ORAL ARGUMENT HELD ON 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 Petitions for Review of an Order of the
United States Department of Energy

PETITIONERS' JOINT MOTION TO VACATE DOE'S FINAL RULE PURSUANT TO THE COURT'S PRIOR ORDER

The American Public Gas Association, the Air-Conditioning, Heating and Refrigeration Institute, Spire Inc., and Spire Missouri Inc. (collectively "Petitioners") brought this action to challenge the Department of Energy ("DOE") final rule for commercial packaged boilers (Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (2020) ("Final Rule")). On January 18, 2022, the Court found DOE's justification for the Final Rule unreasonable in several respects, remanded the Final Rule to DOE for 90 days to provide "a limited opportunity" for DOE "to provide a full and sound explanation why the [Final Rule's] standards … satisfy the clear and

convincing evidence standard," and provided that "the Final Rule will automatically be vacated" if DOE fails to do so. *American Public Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018, 1027, 1029, 1031 (D.C. Cir. 2022) ("*APGA v. DOE*") (internal quotation marks omitted). The Court specified that the Final Rule would be vacated if DOE failed to take "remedial action" within 90 days "unless the agency demonstrates within ten days of the issuance of this decision the need for additional time." *Id*. at 1031. DOE chose not to seek additional time.

On April 15, 2022, DOE notified the Court that it had "published a supplement to the Final Rule providing additional explanation in response to the deficiencies identified in the Court's opinion." The document attached to that notification ("DOE's Response") was published at 87 Fed. Reg. 23421 (April 20, 2022). As explained below, DOE's Response is facially inadequate, was issued without observance of procedure required by law, and manifestly fails to provide a "full and sound explanation of why the [Final Rule's] standards … satisfy the clear and convincing evidence standard." Accordingly, Petitioners respectfully move for the Final Rule to be vacated pursuant to the Court's prior order.[1]

[1] Petitioners are authorized to state that the American Gas Association, representing more than 200 local energy companies, and an intervenor in D.C. Cir. No. 20-1068, supports this Motion.

I. DOE's Response Is Facially Inadequate and Was Issued Without Observance of Procedure Required by Law.

One of Petitioners' key arguments regarding the Final Rule amounted to "a straightforward challenge to DOE's reliance on an unreasonable assumption that purchasers of commercial boilers have no statistically significant preference for economically beneficial investments or aversion to net cost investments regardless of the economic stakes involved." Reply Br. at 22; *see* Opening Br. at 52-53. As the Court explained:

> [I]t is difficult to believe purchasers of commercial packaged boilers, which are often large, sophisticated businesses, do not account for life-cycle costs when making a purchase. Random assignment, the petitioners contend, elides this reality. If a purchaser selects the most efficient unit for its building, then the DOE's model will assign the benefits of that choice to its rule, rather than attributing it, correctly, to the purchaser's rational decision making. As a result, the petitioners argue, the DOE inflated the economic value of a more stringent standard by attributing to a new regulation economic benefits that would be realized even without a new regulation.

APGA v. DOE, 22 F.4th at 1027. Petitioners' core concern has been that this unsupported assumption dramatically skewed the results of DOE's economic analysis by attributing to the proposed new standards the impact of very high net-benefit efficiency investments that purchasers would overwhelmingly make in the absence of such new standards, including "investments" in which the higher efficiency product *is the low-cost option in terms of initial investment*. *See* Opening Br. at 54-55.

In remanding the Final Rule, the Court correctly concluded that DOE had "provided no[] actual evidence that [alleged market failures] affect the market for commercial packaged boilers and thus justify" this assumption and that "[w]ithout a cogent and reasoned response to the substantial concerns the petitioners raised about this crucial part of its analysis, we cannot say that it was reasonable for the DOE to conclude that clear and convincing evidence supports the adoption of a more stringent standard." *APGA v. DOE*, 22 F.4th at 1027-28.

With respect to these issues,[2] DOE could have responded to the Court's invitation "to provide a full and sound explanation why the [Final Rule's] standards … satisfy the clear and convincing evidence standard," *id.* at 1031, in either of two ways. First, it could have attempted to provide a justification for the Final Rule based on the existing record of its rulemaking proceeding. Because the existing record lacked evidence to support the challenged assumption, *see id.* at 1027, that approach would have required some cogent explanation to the effect that the assumption was not material; *i.e.*, that it had not significantly skewed the results of its analysis as Petitioners claimed. Second, DOE could have attempted

[2] Petitioners focus in this Motion to Vacate on a limited range of issues in order to streamline the issues for the Court's consideration. Petitioners reserve their rights, however, to address the substance of DOE's Response with respect to these issues – and to raise additional concerns with DOE's Response – in the event of subsequent litigation or further proceedings before DOE.

to provide "actual evidence" to justify its challenged assumption. That approach would have required DOE to expand the record to include such evidence. *See Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992) (no substantial evidence where study upon which agency relied was not included in the record). It also would have required notice and opportunity for comment to ensure that DOE's evidence was "exposed to refutation" during the administrative proceeding. *Owner-Operator Indep. Drivers Ass'n v. FMCSA*, 494 F.3d 188, 209 (D.C. Cir. 2007); *see Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 899-901 (D.C. Cir. 2006) ("these considerations are no less relevant" on remand).

DOE did not respond in either of these ways. It did not attempt to rely on the existing record to show that its challenged assumption had not materially skewed the results of its analysis (as both the record and the reported results of its analysis indicate). *See* Opening Br. at 55-57 (explaining and illustrating the fact that the average life-cycle cost outcomes DOE relied upon to justify its standards had been "dragged up by a relatively small percentage of outcomes with disproportionately high estimated life-cycle cost savings"). Nor did DOE attempt to supplement the record through notice and comment. Instead, DOE's Response seeks to justify DOE's critical assumption through new arguments supported by new evidence and citations to dozens of academic papers, none of which were

included in the administrative record or have ever been exposed to public comment. *See* 87 Fed. Reg. at 23423-27.

There are two obvious problems with DOE's approach. First, DOE's Response is legally insufficient to remedy one of the critical errors that the Court identified: its failure to cure the absence of any "actual evidence" justifying its challenged assumption. In short, none of the documents cited in DOE's Response have been added to the administrative record, and – particularly in a proceeding in which DOE's determinations must be supported by clear and convincing evidence – DOE cannot base a critical factual premise underlying its action on studies that are *not* included in the administrative record. *See Ctr. for Auto Safety*, 956 F.2d at 314. DOE cannot claim that the studies it cites merely confirm conclusions that were based on other substantial evidence in the record, because there was none. Rather, DOE plainly seeks to remedy its failure to provide *any* "actual evidence that [alleged market failures] affect the market for commercial packaged boilers" by citing documents ostensibly providing such evidence. In short, DOE cannot remedy the critical lack of evidence in the record at the root of its inadequate explanation *without adding* evidence to the record.

Second, DOE seeks to rely on critical new arguments and evidence presented without notice or opportunity for comment. To excuse this procedural error, DOE claims that its new arguments and evidence amount to nothing more

than "further explanation" of its original justification for the Final Rule, rather than (as they are) an attempt to cure DOE's earlier failure to provide evidence of relevant market failures. 87 Fed. Reg. at 23430. In fact, DOE issued the Final Rule without even *attempting* to justify its challenged assumption on the merits,[3] a failure that (as the Court noted) "bespeaks a failure to consider" the issue. *APGA v. DOE*, 22 F.4th at 1027. Opportunity for comment was necessary, however, because DOE's Response consists largely of completely new information and lengthy argument that Petitioners have never had the opportunity to critique. *See* 87 Fed. Reg. at 23422-38. Indeed, weeks in advance of the deadline for DOE's response to this Court approached, Petitioners specifically asked DOE to seek comment on any new arguments or evidence on these issues. *See* Ex. A at 3-11 (Petitioners' Joint Request to DOE on remand).

DOE's alternative excuse (invoking the "good cause" exception to notice and comment requirements) is that – *having declined the Court's invitation to request additional time for remand proceedings* – it could deny Petitioners any opportunity for comment because the Court's unmodified 90-day deadline for "remedial action" made notice and comment "impracticable." 87 Fed. Reg. at 23430. DOE cannot plead "good cause" on the grounds of an exigency it chose to

[3] *See* Opening Br. at 53; Reply Br. at 25-27.

create. *See Chamber of Commerce of U.S.*, 443 F.3d at 908 (describing "exigent circumstances" of a "far different nature" than DOE's choice here not to seek additional time despite the Court's invitation). Nor can DOE reasonably assert that opportunity for comment was "unnecessary." 87 Fed. Reg. at 23430. One of the core purposes of notice and comment requirements is to "to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Envt'l Integrity Project v. EPA*, 425 F. 3d 992, 996 (D.C. Cir. 2005) (quoting *Int'l Union, United Mine Workers of Am. v. MSHA*, 407 F. 3d 1250, 1259 (D.C. Cir. 2005)).

It is easy to see why DOE sought to avoid notice and comment, because – though it failed even to acknowledge the fact – Petitioners *had already provided comment* that DOE's Response cannot survive. In short, as explained below, that comment (Petitioners' Joint Request, Ex. A) demonstrates that arguments of the kind presented in DOE's Response are not responsive to – let alone sufficient to address – the most serious problems created by DOE's "random assignment" methodology. The Joint Request:

- Requested that DOE perform a screening analysis to determine whether its economic analysis can survive even simple and unquestionably justified corrections designed reduce spurious regulatory benefits produced by its random assignment methodology; and

- Explained that there are no purported market failures that could reasonably justify a failure to make at least those simple corrections.

See Ex. A at 6-9. DOE nevertheless sought to prevent vacatur of the Final Rule by ignoring those comments and presenting its new justifications without allowing Petitioners an opportunity to review its new arguments and rebut them in detail. A more prejudicial failure to provide notice and opportunity for comment is difficult to imagine.

DOE's purported "remedial action" should be rejected as facially inadequate (due to the continued absence of relevant record evidence) and procedurally unlawful (due to DOE's failure to provide notice or opportunity for comment on its new justification for "this crucial part of its analysis"). In addition – as explained below – DOE's Response is facially inadequate in that it fails to address "an important aspect of the problem" presented by its random assignment methodology. *APGA v. DOE*, 22 F.4th at 1025 (internal quotation marks omitted).

II. DOE's Response Fails to Address a Critical Defect of Its Random Assignment Methodology.

DOE's Response seeks to couch the issues presented by DOE's "random assignment" methodology as a binary choice between random assignment and an assumption that all boiler purchases are "based solely on economic measures such as lifecycle cost or simple payback period." 87 Fed. Reg. at 23423. It then seeks to rebut the latter assumption by asserting that there is information suggesting that "purchasing decisions with respect to energy efficiency are likely not to be completely correlated with energy use," that "[t]here are several market failures or

barriers that affect energy decisions generally" and that "more generally, there are several behavioral factors that can influence the purchasing decisions of complicated multi-attribute products, such as boilers." *Id*. There are enormous problems with DOE's arguments, but they suffer from a threshold problem: the relevant question on remand is whether DOE can reasonably justify *its random assignment methodology*, and DOE's Response fails to address one of the most serious problems that random assignment creates.

Petitioners' challenge to DOE's "random assignment" methodology amounted to "a straightforward challenge to DOE's reliance on an unreasonable assumption that purchasers of commercial boilers have no statistically significant preference for economically beneficial investments or aversion to net cost investments *regardless of the economic stakes involved*." Reply Br. at 22 (emphasis added); Opening Br. at 52-53. The impact of this assumption on the results of DOE's analysis was dramatic: as Petitioners explained in detail, it "produced average life-cycle cost outcomes that were dramatically skewed by a relatively small percentage of very high-benefit outcomes resulting from investments no purchaser could be expected to decline." Opening Br. at 54-55. That much was apparent from the reported distribution of the results of DOE's analysis in the Final Rule. *See id.* at 55-57.

One of Petitioners' specific concerns was that DOE's assumption claims regulatory benefits even in cases in which the higher efficiency product is *the low-cost option in terms of initial investment*. Petitioners pointed out that this produces a gross overstatement of purported regulatory benefits, as demonstrated when a technical review of DOE's residential furnace analysis revealed that "*over half of the total economic benefits claimed* in DOE's similar residential furnace analysis were attributable to efficiency investments purchasers would be expected to make *even if they ignored the value of efficiency benefits entirely*: investments in which the *higher efficiency* product is the *low-cost option* in terms of initial investment." Opening Br. at 54-55. Petitioners argued that DOE "could have taken steps to ensure that all of the 'trial cases' in which the higher efficiency products have equal or lower installed costs are properly 'assigned' to [the] base case for analysis and that it accounted in some reasonable way for the fact that purchasers acting on their own are far more likely to make investments providing windfall economic benefits than they are to decline them" and that DOE's failure to do *anything* to address the unreasonable impacts of random assignment was arbitrary and capricious. *Id.* at 58-59. The Court agreed that the "significant concerns the petitioners raised … demand a more complete response" from DOE. *APGA v. DOE*, 22 F.4th at 1027.

DOE has again refused to do anything to correct its analysis. *Id.* Rather, DOE's Response suggests that the impacts of its "random assignment" methodology are far less significant than they are and that generalized concerns about potential market failures could reasonably justify its failure to do *anything* to address them. That is not the case, because the major impact of random assignment lies in its unreasonable assignment of extreme economic outcomes in scenarios likely to be immune to potential market failures (even assuming they existed). Again, *over half of the total regulatory benefits claimed* in DOE's residential furnace analysis were generated by cases in which the more efficient product had lower initial costs. Opening Br. at 54-55. In those cases, a basic premise of efficiency regulation – that market failures might cause purchasers facing higher initial costs to forego efficiency investments that would be economically beneficial over time – does not even apply. Whether market failures might cause some purchasers to be deterred by the higher initial costs of more efficient products is beside the point, because there is no basis to conclude that standards are necessary to induce purchasers to choose more efficient products that cost less up-front *in addition to* providing utility bill savings from day one. By "assigning" these cases randomly – as though, in the absence of standards, purchasers would have no statistically significant tendency to choose more efficient products *that are the low-cost option* – DOE's analysis creates spurious

regulatory benefits. DOE has never attempted to justify random assignment of *these particular* outcomes on the merits, and its failure to do *anything* to address the error caused by random assignment of such outcomes is unreasonable. *See* Opening Br. at 58-59. DOE's Response is nonresponsive to this issue, a fact that is especially troubling in light of the Joint Request Petitioners submitted to the agency before DOE issued the Response on remand. *See* Ex. A at 6-7.

Petitioners do not believe that DOE's economic justification for the standards could survive basic, unquestionably justified corrections necessary to address the most extreme impacts of its random assignment methodology. In particular, Petitioners believe that the modest average life-cycle cost benefits DOE relied on to justify the Final Rule would likely *disappear* without the contribution of spurious regulatory benefits produced by the random assignment of economic outcomes in which the more efficient product has lower initial costs. Petitioners' Joint Request asked that DOE perform a simple screening analysis to determine whether this is true. *See* Ex. A at 6-7.

The issue involved is a matter of simple number-crunching: either the average life-cycle cost benefits DOE relied upon to justify the Final Rule were the product of spurious regulatory benefits resulting from the random assignment of cases in which the more efficient product had lower initial costs, or not. If they were, belated arguments about alleged market failures are beside the point and

DOE should not have presented them in its effort to preserve the Final Rule. *See* Ex. A at 7-8. Nevertheless, DOE ignored Petitioners' request. Indeed, its Response ignored the entire problem created by random assignment of cases in which the more efficient product has lower initial costs, despite Petitioners' repeated arguments that random assignment of such cases was a basic, easily remedied error that DOE could not reasonably fail to correct. *See*, *e.g.*, Opening Br. at 58-59; Ex. A at 6-9. DOE's failure to address this problem was a "failure to consider an important aspect of the problem" presented by its random assignment, *APGA v. DOE*, 22 F.4th at 1027-28 (internal quotation marks omitted), and DOE's Response is thus inadequate to "provide a full and sound explanation why the Rules standards . . . satisfy the clear and convincing evidence standard." *Id.* at 1031 (internal quotation marks omitted).

III. DOE's Response Is Inadequate to Justify Random Assignment Even in Cases Potentially Influenced by Market Failures.

DOE's efforts to justify its random assignment methodology are inadequate even with respect to cases in which market failures could potentially cause purchasers facing higher initial costs to forego economically beneficial investments in more efficient commercial boilers. Again, the core problem is that DOE fails to address the most absurd results of random assignment: the fact that it harvests regulatory benefits from very-high-benefit efficiency investments that purchasers would overwhelmingly make on their own. Arguments to the effect that

purchasers do not *always* make decisions "based solely on economic measures such as life-cycle cost or simple payback period," 87 Fed. Reg. at 23423, do nothing at all to suggest that business and institutional purchasers of substantial pieces of commercial equipment would routinely pass up "no brainer" efficiency investments in the absence of standards, and it is the very high benefit outcomes – those purchasers are most likely to make on their own – that drive the average life-cycle cost outcomes on which DOE relies.

Petitioners believe that the modest average life-cycle cost benefits DOE relied on to justify the Final Rule almost certainly would be eliminated by even the most rudimentary correction to address the misallocation of efficiency investments resulting in high net benefits: a correction eliminating random assignment of cases in which efficiency investments would pay off within twelve months. Petitioners' Joint Request asked that DOE perform a simple screening analysis to determine whether this is true. *See* Ex. A at 7-8. As with the screening analysis discussed in Section II above, the question is a simple and objective one: either the average life-cycle cost benefits DOE relied upon to justify the Final Rule were the product of the random assignment of such high benefit outcomes or not. If so, it does not matter whether DOE could reasonably justify random assignment of less extreme economic outcomes, because the failure to correct random assignment of *these particular* outcomes would be unreasonable. Ex. A at 8-9.

DOE nevertheless ignored Petitioners' request. Again, DOE did *nothing* to address the fact that random assignment creates a misallocation of high-benefit outcomes that overstates the potential for standards to provide economic benefits for consumers, despite Petitioners' argument that the limited correction requested was unquestionably justified, Ex. A at 8-9, and repeated explanations that DOE's failure to make any correction at all was unreasonable. *See, e.g.*, Opening Br. at 58-59.[4] This failure is troubling, because the "windfall benefit" cases at issue, almost by definition, arise in the context of new construction, where the lower venting costs for higher-efficiency products largely offset the incremental additional cost of such products. *See* Ex. A at 6, 9 & n. 9. Accordingly, these cases are essentially immune to alleged market failures relevant to the replacement market. *Id*. at 8-9. Similarly – again by definition – these windfall benefit cases would be unaffected by alleged implied discount rates or "required payback periods … higher than the appropriate cost of capital for the investment," even "very short payback periods of 1-2 years." 87 Fed. Reg. at 23425. However valid concerns about lack of information or short-sightedness might be in complicated cases, there is no basis to conclude that they are relevant in cases in which the

[4] DOE's Response only restates its refusal to accept a broader correction put forward by Air-Conditioning, Heating, and Refrigeration Institute as though that were the only correction possible. 87 Fed. Reg. at 23423.

more efficient products are well-established in the market, certified efficiency ratings are required, and the *economic benefits of the particular investments are so obvious*. Nor is there any basis to suggest that "misaligned incentives" are a significant issue "in [the] specific market" for *commercial boilers*, *APGA v. DOE*, 22 F.4th at 1027, particularly in high-benefit cases; DOE's effort to suggest otherwise (87 Fed. Reg. at 23424) completely ignores record evidence explaining why such concerns are of limited relevance in the context of commercial boilers. Opening Br. at 49-50.

DOE's Response argues that purchases of commercial boilers "are most likely subject to several market failures" and makes the conclusory claim that any "overstatement of the economic benefits of the new standards" produced by random assignment "would be small and would not alter DOE's conclusion that the revised standards are economically justified." 87 Fed. Reg. at 23427. As explained below, DOE's efforts to show the former are invalid, but – in any event – its suggestion that the impacts of random assignment were small and immaterial is baseless.

The impact of random assignment was enormous in the case of DOE's similar residential furnace analysis, *see* Ex. A. at 6-7, and there is no basis to suggest that the opposite would be true in DOE's similar commercial boiler analysis. To the contrary, the reported results of DOE's commercial boiler

analysis show that the average lifecycle cost outcomes DOE relied upon had been "dragged up by a relatively small percentage of outcomes with disproportionately high estimated life-cycle cost savings," Opening Br. at 55-57, which is exactly the result that random assignment produces. Petitioners pointedly asked DOE to show that its analysis could survive even a rudimentary effort to correct the worst of the errors introduced by random assignment, and DOE declined to do so. If DOE believes that it could reasonably make other corrections that would counterbalance the impact of those errors, it should do so and provide notice and opportunity for comment on its analysis. It cannot simply make the conclusory claim that the impact of the errors introduced by random assignment were not material.

DOE's efforts to show that purchases of commercial boilers "are most likely subject to several market failures" (87 Fed. Reg. at 23427) are plainly inadequate to justify random assignment. To supplement its lengthy but general summary of information concerning market failures, DOE attempts to back into the conclusion that market failures *must be at work* by arguing – on the basis of extra-record evidence – that "purchasing decisions with respect to energy efficiency are likely not to be completely correlated with energy use." *Id.* at 23423. DOE suggests that "using economic criteria based on energy use or payback period alone, one might not predict that non-condensing gas-fired boilers would be more likely installed in colder climates." *Id.* at 23426. DOE goes on to suggest that an asserted lack of

correlation between conditioned floor area and boiler efficiency somehow provides an indication that "purchasing decisions are most likely subject to several market failures." *Id.* at 23427. There is no merit to any of this. The economics of efficiency investments are driven by costs as well as benefits, and differences in *energy use* relate only to benefits. Both factors must be considered to determine whether purchasing decisions are rational and – in this case – the failure to consider the cost side of the equation is particularly unjustified.

As already discussed, the initial cost of higher efficiency boilers is lowest in the context of new construction, which often makes such products economically attractive even in cases in which energy use is modest. Importantly, new construction is most prevalent in areas where heating needs are modest, which is why one would *not expect* decisions to purchase more efficient equipment to be "completely correlated with energy use." 87 Fed. Reg. at 23423. Conversely, most higher efficiency products are incompatible with the atmospheric venting systems built into many existing buildings, a factor that can make them an economically unattractive option even in cold climate areas. This issue is most prevalent in areas where most boiler installations involve replacements in older existing buildings, which is undoubtedly why there are many installations of "non-condensing" (*i.e.*, atmospherically vented) boilers in Milwaukee and why the

market for such products can be expected to persist in Massachusetts for replacement situations. *See id.* at 23426.

This is evidence that purchasers of commercial packaged boilers *are* making economically rational decisions, not evidence that they are *not*. This is no news to DOE, because the difficulties involved in replacing existing non-condensing gas products with more efficient gas products have been the subject of a long, intensive, and ongoing dispute over multiple rulemaking proceedings, including one for which a Petition for Review is pending. *See American Gas Ass'n et al. v. DOE*, No. 22-1030 (D.C. Cir. filed Feb. 25, 2022). In short, the claim that "a cold climate (and therefore a large heating load) does not necessarily mean that high-efficiency boilers will predominate" (87 Fed. Reg. at 23426) provides no basis to suggest that market failures are likely to be at work.

CONCLUSION

DOE continues to refuse to make even a simple correction in its economic model to account for the most serious and indefensible error caused by the critical underlying assumption Petitioners challenged, likely because the Final Rule could not be justified if that error were corrected. DOE's Response is facially inadequate, was issued without observance of procedure required by law, and manifestly fails to provide a "full and sound explanation why the [Final Rule's] standards … satisfy the clear and convincing evidence standard." *APGA v. DOE*,

22 F.4th at 1031 (internal quotation marks omitted). The Court should vacate the Final Rule pursuant to its prior order.

Dated: April 28, 2022

Respectfully submitted,

/s/ John P. Gregg
John P. Gregg
William C. Simmerson
McCarter & English, LLP
1301 K Street, N.W.
Suite 1000 West
Washington, DC 20005
(202) 753-7400
jgregg@mccarter.com

Counsel for American Public Gas Association

/s/ Scott Blake Harris
Scott Blake Harris
Stephanie Weiner
Jason Neal
Harris, Wiltshire & Grannis LLP
1919 M St., NW, 8th Floor
Washington, DC 20036
(202) 730-1300
sbharris@hwglaw.com

Counsel for Air-Conditioning, Heating, and Refrigeration Institute

/s/ Barton Day
Barton Day
Law Offices of Barton Day, PLLC
10645 N. Tatum Blvd.
Suite 200-508
Phoenix, AZ 85028
(602) 795-2800
bd@bartondaylaw.com

Counsel for Spire Inc. and Spire Missouri Inc.

EXHIBIT A

BEFORE THE
UNITED STATES DEPARTMENT OF ENERGY
WASHINGTON, D.C.

Proposed Amended Energy Conservation Standards for Commercial Packaged Boilers

Docket No. EERE–2013–BT–STD–0030

JOINT REQUEST OF AMERICAN PUBLIC GAS ASSOCIATION; AIR-CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE; SPIRE INC.; AND SPIRE MISSOURI INC. ON REMAND, FOR DEFERRAL OF ENFORCMENT OF RULE, AND FOR STAY OF RULE PENDING JUDICIAL REVIEW

John P. Gregg
McCarter & English, LLP
1301 K Street, N.W.
Suite 1000 West
Washington, DC 20005
(202) 753-3400
jgregg@mccarter.com

Counsel for American Public Gas Association

Scott Blake Harris
Stephanie Weiner
Jason Neal
Harris, Wiltshire & Grannis LLP
1919 M St., NW, 8th Floor
Washington, DC 20036
(202) 730-1300
sbharris@hwglaw.com

Counsel for Air-Conditioning, Heating, and Refrigeration Institute

Barton Day
Law Offices of Barton Day, PLLC
10645 N. Tatum Blvd.
Suite 200-508
Phoenix, AZ 85028
(602) 795-2800
bd@bartondaylaw.com

Counsel for Spire Inc. and Spire Missouri Inc.

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INTRODUCTION

American Public Gas Association; the Air-Conditioning, Heating and Refrigeration Institute; Spire Inc.; and Spire Missouri Inc. (collectively "Petitioners") urge the Department of Energy ("DOE") to take appropriate action in response to the D. C. Circuit's January 18, 2022 decision in their challenge to the final rule for commercial packaged boilers (Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (2020) ("Final Rule")).[1] That decision found DOE's justification for the Final Rule unreasonable in several respects, remanded the Final Rule to DOE for 90 days to allow "a limited opportunity" for DOE "to provide a full and sound explanation of why the [Final Rule's] standards …. satisfy the clear and convincing evidence standard," and provided that "the Final Rule will be automatically vacated" if DOE fails to do so. *American Public Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018, 1027, 1029 (D.C. Cir. 2022) ("*APGA v. DOE*") (internal quotation marks omitted).

The issues on remand are substantial, particularly in view of DOE's failure properly to address issues critical to its analysis and the D.C. Circuit's repeated admonitions that, under the clear-and-convincing-evidence standard, DOE cannot overcome the absence of "actual evidence" in support of the standards by doing "the best it could with the data it had" or using "data ill-suited to the task at hand." *APGA v. DOE*, 22 F.4th at 1027, 1029. Petitioners trust that the Department would "certainly not" pre-judge any of these issues on remand.[2] Given the significant flaws in DOE's previous approach and the absence of evidence supporting critical aspects of DOE's analysis, Petitioners do not believe that it will be possible for DOE "to provide

[1] Petitioners are authorized to state that the American Gas Association, representing more than 200 local energy companies, and an intervenor in D.C. Cir. No. 20-1068, supports the positions set forth in this request.

[2] *APGA v. DOE* Oral Argument Audio at 50:20-25.

a full and sound" justification for the Final Rule in the "limited time" before it is due to be vacated. Petitioners do believe, however, that DOE can confirm the *absence* of clear and convincing evidence for the Final Rule by means of a relatively simple screening analysis involving simple corrections to its lifecycle cost ("LCC") analysis. If DOE believes that it is possible to provide a new justification for the Final Rule within the "limited time" available, Petitioners request that DOE first conduct that screening analysis and disclose the results.

If—despite the outcome of such an analysis—DOE still believes that it can justify the standards in the time available, Petitioners request that DOE take several steps as part of its process. *First*, Petitioners urge DOE to provide a full and transparent explanation of how it has addressed the several significant flaws the Court identified in the Final Rule. Because the Court explained that DOE may not rely on flawed assumptions to correct for a lack of information, Petitioners urge DOE to make any new information, analysis, or assumptions available in time for meaningful public comment. *Second*, DOE should immediately exercise its authority to defer enforcement of the Final Rule for at least 90 days, such that products need not be manufactured to the new standards until April 1, 2023. It is both unwise and unjust to force manufacturers to make large expenditures to comply with a rule about which there is serious doubt and that the Department may alter. *Third*, Petitioners urge DOE to stay the effective date of the Final Rule for the duration of any appeal of DOE action regarding the Final Rule in response to the D.C. Circuit remand, pursuant to 5 U.S.C. § 705.

ARGUMENT

I. ANY RESPONSE TO THE D.C. CIRCUIT'S DECISION MUST ADDRESS SERIOUS DEFICIENCIES IN THE FINAL RULE.

The Court provided DOE a "limited opportunity" to explain how clear and convincing evidence supported the economic justification of efficiency standards more stringent than existing ASHRAE standards despite significant substantive concerns with the Final Rule. *APGA v. DOE*, 22 F.4th at 1031.

- *First*, the Court called DOE's random assignment of boilers to buildings a "crucial part of the analysis supporting the DOE's conclusion that a more stringent standard was warranted," but found that DOE's response to "significant concerns" was "lackadaisical" and required a "cogent and reasoned" treatment on remand. *Id.* at 1027-28. In particular, the Court explained, DOE's doing "the best it could with the data it had" was "not enough to justify assuming a purchaser's decisions will not align with its economic interests in purchasing a boiler" model. *Id.* DOE's explanation in the Final Rule "would have been inadequate even if the rulemaking were not governed by a heightened evidentiary standard." *Id.*

- *Second*, the Court held that DOE failed to explain how it accounted for "specific concerns raised by the petitioners" regarding how the "average prices the DOE used do not reflect the marginal prices paid by purchasers of commercial packaged boilers." *Id.* at 1028. While DOE explained its "methodology for calculating energy prices" in the Final Rule and accompanying Technical Support Document based on average prices, the Court explained, "[n]one of this addresses the lower prices for fuel allegedly paid by those who operate commercial packaged boilers," and the Court could not "discern [any cogent response] in the administrative record." *Id.*

- *Third*, the Court concluded that DOE "ignored" concerns regarding "anomalies in the DOE's data" regarding burner operating hours, even though those operating hours are a "crucial" part of the analysis. *Id.* at 1029. DOE estimated burner operating hours because it "did not have direct data about [them] for its no-new-standard case," with a "lengthy description of the method" it used for the estimates. *Id.* But the Court explained that "[u]sing data ill-suited to the task is not excused by failure—even good faith failure—to locate suitable data, particularly considering that the Congress here required clear and convincing evidence before the Secretary can disturb the regulatory status quo." *Id.*

DOE represented to the Court (before it knew the Court was unpersuaded by DOE's explanations on these points) that it would be able to "provide a full and sound explanation why the Rule's standards … satisfy the clear and convincing evidence standard." *Id.* at 1031. The

Court accordingly remanded to provide DOE a "limited opportunity" to take "appropriate remedial action within 90 days." *Id.* Although the Court said the "deficiencies of the rule may fairly be characterized as failures to explain," *id.*, it also made clear that satisfying the clear-and-convincing-evidence standard's "unusually strong bias in favor of the status quo" would be a significant undertaking here. *Id.* at 1025.[3] The issues on remand include "significant" and "substantial concerns" concerning "crucial" parts of DOE's analysis and the absence of sound evidence in the existing record supporting several of DOE's assumptions. *Id.* at 1027-28.

A. If DOE Intends to Provide a New Justification for the Final Rule, It Should First Perform a Screening Analysis to Determine Whether Simple Corrections to Its Analysis Are Sufficient to Demonstrate that the Final Rule Would Not Provide LCC Benefits.

DOE's justification for the standards at issue was based on an analysis suggesting that new standards would provide very modest average LCC benefits. In the case of small gas hot water boilers (the product class that accounts for the vast majority of the total shipments of products subject to the standards[4]), DOE's projected average LCC benefits barely exceeded $200 over the relatively long life of the expensive products at issue.[5] As Petitioners explained in their supplemental brief, those modest savings were based on the projected natural-gas prices DOE

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[3] *See also*, *e.g.*, *id.* ("[d]ifficulty in satisfying the clear and convincing standard is not a justification for ignoring it"); *id.* at 1027 (DOE argument that "it did the best it could with the data it had … is not enough to justify assuming a purchaser's decisions will not align with its economic interests in purchasing a boiler"); *id.* at 1027 ("DOE's lackadaisical response would have been inadequate even if the rulemaking were not governed by a heightened evidentiary standard"); *id.* at 1028 (DOE's response in the Final Rule regarding fuel prices was "conclusory, not explanatory," and did not "address the specific concerns raised by the petitioners"); *id.* at 1029 ("[u]sing data ill-suited to the task is not excused by failure—even good faith failure—to locate suitable data" on burner operating hours).

[4] *See* Final Rule TSD at p. 9-11, Figure 9.5.1.

[5] *See* Final Rule TSD at p. 8-38, Table 8.4.2.

asserted that proved to be grossly overstated.[6] Correction of that one error would likely be sufficient on its own to show that the standards would provide no LCC benefits at all.

There is an even more fundamental error in DOE's analysis: it was based on the absurd assumption that purchasers of commercial packaged boilers are economically irrational. Rather than recognizing that—in the absence of new standards—purchasers tend to make the most economically attractive efficiency investments and decline those with the most substantial net costs, DOE's analysis "assigned" even the most economically attractive and highest net-cost efficiency investment outcomes to the base case for analysis randomly, *as though purchasers never consider the economics of potential efficiency investments regardless of the economic stakes involved*. As a result, DOE's analysis was based on a universe of purported "rule outcome" efficiency investments in which highly favorable economic outcomes were substantially overrepresented, large net-cost outcomes were substantially underrepresented, and the average LCC outcome was substantially overstated.

Upon review, the D.C. Circuit rejected DOE's explanation for its random assignment as insufficient to "justify assuming a purchaser's decisions will not align with its economic interests in purchasing a boiler." *APGA v. DOE*, 22 F.4th at 1027. As the court observed: "[I]t is difficult to believe purchasers of commercial packaged boilers, which are often large, sophisticated businesses, do not account for life-cycle costs when making a purchase." *Id.* A recent National Academies of Sciences review of DOE's analytical methods (the "NAS Report") reached the same conclusion, noting that "[i]t is hard to imagine, for example, that supermarket chains are

[6] *See* Joint Responsive Supplemental Brief of Petitioners at 3 & n.2, *APGA v. DOE*, No. 20-1068 (D.C. Cir. filed Aug. 23, 2021).

inattentive to the operating costs of commercial refrigeration."[7] Indeed, the NAS Report recommended that "[f]or some commercial goods in particular, *there should be a presumption that the market actors behave rationally unless DOE can provide evidence or argument to the contrary*."[8]

Petitioners believe that any reasonable correction of this fundamental error in DOE's analysis would yield results showing that the new standards would not provide any net LCC benefits for consumers. Moreover—while it would take substantial information collection and analysis to develop a detailed understanding of baseline purchasing behavior in the market for commercial packaged boilers—it should be relatively easy for DOE to confirm that the standards at issue in *APGA v. DOE are not* economically justified.

DOE should start by recognizing that the "random assignment" methodology has the perverse effect of generating purported regulatory benefits from cases in which the higher efficiency product has lower installed costs.[9] In such cases, the basic premise of efficiency regulation—that market failures might cause purchasers facing higher initial costs to forgo efficiency investments that would be economically beneficial over time—does not apply. There is no basis to suggest that standards are needed to ensure that consumers will choose more efficient products when those products have lower initial costs. DOE should thus assign such cases to the base case for analysis rather than assigning them to the base or standards cases randomly. In DOE's 2016 analysis of proposed residential furnace standards, this simple

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7 National Academies of Sciences, Engineering, and Medicine, *Review of Methods Used by the U.S. Department of Energy in Setting Applicance and Equipment Standards* 77 (2021), *available at* http://nap.edu/25992 ("NAS Report").

8 *Id.* at 77 (emphasis added).

9 This scenario often occurs in the context of new construction (or major renovations) where the avoided cost of constructing a Category I venting system can be greater than difference in purchase price between high-efficiency condensing boilers and lower-efficiency alternatives.

correction would have eliminated over half of the total claimed consumer benefits.[10] Making this simple correction here would likely be sufficient to eliminate the small average LCC benefits DOE relied upon to justify the standards at issue. If DOE believes that it might be able to provide a new justification of those standards, Petitioners request that it make this simple correction in its commercial boiler analysis—and report publicly the resulting change in the average LCC outcome for its standards—before it attempts to do so.

If that simple correction is insufficient to eliminate the LCC benefits DOE relied upon to justify the standards, DOE should also make at least some elementary correction to account for the fact that—even when a more efficient product has *higher* initial costs—purchasers of commercial packaged boilers can be expected to make at least the most obviously beneficial efficiency investments on their own. Again, a simple correction would likely be sufficient to demonstrate whether the standards would really provide LCC benefits for consumers. It is, for example, difficult to envision circumstances in which a purchaser of commercial packaged boilers would fail to invest in a more efficient boiler that would pay for itself within a year. Accordingly, DOE should assign all such economic outcomes to the base case for analysis rather than assigning them randomly. This additional limited correction would certainly be conservative (*i.e.*, it would not, by itself, go far enough to correct the much broader over-representation of high net-benefit outcomes produced by DOE's random assignment methodology), but it would likely be sufficient to confirm that the standards at issue would not

[10] *See* Comments of Spire Inc. on DOE's Supplemental Notice of Proposed Rulemaking on Energy Conservation Standards for Residential Furnaces at p. 60-61 and Attachment C (Gas Technology Institute Report entitled Technical Analysis of DOE Supplemental Notice of Proposed Rulemaking on Residential Furnace Minimum Efficiencies (January 4, 2017)) at p. 23. The Comments of Spire, Inc. are identified as Document No. EERE-2014-BT-STD-0031-0309 in Docket No. EERE-2014-BT-0031, and that submission – along with its Attachment C – can be accessed at: https://www regulations.gov/document?D=EERE-2014-BT-STD-0031-0309.

produce LCC benefits for consumers. If DOE believes that it might be able to provide a new justification of those standards, Petitioners request that DOE also make this correction in its commercial boiler analysis—and report the resulting change in the average LCC outcome for those standards—before it attempts to do so.

Importantly, there is no additional explanation that could justify a failure to make at least the two simple corrections identified above. There is no viable theory in which standards would be necessary to induce purchasers to *choose higher-efficiency products when they have the lowest installed cost*. Similarly, it would be unreasonable to suggest either that standards are needed to induce purchasers of commercial packaged boilers to make the kind of "no brainer" efficiency investments that would pay for themselves within a year or that assigning all such outcomes to the base case for analysis would go too far in correcting for the broader overrepresentation of high-benefit investments in the purported "rule outcomes" generated by DOE's random-assignment methodology.

At oral argument, counsel for DOE suggested that a "huge number" of commercial packaged boiler installations involve replacements of existing boilers, with many of those replacements being "emergency" replacements in which "like-for-like" replacements are made without regard to efficiency considerations.[11] DOE should recognize that this alleged "market failure" is not relevant to the corrections identified above. Even if the basic factual claims were true as a general matter, they would not justify random assignment of the high-net-benefit outcomes discussed above. The corrections identified above are designed to address the fact that DOE's LCC results are heavily influenced by a small percentage of cases that provide

[11] *APGA v. DOE* Oral Argument at 57:17-58:40.

disproportionately large economic benefits,[12] and the specific high net-benefit cases at issue overwhelmingly occur in installations involving new construction rather than product replacements (let alone emergency replacements). Specifically, the corrections are focused on economic outcomes that occur in cases in which—because existing built-in venting systems are absent—savings in the venting costs for higher-efficiency products are sufficient to nearly (or completely) offset the higher purchase price of the product itself. An alleged market failure involving "emergency replacement" scenarios would provide no basis for random assignment of these particular economic outcomes.

B. If DOE Seeks to Maintain the Final Rule, It Must Properly Consider Whether Relevant Market Failures Exist and the Extent to Which Any Such Market Failures Influence Base-Case Purchasing Behavior.

If DOE seeks to maintain the Final Rule, it will need to consider whether and to what extent there are market failures that significantly impede economically beneficial investments in higher-efficiency commercial packaged boilers. Both the Court in *APGA v. DOE* and the NAS in its review of DOE's analytical methods concluded that DOE's failure to address this issue is a critical flaw in its regulatory analysis.[13]

As already indicated, the market failure alleged at oral argument—even if substantiated[14]—cannot "justify the assumptions that underlay" DOE's use of a random-assignment methodology. *APGA v. DOE*, 22 F.4th at 1027. The same is true of the

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[12] There is no basis to assume that decision-making in these exceptional cases would be the same as it is in typical cases, or—more specifically—that they would be governed by the purported general rules above regarding emergency replacements. To the contrary, the general rule relevant here is that large economic consequences can be expected to matter in cases in which small economic consequences would not.

[13] *See APGA v. DOE*, 22 F.4th at 1027; NAS Report at 3, 21-22, 24-25, 75-78 and Recommendations 2-2 and 4-13.

[14] If the Department believes that the market failure identified in oral argument is empirically true, it must at a minimum explain its reasoning, provide record evidence in support of its factual claims, and afford interested parties an opportunity to comment upon that evidence and reasoning.

three high-level purported market failures cited in the Final Rule (insufficient information among some consumers, misaligned incentives between purchasers and users, and externalities not captured by equipment users). *See* Final Rule, 85 Fed. Reg. at 1676. Both the NAS Report and the Court in *APGA v. DOE* noted that generalized claims in the absence of evidence of relevant market failures are not enough, with the Court noting that "DOE provided no[] actual evidence that these market failures affect the market for commercial packaged boilers" in particular. *APGA v. DOE*, 22 F.4th at 1027; *see also id.* (explaining DOE's failure to provide evidence of "some market failure in *this specific market*" in response to the "significant concerns the petitioners raised about this assignment" of cases) (emphasis added). Under the Court's decision, DOE requires such evidence before it can maintain the Final Rule.

If DOE believes that it can provide an adequate justification for its standards, Petitioners request that DOE present enough information to enable interested parties to understand and critique that justification. Public comment on any newly elaborated economic justification or material factual evidence is consistent with the requirements of the EPCA, *see* 42 U.S.C. § 6313(a)(6)(B)(ii), and the Administrative Procedure Act, *see Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 899-901 (D.C. Cir. 2006) ("on remand the agency remains bound by the APA's notice and comment requirements"). Indeed, the Court's agreement that Petitioners already raised "significant concerns" on "crucial parts of [DOE's] analysis," in response to which DOE provided no "cogent and reasoned response," *APGA v. DOE*, 22 F.4th at 1027-28, reveals the need for additional notice and comment on DOE's first significant response on such issues. The exact nature of the information DOE should provide notice and comment on depends in part on whether and how DOE maintains the Final Rule. Petitioners nonetheless identify here several important issues likely to arise.

For example, given the Court's rejection of the purported market failures listed in the Final Rule, if DOE seeks to rehabilitate its rationale on that issue, Petitioners request that DOE:

(1) identify the specific nature and impact of any market failures allegedly interfering with sound economic decision-making on the part of purchasers of commercial packaged boilers; and

(2) disclose the evidence DOE relied upon to support its assessment of such market failures.

In addition, to enable interested parties to understand and critique DOE's analysis of the impact of any market failures on baseline purchasing behavior, Petitioners request that DOE:

(3) disclose the range and distribution of *the most economically beneficial* individual LCC outcomes in both its base case and rule outcome case; and

(4) explain its justification for the distribution of those outcomes.

At a minimum, this information and explanation should separately address individual LCC outcomes with no or negative payback periods, individual LCC outcomes with positive payback periods not exceeding one year; and the five percent of individual LCC outcomes with the largest net benefits.

Similarly, Petitioners request that DOE disclose:

(5) the range and distribution of the *highest net cost* individual LCC outcomes in both its base case and rule outcome case; and

(6) explain its justification for the distribution of those outcomes.

At a minimum, this information and explanation should address the five percent of individual LCC outcomes with the largest net costs.

If DOE relies on a "fuel switching" analysis that alters the nature or distribution of economic outcomes in the base or standards cases of its analysis, it will need to similarly explain its reasoning and seek public comment.

DOE has sometimes used a "fuel switching" analysis that effectively compounds the underrepresentation of bad economic outcomes in the "standards case" produced by DOE's random-assignment methodology by selectively excluding additional unfavorable economic outcomes from its standards case on the theory that purchasers would switch to electric alternatives.[15] Specifically:

- Despite having relied on a random-assignment methodology that assumes that base case purchasers *never* consider the economics of potential investments in more efficient gas products, DOE assumes that—in the standards case—purchasers facing bad economic outcomes as a result of new standards would *always* consider the economics of a potential switch from gas products to electric alternatives.

- DOE then selectively excludes efficiency investments with bad economic outcomes from its analysis on the theory that purchasers would switch to electric alternatives.

- DOE then substitutes more favorable economic outcomes (ostensibly representing investments in electric alternatives) for the unacceptable economic outcomes of the efficiency investments its standards would otherwise require.

This kind of analysis does not show that the efficiency improvements required by new standards would be justified by the energy savings those efficiency improvements would provide; instead it seeks to show that requirements for *economically unjustified* efficiency improvements would ultimately benefit consumers by forcing them to switch to alternative products.

This kind of justification is fundamentally at odds with EPCA's basic statutory scheme. The purpose of EPCA's appliance and equipment efficiency program is to conserve energy through improvements in the efficiency of regulated products. 42 U.S.C. § 6201. Standards are required to be justified on the basis of the costs and benefits of the required efficiency improvements *in the products subject to the standards*. DOE is directed to justify standards based on the economic impact of standards on consumers "of the products subject to such

[15] AHRI does not join in this argument regarding the use of a "fuel switching" analysis, but supports the need for public explanation and comment and thus supports the requests for disclosure numbered (7) and (8) below.

standard," *id.* § 6313(a)(6)(B)(ii)(I), on the basis of energy savings resulting "directly" from the standard, *id.* § 6313(a)(6)(B)(ii)(III), and—explicitly—through consideration of LCC analyses comparing the increase in the initial cost of the more efficient products that the standards would require with the operating cost savings those more efficient products would provide, *id.* § 6313(a)(6)(B)(ii)(II). In short, the efficiency improvements a standard requires must be technologically feasible and economically justified, and standards cannot be justified on the theory that requirements for infeasible or economically unjustified efficiency improvements would benefit consumers by forcing them to choose alternative products, whether or not those alternatives are different only in that they rely on a different fuel.[16]

The issue is not whether EPCA precludes fuel switching; rather, it is that the LCC analysis specified by statute expressly requires consideration of how the cost of required efficiency improvements compares with the operating cost savings those efficiency improvements provide. DOE must consider that comparison without selectively ignoring or discounting bad data points.

As already discussed, DOE should disclose the range and distribution of at least the "worst" five percent of economic outcomes in both its base and standards cases and explain the justification for its distribution of those outcomes. If DOE does engage in a fuel-switching analysis for any purpose, Petitioners request that DOE disclose:

(7) the range and distribution of the efficiency investment outcomes that purchasers were assumed to avoid through fuel switching (*i.e.*, decisions to turn to alternative products); and

(8) the results of an LCC analysis that compares the costs and benefits of required efficiency improvements without any investment outcomes being excluded from the

[16] Similar products that use different fuels must be regulated separately, through different product classes. *See* 42 U.S.C. § 6295(q)(1)(A).

analysis—or replaced by alternative outcomes representing assumed investments in alternative products—on the premise that fuel switching would occur.

C. DOE Must Correct Its Reliance on Erroneous Fuel Prices.

The Court also agreed with Petitioners that DOE's justification for the fuel prices used in the economic justification for the Final Rule was insufficient. *See APGA v. DOE*, 22 F.4th at 1028-29. In particular, the Court noted, DOE's response to the "specific concerns raised by the petitioners" regarding how the "average prices the DOE used do not reflect the marginal prices paid by purchasers of commercial packaged boilers" was "conclusory." *Id.* at 1028. Moreover, the projected natural-gas prices DOE relied on in its analysis to establish the Final Rule's economic justification were grossly overstated.[17] DOE must not repeat that error in attempting to rehabilitate the fuel-price analysis on remand.

Petitioners thus request that DOE disclose the natural-gas prices used to calculate utility bill savings by providing tables specifying the range and average of the residential and commercial gas prices it uses to calculate utility-bill savings in each state. Discussion of DOE's data sources, methodology and "price factors" is insufficient: Stakeholders with knowledge of the marginal prices that determine actual utility bill savings in particular states cannot determine whether DOE's analysis is reasonable unless DOE discloses those results in a way that permits comparisons between actual price information and the prices used in DOE's analysis.[18]

D. DOE Must Correct Errors in Its Analysis of Burner Operating Hours.

Finally, DOE "ignored" concerns in the record regarding "anomalies in the DOE's estimates" regarding burner operating hours, even though those operating hours are a "crucial"

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[17] *See* Joint Responsive Supplemental Brief of Petitioners at 3 & n.2, *APGA v. DOE*, No. 20-1068 (D.C. Cir. filed Aug. 23, 2021).

[18] Spire has repeatedly submitted actual marginal price data for the State of Missouri – including a weighted average price for the State – but generally has not been able to determine how DOE's numbers compared.

part of the analysis supporting the Final Rule. *APGA v. DOE*, 22 F.4th at 1029. DOE estimated burner operating hours because it "did not have direct data about [them] for its no-new-standard case," but the Court explained that "[u]sing data ill-suited to the task is not excused by failure—even good faith failure—to locate suitable data, particularly considering that the Congress here required clear and convincing evidence before the Secretary can disturb the regulatory status quo." *Id.* The Court explained that it expects on remand "a reasoned response" to Petitioners' concerns about the anomalies in DOE's burner-operating-hour data. Petitioners do not anticipate that DOE will be able to overcome the absence of reliable evidence that supports the Final Rule, "particularly considering that the Congress here required clear and convincing evidence before the Secretary can disturb the regulatory status quo." *Id.* As with the issues discussed above, any new data or analysis on this important issue should be subject to review and comment by interested parties.

II. AS A RESULT OF THE REMAND, DOE SHOULD DEFER ENFORCEMENT OF THE FINAL RULE BY AT LEAST 90 DAYS.

While DOE is considering a new justification for the Final Rule, it should immediately announce that it will defer enforcement of the Final Rule by at least 90 days, such that products need not be manufactured to the new standards until April 1, 2023. As discussed above, the issues on remand are serious, and DOE cannot sustain the Final Rule in its current form through mere addition of new language to the Rule's explanation. Particularly given Congress's "unusually strong bias in favor of the status quo" under the clear-and-convincing-evidence standard, *id.* at 1025—*i.e.*, in favor of the standards in place before DOE adopted the Final Rule—it is prudent to allow the industry to avoid enormous continuing expenditures to comply with rules that DOE may abandon on remand.

III. IF DOE PROVIDES A NEW JUSTIFICATION FOR THE FINAL RULE, IT SHOULD STAY THE FINAL RULE PENDING JUDICIAL REVIEW.

If DOE provides a new justification for the Final Rule, it should also "postpone the effective date" (currently January 1, 2023) of the Rule "pending judicial review." 5 U.S.C. § 705. The interests of justice require postponement of the Final Rule pending judicial review so that, if DOE does maintain the Final Rule, the D.C. Circuit is able to review DOE's response to the remand before regulated entities are required to continue compliance efforts and, ultimately, begin complying with the Final Rule. While 5 U.S.C. § 705 does not specify the factors an agency must consider in granting a stay pending judicial review, the traditional factors that courts consider for such stays are informative. *See, e.g.*, *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017). All four factors support a stay pending judicial review.

First, as discussed above, there is a significant likelihood that Petitioners will succeed on the merits in a court challenge should DOE maintain the Final Rule in its current form. The issues the D.C. Circuit identified are significant, and many involve not only inadequate explanation, but rather a lack of reliable evidence and support for "crucial" methodological choices DOE had to make to establish an economic justification for the Final Rule. *APGA v. DOE*, 22 F.4th at 1027. Moreover, as the Court noted, EPCA's "unusual framework" means that DOE must overcome "an unusually strong bias in favor of the status quo." *Id.* at 1025.

Next, Petitioners are likely to suffer irreparable injury absent a stay. Manufacturers of the covered products have no choice now but to spend millions of dollars preparing to comply with the Final Rule by January 1, 2023, and many of those expenditures will be stranded if the Final Rule is ultimately deemed unlawful. Even if the D.C. Circuit ultimately vacates the Final Rule, there will be no mechanism for the recovery of those lost costs. *See, e.g.*, *In re NTE Connecticut, LLC*, No. 22-1101, --- F.4th ---, 2022 WL 552060, at *6-7 (D.C. Cir. Feb. 24, 2022)

("we have recognized that financial injury [can be] irreparable where no adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation") (internal quotation marks omitted). Indeed, the D.C. Circuit recognized the irreparable impact of the Final Rule on regulated entities by ordering that the "Final Rule will automatically be vacated" unless DOE "take[s] appropriate remedial action within 90 days." *APGA v. DOE*, 22 F.4th at 1031.

Finally, a stay pending judicial review will not substantially injure other parties or undermine the public interest. The D.C. Circuit has consistently recognized that in litigation against the government these factors merge and that "[t]here is generally no public interest in the perpetuation of unlawful agency action." *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021) (internal quotation marks omitted). Again, the D.C. Circuit's order in this case reflects the fact that, if DOE cannot address the significant issues with the Final Rule in the time provided, the Final Rule should be rendered ineffective without delay.

CONCLUSION

The D.C. Circuit's remand to DOE in this case is no mere formality. The issues DOE must address to sustain the Final Rule involve fundamental, crucial methodological choices and issues where DOE impermissibly filled in gaps where it lacked necessary data. Petitioners do not believe that DOE can reasonably conclude that clear and convincing evidence supports the Final Rule. Even if DOE does believe that it can support the Final Rule, however, Petitioners urge DOE to make its views and the evidence upon which it intends to rely available for public review and comment. In addition, given the seriousness of these issues and the mounting costs regulated entities are incurring in anticipation of the January 1, 2023 effective date, DOE should

(1) announce immediately that it will defer enforcement of the Final Rule for at least 90 days and

(2) postpone the effectiveness of the Final Rule pending judicial review.

Dated: March 23, 2022

Respectfully submitted,

/s/ John P. Gregg
John P. Gregg
McCarter & English, LLP
1301 K Street, N.W.
Suite 1000 West
Washington, DC 20005
(202) 753-3400
jgregg@mccarter.com

Counsel for American Public Gas Association

/s/ Scott Blake Harris
Scott Blake Harris
Stephanie Weiner
Jason Neal
Harris, Wiltshire & Grannis LLP
1919 M St., NW, 8th Floor
Washington, DC 20036
(202) 730-1300
sbharris@hwglaw.com

Counsel for Air-Conditioning, Heating, and Refrigeration Institute

/s/ Barton Day
Barton Day
Law Offices of Barton Day, PLLC
10645 N. Tatum Blvd.
Suite 200-508
Phoenix, AZ 85028
(602) 795-2800
bd@bartondaylaw.com

Counsel for Spire Inc. and Spire Missouri Inc.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with the requirements of Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman font and contains 4,629 words according to the word-count feature of Microsoft Word.

/s/ Scott Blake Harris
Scott Blake Harris

CERTIFICATE OF SERVICE

I certify that on this 28th day of April, 2022, the foregoing document was filed via CM/ECF. Service was accomplished on all parties or their counsel of record via CM/ECF.

/s/ Scott Blake Harris
Scott Blake Harris