[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 9, 2021]

No. 20-1068 (consolidated with Nos. 20-1072 and 20-1100)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PUBLIC GAS ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,

Respondent.

On Petition for Review of Action by the U.S. Department of Energy

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SUPPLEMENTAL BRIEF FOR RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Petitioners in these consolidated cases are the American Public Gas Association (20-1068), the Air-Conditioning, Heating, and Refrigeration Institute (20-1072), and Spire Inc. and Spire Missouri Inc. (20-1100). Respondent in each case is the United States Department of Energy. The American Gas Association has intervened in support of petitioners. The City of New York, the Commonwealth of Massachusetts, the Consumer Federation of America, the District of Columbia, the Massachusetts Union of Public Housing Tenants, the Natural Resources Defense Council, the Sierra Club, and the States of California, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, Oregon, and Vermont have intervened in support of respondent.

As of the date of this filing, no amicus curiae has appeared in these consolidated cases.

B. Rulings Under Review

Petitioners seek review of the Department of Energy's final rule captioned Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (Jan. 10, 2020).

C. Related Cases

These cases have not previously been before this Court or any other court. In *National Resources Defense Council, Inc. v. Perry*, Nos. 18-15380, -15475 (9th Cir.), the Ninth Circuit considered a challenge to the Department of Energy's failure to publish the final rule at issue in this case after it was publicly posted for error correction purposes. In that case, the Ninth Circuit held that publicly posting the rule for error correction purposes triggered a non-discretionary duty to publish, and ordered the Department of Energy to publish the rule. *National Res. Def. Council, Inc. v. Perry*, 940 F.3d 1072, 1075 (9th Cir. 2019). Counsel for respondent are not aware of any other related cases.

/s/ Jack Starcher
Jack Starcher

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Other Authorities:

GLOSSARY

Department	Department of Energy
Rule	Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (Jan. 10, 2020)

Petitioners challenge a final rule (the Rule) issued by the Department of Energy (the Department) setting new, more stringent energy conservation standards for commercial packaged boilers, which are large boilers used to heat commercial spaces. As explained in the Department's brief, the Department agrees with petitioners that the underlying statute authorizes the Department to impose more stringent energy conservation standards only if it "determines …, supported by clear and convincing evidence, that adoption of" more stringent standards would "produce significant additional conservation of energy and [would be] technologically feasible and economically justified." 42 U.S.C. § 6313(a)(6)(A)(ii)(II). Because the rule incorrectly asserts that the Department need not satisfy that clear and convincing evidence standard, and because the rule's alternative conclusion that the clear and convincing evidence standard was satisfied is conclusory and inadequately explained, the Department agrees that the rule must be remanded back to the agency for further consideration.

After the Department filed its brief, respondent-intervenors argued that, should this Court agree with petitioners and the Department that the Rule is unlawful, the Court should remand the

Rule to the agency without vacatur. The Department respectfully submits this supplemental brief to address that question.

ARGUMENT

This Court has long recognized that a rule found to violate the Administrative Procedure Act "need not necessarily be vacated." *Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). Instead, the decision whether to vacate depends on (1) "the seriousness of the [rule]'s deficiencies (and thus the extent of doubt whether the agency chose correctly) and (2) the disruptive consequences of an interim change that may itself be changed." *Id.* at 151. Where it is "conceivable" that the agency will be able to remedy the defects identified on remand and reach the same result, and where vacating the rule while the agency tries again might impose significant disruption, this Court has recognized that remand without vacatur is appropriate. *See id.* In those kinds of cases, remand without vacatur recognizes that "[v]acation of an important, complex rule that an agency has spent years developing due to a relatively unimportant flaw in the agency's decision-making process" is a disproportionate remedy,

"especially where that flaw can be readily redressed." 33 Wright & Miller, *Federal Practice & Procedure* § 8382 (2d ed. 2021).

The first *Allied-Signal* factor—the "seriousness of the [rule]'s deficiencies" and whether it is "conceivable" that the agency might remedy those deficiencies on remand—supports remand without vacatur in this case. While the Rule contains a legal error that could not be remedied on remand, as the Department explained in its brief the Rule's alternative conclusion that the clear and convincing evidence standard was satisfied is only deficient because it is inadequately explained. *See* Resp. Br. 21-24. That is the type of deficiency that is "conceivable" for the agency to correct on remand. The Department has expressed its conclusion that the Rule is justified under the correct standard. On remand, the Department can apply the correct evidentiary standard and more fulsomely explain why that standard is met. It is therefore at minimum "possible" that the Department "'can redress [its] failure of explanation on remand while reaching the same result.'" *Shafer & Freeman Lakes Env'tl Conservation Corp. v. FERC*, 992 F.3d 1071, 1096 (D.C. Cir. 2021) (quoting *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013)). And the Department

expects on remand that it will be able to provide a full and sound explanation why the Rule's standards satisfy the clear and convincing evidence standard.

As for the second *Allied-Signal* factor, vacatur of the Rule would have significant disruptive consequences. The heightened standards set by the Rule were established pursuant to a statutorily mandated review process. *See* 42 U.S.C. § 6313(a)(6)(C) ("Every 6 years, the Secretary shall conduct an evaluation of each class of covered equipment"). After engaging in that process, the Department determined that the prior energy conservation standards, which had been set in 2009, are not sufficiently rigorous. And while the Rule does not require compliance with its new standards until 2023 in order to provide relevant parties time to prepare for the heightened standards, vacatur of the Rule would push back that timeline by many years and maintain the 2009 standards for years to come. The lookback process that ultimately resulted in the 2020 Rule began in 2013—ten years before the current 2023 compliance date. *See* 78 Fed. Reg. 54,197 (Sept. 3, 2013). Forcing the Department to restart that process now would therefore almost

certainly result in the 2009 standards remaining in place well after 2023.

In short, vacatur would have the effect of frustrating a statutorily mandated lookback procedure, and would result in the continued application of outdated standards that are already over a decade old—standards that the Department already concluded were insufficiently rigorous *in 2016*. And the Rule concluded that the heightened standards would result in substantial additional conservation of energy (and accompanying reductions in harmful emissions) over the 2009 standards. *See, e.g.*, JA579 (noting that "energy savings described in this section are estimated to result in cumulative emission reductions" of "16 million metric tons . . . of carbon dioxide," "139 thousand tons of methane," "3.1 thousand tons of sulfur dioxide," "41 thousand tons of nitrogen oxides," "0.1 thousand tons of nitrous oxide," and "0.0003 tons of mercury" (footnote omitted)). This Court has "frequently" deployed remand without vacatur in this kind of case—where vacatur "would at least temporarily defeat the enhanced protection of the environment[]" provided by the Rule. *U.S. Sugar Corp. v. EPA*, 844 F.3d 268, 270 (D.C. Cir. 2016) (per curiam) (alteration omitted) (quotation marks omitted).

CONCLUSION

For the foregoing reasons, the Rule should be remanded to the agency without vacatur.

Respectfully submitted,

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July 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 955 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Jack Starcher
Jack Starcher

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

/s/ Jack Starcher
Jack Starcher