Limited Joint Comments
in Response to the
Draft Recommendations of the Joint Outreach Team

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The entities listed in footnote one below[1] (together, Joint Commenters) submit these limited joint comments in response to the Draft Recommendations[2] of the Department of Energy ("DOE") and Western Area Power Administration ("Western") Joint Outreach Team ("JOT"). The Joint Commenters appreciate this opportunity to comment on the Draft Recommendations. Many of the Joint Commenters are also submitting individual comments on the Draft Recommendations, or joining with other groups in comments. They submit these separate Joint Comments to highlight for the JOT, DOE and DOE Secretary Chu their concerns regarding the legal issues raised by the Draft Recommendations.

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[1] American Public Power Association, Arizona Electric Power Cooperative, Arizona Municipal Power Users Association, Balancing Authority of Northern California, California Municipal Utilities Association, Colorado Association of Municipal Utilities, Colorado River Commission of Nevada, Colorado River Energy Distributors Association, East River Electric Power Cooperative, Grand Canyon State Electric Cooperative Association, Heartland Consumers Power District, Irrigation & Electrical Districts Association of Arizona, Kansas Municipal Utilities, Mid-West Electric Consumers Association, Minnesota Municipal Utilities Association, Missouri River Energy Services, Municipal Electric Systems of Oklahoma, National Rural Electric Cooperative Association, Northern California Power Agency, Platte River Power Authority, Public Power Council, Redding Electric Utility, Sacramento Municipal Utility District, Salt River Project, Southeastern Federal Power Customers, Southwest Transmission Cooperative, Southwestern Power Resources Association, Trinity Public Utilities District, Tri-State G&T Association, Utah Associated Municipal Power Systems, and Wyoming Municipal Power Agency.

[2] A notice of availability of the Draft Recommendations was published in the *Federal Register* (77 Fed. Reg. 69619 (November 20, 2012)), with the Draft Recommendations themselves posted to WAPA's Defining the Future website, available at: http://ww2.wapa.gov/sites/western/about/Documents/JOT%20Draft%20Recommendations%20-%20FINAL%20(111512).pdf

Although the Draft Recommendations represent an improvement over a wholesale implementation of the directives outlined in DOE Secretary Chu's March 16, 2012 Memorandum ("Chu Memo"), several aspects of the Draft Recommendations and the manner in which they have been promulgated remain troubling to the Joint Commenters. One of their prime concerns (and the motivating factor for these Joint Comments) is the failure of the JOT to provide with the Draft Recommendations any substantial legal analysis addressing whether the proposals are permitted under Western's enabling statutes. Certain of the Draft Recommendations seem on their face to be well outside Western's statutory authorities, including but not limited to, the Draft Recommendations to consolidate rates across project areas and to implement flow-based pricing and locational marginal pricing ("LMP").

Hence, the Joint Commenters provide these brief comments to remind the JOT, Western and DOE once again of some of the explicit statutory obligations Western must satisfy prior to taking action on the Draft Recommendations.

The Chu Memo recognized that the Power Marketing Administrations ("PMAs"), including Western, are limited in their activities by their enabling statutes. Changes to the administration of the PMAs are only possible "to the extent allowable under [the PMA] enabling statutes."[3] As Secretary Chu himself recognized, the PMAs are governed by a complex statutory framework: not only may each PMA have its own enabling statute, each system of dams may have their own governing statute, and sometimes even a single dam may have its own authorizing statute.[4]

Although Western's enabling statutes restrict its activities in several ways, the Draft Recommendations make no mention of these enabling statutes or the legal authority under

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[3] Chu Memo at 1 and 4.

[4] *See id.* at 2.

which the JOT has based its recommendations. Western customers have raised this issue repeatedly throughout this process, both in their responses to the Chu Memo and in their participation in the "Defining the Future" initiative. We continue to question whether Western's enabling statutes permit DOE and Western to conduct certain of the activities recommended in the Draft Recommendations. Indeed, we believe several of the recommendations are contrary to three specific Congressional directives for the administration of Western.

First, Congress has provided that electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of Energy, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof among preference customers "at the lowest possible rates to customers consistent with sound business principles."[5] Thus, Western is required to provide "power at cost." The use of hydroelectric project facilities constructed pursuant to these enabling statutes for another purpose, if that purpose would prevent the provision of power at the lowest possible rates to preference customers, runs counter to the plain meaning of the underlying statutes. Any activities undertaken in furtherance of the Draft Recommendations to benefit third parties that would increase costs to project beneficiaries would run counter to the cost recovery mechanisms directed by Congress.

Second, Congress has decreed that "[p]reference in the sale of [excess hydro-] power and energy shall be given to public bodies and cooperatives."[6] As Western customers, "preference customers" will be affected by any change in the way Western is administered. To

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[5] Flood Control Act of 1944, § 5, 16 U.S.C. § 825s (2012), *see also*, Reclamation Project Act of 1939 § 9(c), 43 U.S.C. § 485h(c) (2012).

[6] *Id.*

the extent any actions in pursuit of the JOT's Draft Recommendations stray from the preference principle by providing benefits to other customers or customer classes, at the expense of preference customers, such actions would violate the Congressional directives governing Western's operations and activities.

Third, Congress has prohibited the reallocation of certain project costs without Congressional approval.[7] JOT Draft Recommendations or actions in fulfillment of such recommendations that are deemed to reallocate such project costs would constitute changes requiring prior Congressional approval. Such changes would include any movement to market-based rates or other mechanisms utilizing hydropower to firm-up intermittent resources that would increase costs to preference customers. Pursuit of such changes without Congressional approval would clearly violate the preference principle.

A legal analysis taking into account these and any other statutory limitations on Western's activities in furtherance of the Chu Memo and the JOT Draft Recommendations should immediately be conducted by the JOT or the appropriate legal counsel and made public within this process. This should be done in advance of any further action regarding these proposals, and made available for public review and comment. Conducting such an analysis prior to implementing any of the Draft Recommendations could avoid the waste of enormous amounts of resources and time, as well as ensure that Western continues to comply with its statutory obligations.

[7] Department of Energy Organization Act § 302(a), 42 U.S.C. § 7152(a)(3) (2012).