

Via Email: [JOT@wapa.gov](mailto:JOT@wapa.gov)

Attn: Ms. Anita J. Decker  
Acting Administrator  
Western Area Power Administration  
P.O. Box 281213  
Lakewood, CO 80228-8213

**Re: “Power Marketing Administrations’ Role” -- Draft Recommendations of Joint Outreach Team**

Dear Administrator Decker:

I am writing, on behalf of the multi-sector membership of the Western Business Roundtable (“Roundtable”), in response to draft recommendations of the Western Area Power Administration (“WAPA”) / Department of Energy (“DOE”) Joint Outreach Team (“JOT”),<sup>1</sup> produced in response to a March 16, 2012 memorandum issued by DOE Secretary Chu to the heads of four federal Power Marketing Administrations (“PMAs”) (hereafter referred to as the “Chu Memo” or “Memo”).<sup>2</sup>

In that document – entitled “Power Marketing Administrations’ Role” – the Secretary issued a series of directives intended to make major changes in the PMAs’ missions and priorities. It also made clear that detailed directions on implementation of the mandate will be forthcoming. It is that implementation which the JOT recommendations relate to.

The Chu Memo has fostered a tremendous amount of concern in Congress, within Western states and among rural cooperatives and municipal utilities and energy customers. Those concerns – legal, process and economic – are numerous. A joint letter, submitted to Secretary Chu by 166 Members of the U.S. House of Representatives and U.S. Senate, sums up a number of the most troubling implications of the Memo:

*“Public power utilities, rural electric cooperatives and local officials in our states are troubled by the potential cost impacts of these directives and by a perceived expansion of the role of the PMAs beyond their current statutory authority. These proposals also constitute a fundamental shift away from regional planning, and the understanding of local needs and impacts which comes with it, towards a Washington, D.C.-based, top-down approach.”<sup>3</sup>*

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<sup>1</sup> 77 Fed Reg. 69619, November 20, 2012.

<sup>2</sup> U.S. Secretary of Energy Steven Chu, “Power Marketing Administrations’ Role” Memorandum to Power Marketing Administrators (March 16, 2012).

<sup>3</sup> Joint U.S. House of Representatives-U.S. Senate letter to U.S. Department of Energy Secretary Steven Chu regarding March 16, 2012 PMA Memorandum (June 5, 2012): <http://naturalresources.house.gov/uploadedfiles/congressionaltrtosecchupmas06-05-12.pdf>.

## ROUNDTABLE STATEMENT OF INTEREST

The Roundtable is a broad-based coalition of companies doing business in the Western United States, including the State of Alaska. Our members are engaged in a wide array of enterprises, including: manufacturing; retail energy sales; mining; electric power generation and transmission; energy infrastructure development; oil and gas exploration development, transportation and distribution; and energy services.

We work to defend the interests of the West and support policies that encourage economic growth and opportunity, freedom of enterprise and a common-sense, balanced approach to conservation and environmental stewardship.

A number of our Members interact directly with Western PMAs, particularly WAPA. Thus, we have a keen interest in the Chu Memo and the implications it has for our regional electricity system and economy. These comments should be considered supplementary to the Roundtable's comments submitted to DOE on August 17, 2012.<sup>4</sup>

## LEGAL AUTHORITIES

The federal government, through its four PMAs, markets the hydropower produced at federally-owned dams operated by the U.S. Army Corps of Engineers ("Corps") and the Bureau of Reclamation ("BOR"). The PMAs own and operate approximately 33,730 miles of transmission lines, overlaying approximately 42 percent of the continental United States.

WAPA owns approximately 17,000 miles of high-voltage transmission lines, with a footprint covering 15 states in the central and western U.S. WAPA markets wholesale power to approximately 287 public power systems, serving over 5.5 million retail electricity consumers.

The four PMAs are complicated entities, each with its own legal foundations. Congress, recognizing the unique characteristics and needs of each region, purposefully structured separate authorizing statutes for each. By law, each PMA is required to be headquartered in the region it serves.

The statutorily-defined mission of the PMAs is to provide the lowest-cost energy possible (within sound business principles) to their wholesale electricity customers.<sup>5</sup> Thus, PMAs are intricately tied to their customers both functionally and contractually.

Many Western rural cooperatives and municipal utilities depend on long-term purchase contracts with WAPA. The rates paid by these "preference customers" cover costs of generating and transmitting that power, interest on the federal investment in projects they benefit from, a proportionate share of the joint costs, and ongoing operation and maintenance. In some cases, the power customers also subsidize other purposes of the dams (i.e. irrigation and/or recreation).

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<sup>4</sup> Roundtable Comments to DOE Secretary Steven Chu, *Secretarial Memorandum: "Power Marketing Administrations' Role"* (August 17, 2012): [http://www.westernroundtable.com/Portals/0/Docs/energy/2012/WBRT\\_Comments\\_ChuParamo\\_FINAL.pdf](http://www.westernroundtable.com/Portals/0/Docs/energy/2012/WBRT_Comments_ChuParamo_FINAL.pdf).

<sup>5</sup> Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (codified as amended at 16 U.S.C. §§ 460d, *et seq.*, and in various sections of 33 and 43 U.S.C.)

A great deal of the Western interstate transmission grid is the result of joint funding by WAPA and its preference customers. As modifications and updates are made to federal dams, the power customers that receive the benefits of these upgrades repay the government for them. This “beneficiary pays” concept is a core underpinning of WAPA’s operations.

## GENERAL CONCERNS

A number of organizations have filed materials outlining detailed legal, technical and economic concerns with the directives contained in the Chu Memo and the resulting JOT recommendations. In particular, we would point to comments filed by the Colorado River Energy Distributors Association (“CREDA”), the American Public Power Association (“APPA”) and the National Rural Electric Cooperative Association (NRECA”). These organizations represent the bulk of the PMAs’ preference customers and their input is crucial to any legitimate discussion of the PMAs’ missions or operations. We wish to associate, by reference, with the CREDA, APPA and NRECA comments.<sup>6</sup>

The Roundtable will use the remainder of our comments to reemphasize the threshold regulatory process, legal and operational issues raised by the ChuMemo / JOT recommendations.

- **DOE’s Authority to Mandate Changed Missions for PMAs is Questionable.**

There is a very real question whether DOE has the legal authority to compel the PMAs to alter their missions and whether PMAs have the legal authority to comply. As discussed above, the Flood Control Act of 1944 statutorily defines the overall mission of the PMAs and each individual PMA is governed by its own statute, which explicitly dictates the specific responsibilities of that entity.

Clearly, the Chu Memo was not the result of any meaningful consultation with Congress, nor has Congress acted independently to alter the current statutory framework. The fact that 166 Members of the House and Senate have signed bipartisan/bicameral correspondence to Secretary Chu stating their opposition to the action is evidence of that fact.<sup>7</sup>

Many of the JOT recommendations suggest significant changes in how WAPA’s transmission grid is used, and how transmission services are priced. Such changes go to the heart of the federal power program, cost-based pricing principles and the preference in sales to consumer-owned utilities. Yet DOE provides no information about its legal authority to make these changes, and no information about the cost impacts on consumers.

The Roundtable believes that DOE and WAPA must provide a detailed legal and economic impact analysis of each of the JOT recommendations to Congress, and to WAPA’s preference customers, before the Secretary moves forward with such changes to WAPA’s defined mission.

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<sup>6</sup> The named organizations have filed materials: through the DOE workshop process, in the context of the initial comment period which closed in August, 2012, and now as part of this NOA. We ask to be associated with their filings in all three contexts.

<sup>7</sup> Joint U.S. House of Representatives-U.S. Senate letter to U.S. Department of Energy Secretary Steven Chu regarding March 16, 2012 PMA Memorandum (June 5, 2012): <http://naturalresources.house.gov/uploadedfiles/congressionaltrtosecchupmas06-05-12.pdf>.

- **The Chu Memo an Example of Regulatory “Side-Stepping” by the Administration.**

The Chu Memo is just the latest example of a trend exhibited across the Obama Administration: the frequent side-stepping of formal rulemaking processes set forth in the Administrative Procedures Act (“APA”) and various enabling statutes in favor of unilateral regulation through the use of Executive Orders, Secretarial Orders, agency guidance, interim rules, draft policies, reinterpretation policies and legal “consent agreements,” etc.

This approach is directly at odds with the standards of cooperativeness, transparency and regulatory efficiency President Obama explicitly set for his Administration:

- On January 3, 2010, the President issued the “*Transparency and Open Government*” Executive Order. In it he said: “*My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.*”
- In January, 2011, the President issued Executive Order: “*Improving Regulation and Regulatory Review.*” In it, he directed all federal agencies “*to develop and submit plans to identify and review existing regulations that can be made more effective and less burdensome, while achieving regulatory objectives.*” (In August, 2011, DOE issued its plan.”<sup>8</sup>)
- In March, 2012, the President issued Executive Order: “*Improving Performance of Federal Permitting and Review of Infrastructure Projects.*” The President stated, “*Federal permitting and review processes must provide a transparent, consistent, and predictable path for both project sponsors and affected communities.*”
- In May, 2012, the President issued Executive Order: “*Identifying and Reducing Regulatory Burdens.*” This EO speaks to how federal agencies are to use their retrospective review processes going forward: “*Consistent with Executive Order 13563 and Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), agencies shall give consideration to the cumulative effects of their own regulations, including cumulative burdens, and shall, to the extent practicable and consistent with law, give priority to reforms that would make significant progress in reducing those burdens while protecting public health, welfare, safety, and our environment.*”

It is ever more difficult to reconcile the incongruities between the President’s stated regulatory reform goals and the seemingly insatiable desire of federal agencies to expand their power and scope of regulatory authority. Sadly, the Chu Memo appears to fall into that latter category. It is a highly questionable assertion of authority which would dictate a top-down “Washington Knows Best” approach. It would add new layers of bureaucracy and would increase costs to industrial and retail electric consumers already struggling to cope with the impacts of an extended economic downturn.

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<sup>8</sup> U.S. Department of Energy, “*Final Plan for Retrospective Analysis of Existing Rules*” (August 23, 2011)

The Chu Memo clearly violated the President’s “*Transparency and Open Government*” Executive Order,” which committed the Administration to “a *system of transparency, public participation, and collaboration.*” As already noted, Secretary Chu issued the directive without even consulting with the PMAs, much less Congress, state electricity regulators, local communities, rural cooperatives/municipal utilities or electricity consumers.

The actions of the JOT further violate the standard of transparency purportedly adopted by the President. It is our understanding that the final recommendations from the JOT to Secretary Chu will not be made available to the public. We simply cannot understand how any credible public process would result in recommendations that are provided to the Secretary but not the participants who have commented in that process (and particularly the PMAs’ preference customers who are directly impacted). We strongly urge you to reconsider releasing the final recommendations.

- **The Chu Memo and JOT Recommendations Blur the Distinction Between “Lowest-Cost” Power and “Cost-Based” Power**

We find troubling the DOE’s blurring of the distinction between “lowest-cost” power and “cost-based” power.

The NOA states: “*Western’s mission is to market and deliver reliable, cost-based Federal hydroelectric power and related services to its customers.*”<sup>9</sup>

However, the statutorily-defined mission of the PMAs is not simply to provide wholesale electricity from hydropower at cost-based rates. Rather, any new actions taken by the PMAs must be in accordance with the standard established in Section 5 of the Flood Control Act of 1944, which provides that sales of wholesale electric power to PMA customers are to be made at the lowest possible rates to consumers, consistent with sound business practices.

APPA points out the importance of the distinction between terms: “*Without a standard specifying that rates are to be the lowest possible, the concept of cost-based rates allows for boundless, and potentially duplicative, mandates from DOE to the PMAs that would drive up the costs.*”<sup>10</sup>

Based on the lengthy list of new activities and initiatives introduced by the Chu Memo, and endorsed by the JOT recommendations, the utilities’ concerns are well-founded. (See the discussion on impacts to electricity costs below.)

- **The Chu Proposal Will Needlessly Increase Electricity Costs.**

A major concern in the West is the potential for cost increases to electricity consumers. We were pleased to see that the JOT recommendations removed some of the areas that were of concern to the Roundtable from a cost perspective. However, we continue to strongly oppose any DOE mandate that forces PMAs to pay for functions that do not align specifically with their statutorily-defined missions. Several examples:

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<sup>9</sup> 77 Fed Reg. 69619, November 20, 2012.

<sup>10</sup> Comments of the American Public Power Association In Response to the Department of Energy’s and the Western Area Power Administration’s Joint Outreach Team (JOT) Workshops (August 17, 2012).

- The Chu Memo vision seems to be one of a new centralized, mandatory regime directed from DOE headquarters (which is at odds with PMA enabling statutes requiring PMAs to be headquartered in the regions they serve). We share concerns expressed by PMA customers that they could be required to take on the costs of system-wide transmission upgrades not needed to serve them. This would violate the “beneficiary pays” principle.
- The JOT recommendations include a large amount of future study and evaluation for many of the recommendations it advances. We would be very concerned if DOE seeks to force WAPA, and ultimately its customers, to pay for those activities (which have little or no benefit for the PMA’s current customers).
- We share the concern stated by other commenters regarding the feasibility of some of the timeframes proposed in the JOT recommendations, given the burdens they would exact on WAPA. Any recommendations pursued should ensure that the associated costs are funded by the beneficiary/user. If customers are not beneficiaries/users of an initiative, then it should be funded only by DOE appropriations.

- **The Proposed JOT Recommendations Impact State/Local Authority.**

The JOT recommendations related to the Energy Planning and Management Program appears to link the “policy goals” of DOE to the Integrated Resource Planning (IRP) process. The IRP process established under Section 114 of the Energy Policy Act 1992 has work well.

This JOT proposal would encroach on the jurisdiction of state and local decision-making bodies, including public utility districts, municipalities, and cooperative boards of directors. State and local regulators have traditionally set resource planning requirements for renewable energy, energy efficiency, demand response and related programs, as part of their regulatory authority. Replacing the judgment of locally elected officials with those of DOE through the IRP process is not consistent with the Energy Policy Act of 1992.

We would oppose any effort by DOE to impose “one size fits all” federal mandates, particularly where such mandates will either duplicate or cause a conflict with state and local authorities.

- **The Chu Memo’s Mandates Would Distract PMAs’ From Their Focus on Grid Reliability.**

The PMAs play a crucial role – working with their utility customers – in ensuring the reliability of the nation’s electricity grids. Grid reliability is of fundamental concern to the Western region. Public health and safety depend on it, as does our regional economy. The suggestion that the PMAs’ employees could be mandated by DOE to turn attention away from this core function, and toward activities outside their statutory mission, is stunning. The likelihood that customers will be forced to finance it is infuriating.

- **DOE/JOT Should be Engaging Primarily With Preference Customers**

Most of the JOT recommendations refer outreach to “*customers, stakeholders and tribes.*” We share the concerns expressed other commentators that the federal preference customers, who are paying all the costs of the federal generating and transmitting agencies, should be afforded a different standard of engagement in this process than “stakeholders.” Further, references to “customers” should be clearly defined as “federal preference customers.”

- **Chu Memo and JOT Recommendations Seek to Force Use of Low-Cost Hydro to Support More Expensive Renewables Development**

Many of the JOT recommendations appear aimed at shifting WAPA's mission from utilizing hydropower to provide the lowest-cost power to customers and to using the existing hydropower system and WAPA's transmission to integrate variable energy resources (i.e. wind and solar) in the Western grid. This raises a host of questions:

- How does such a premise align with existing statutes and contractual obligations of WAPA?
- What about the impacts on existing hydropower customers? How are such costs justified, given WAPA's statutory obligation to provide "lowest-cost" power?
- here is assertion that the JOT recommendations follow the "beneficiary pays" principle. However, there are no specifics about who will pay for using the hydropower system to provide reserves and other ancillary services to other renewable generators.
- The Recommendations propose potentially significant changes in the operations of Western's hydropower resources and transmission grid. Has DOE done any cost/benefit analysis of how these changes will affect existing Western customers?

## CONCLUSION

On behalf of the Roundtable's multi-sector membership, I strongly urge DOE to rethink this initiative. It attempts to fix what isn't broken, at great cost to the West, its economy and its consumers.

Best regards.



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