

November 29, 2013

MEMORANDUM

To: DOE Ex Parte Communications (expartecommunications@hq.doe.gov)

From: Scott Blake Harris

Re: *Energy Conservation Program for Consumer Products and Certain Commercial and Industrial Equipment: Proposed Determination of Computer Servers as a Covered Consumer Product*, EERE-2013-BT-DET-0034

Pursuant to the guidance issued by the Office of General Counsel in its Notice of Guidance on Ex Parte Communications, 74 F.R. 197, this memorandum summarizes a November 22, 2013 meeting between Cisco Systems, Inc. (“Cisco”) and Department staff regarding the above-referenced Proposed Determination. The meeting participants were Daniel Cohen, Assistant General Counsel; John Cymbalsky and Jeremy Domm of the Office of Energy Efficiency and Renewable Energy; Jennifer Sanford, Senior Manager, International Trade and Energy Policy, Cisco; and Scott Blake Harris, Managing Partner of Wilkinson Barker Knauer, LLP, counsel to Cisco.

Consistent with Cisco’s comments filed in this proceeding, Cisco argued that the proposed definition of “server” is too broad and, as such, covers products that are not of the same “type” in any meaningful way. Cisco also explained that network-based and data center “servers” are not consumer products or part of a class of products that can be considered consumer products, and thus the proposed determination is legally impermissible. Moreover, Cisco argued that the Department’s conclusion that servers meet the energy usage threshold for the proposed determination is arbitrary and does not meet statutory requirements.

Cisco suggested that regardless of whether the Department agrees with these arguments on the merits, it should recognize that they are substantial and could be accepted by a court. Cisco argued that it would be a waste of DOE and private sector resources to spend two years on the substantive rulemaking process, only to learn upon appeal that servers cannot be regulated. Thus, if the Department seeks to move forward in regulating server energy efficiency, it should ensure that any determination it issues constitutes final agency action that can be tested in court before the rulemaking process commences.

Cisco appreciates the opportunity to meet with the Department and is available to provide further information upon request.