parties' expressed common purpose and reasonable expectations rather than to frustrate the contract, and having caused it to forego a benefit or lose an opportunity to bargain for in reasonably anticipated from the consummation of the agreement. Such review would be, as a practical matter, akin to that which would be derived from review under Section 10 of the Administrative Procedure Act. This would be especially true because of the commitment by Western to have a public process, which would clearly place the decision within the context of the Administrative Procedure Act or the covenant of good faith and fair dealing. The public process is, in my view, a necessary process in either event. Thus, the words "and sole determination" have no judicially effective application but only serve to inflame passions over Western's management style. I would suggest that those words could be deleted from the final criteria without meaningfully altering the contract principles necessary for completing this process.

MANDATORY ADVANCE FUNDING

As you know, I have been engaged in research on the question of whether Western has the legal authority to require advance funding for power resources. I have concluded that Western does not have that authority.

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[1] Action involving a power contract is thus distinguishable from federal discretionary decisions concerning allocations among preference entities, which the courts have declared nonreviewable. City of Santa Clara v. Andrus, 572 F.2d 660, 668 (9th Cir. 1978), cert. denied sub nom. Pacific Gas and Electric Co. v. City of Santa Clara, 439 U.S. 859; Arizona Power Authority v. Morton, 549 F.2d 1231, 1241, 1252 (9th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

My analysis starts with Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. Sec. 485(h)(c). In that statute, its initial provision concerning furnishing water for municipal or miscellaneous purposes specifically provides that the Secretary (of the Interior) "shall require the payment of said rates each year in advance of delivery of water for said year." In the very next sentence concerning the sale of electric power or lease of power privileges, that requirement is missing and no provision concerning advance payment for power resources can be found in the statute or elsewhere in the Act.

It is a consistently applied tenet of statutory construction that, where Congress inserts a particular provision in a statute and fails to put it in another part of the statute, Congress is deemed to have intended to make a distinction and the courts will not assume that the failure to include the provision in the other part of the statute in inadvertent. 2 J.Southerland, Statutory Contstruction, Section 4915. Thus, the omission of the requirement for advance funding as to power resources is presumed to be intentional. Cervantes-Ascencio v. United States Immigration and Naturalization Service, et al., 326 F.3d 83, 86 (2d Cir. 2003). It would require substantial evidence to the contrary to "add terms or provisions where Congress has omitted them" (citation omitted). Ibid.

The only contrary evidence that could be produced concerning this issue would be from court interpretations (there are none), from Interior Department Solicitor Opinions prior to the transfer of the power program in 1977 (there are none on this issue), or from the Congressional history of the statute itself. We have examined the committee reports and the testimony and the floor debate on the Reclamation Project Act of 1939. Section 9 was the focus of much of the debate in both houses and provisions of this subsection were amended in both houses. There was no discussion of the requirement for advance payment provision concerning water that was in the bill as proposed by the Administration and as passed in both houses nor was there any discussion of whether the Secretary should be given the authority to require advance payment as to power. Both houses made amendments to Section 9(c) and ultimately the House acceded to the amendments of the Senate concerning the interest rate and the application of preference. Thus, the very provision concerning power sales was examined by Congress and nothing was discussed as to advance payment for power sales. There is a total absence in the Congressional record of any reference to this subject. That being the case, the courts are left to apply principles of statutory interpretation to the statutes including this one.

We have also examined the Contributed Funds Act and Solicitor Opinions concerning it. There is nothing in it or the 1928 Appropriation Act that speaks to the issue of requirements for advance funding.

In short, there is no stated authority for Western to rely upon. Indeed, there have been proposals in Congress recently related to this subject and none of them have passed.

Western has inherited the power portion of the authorities of the Secretary of the Interior under Section 9(c). The Department of Energy Organization Act made no changes in Reclamation law in transferring the power program of the Bureau of Reclamation to the Department of Energy. There is no statutory support that would enable Western to require advance funding. Since its predecessor, the Secretary of the Interior, had express authority which the Secretary retains to this day for requiring advance payment for water and the statute is otherwise silent concerning power, the inescapable conclusion is that Congress did not grant the authority under this statute or anywhere else for requiring advance payment for power.

The inescapable conclusion is that Western has the authority under the Contributed Funds Act and the 1928 Appropriation Act to accept advance payment but does not have the authority to require it. This provision should be deleted from the General Contract Principles that Western intends to apply in this supplemental marketing of Parker-Davis power.

REIMBURSEMENT OF EXISTING CONTRACTORS

Section IV, subsection G of the General Contract Principles proposed in the October 1, 2004 Federal Register notice contemplates that existing contractors will be reimbursed for the value of undepreciated replacement advances made by them for which they will receive no benefit to the extent that their allocations are reduced by the creation of this new resource pool. That is obviously only fair. We urge you to work with your existing customers to develop a fair and equitable formula for determining the value of these undepreciated replacement advances including taking into consideration the additional capacity that the replacement program will have created.

Finally, we note that the 30-day extension contemplated by the December 30, 2004 Federal Register notice causes the deadline for Western receiving written comments and/or applications to fall on a Sunday. Since the notice requires that the comments or applications "be received" on or before Sunday, January 30, 2005, potentially two days of the intended 30-day extension could be lost. It would appear to be appropriate to consider comments and applications received on the following business day, Monday, January 31, 2005.

Sincerely,
ROBERT S. LYNCH & ASSOCIATES

Robert S. Lynch

RSL:psr

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