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' REPLY IN SUPPORT OF JOINT MOTION TO VACATE DOE'S FINAL RULE

This Court found that the Department of Energy ("DOE") failed to provide an adequate justification for the action at issue (the "Final Rule"). *American Public Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018, 1027-28 (D.C. Cir. 2022) ("*APGA*"). Based on DOE's "represent[ation]" that it could "provide a full and sound explanation" for the deficiencies on remand, the Court "afforded [DOE] a limited opportunity to do so." *Id.* at 1030-31. The Court gave DOE 90 days (unless it demonstrated "the need for additional time") to "take appropriate remedial action" and provided that the Final Rule would "automatically be vacated" if DOE failed to do. *Id*. at 1031.

DOE did not seek additional time and failed to "take appropriate remedial action" within 90 days. Instead, it sought to avoid vacatur of its Final Rule by issuing a purported response to the Court's decision that is procedurally defective and facially insufficient to remedy a fundamental error this Court required DOE to address on remand: its failure to "engage the arguments raised before it" on a "crucial" part of its analysis. *Id.* at 1027. The Court should enforce its mandate by confirming that DOE failed to take appropriate remedial action within 90 days and that the Final Rule is vacated. Because DOE has declined Petitioners' request to delay the Rule's effective date beyond January 2023, Petitioners ask that the Court grant this motion expeditiously to avoid further disruption associated with the uncertain status of the unlawful Final Rule.[1]

I. The Court Has Jurisdiction to Enforce Its Mandate.

DOE admits that this Court has jurisdiction to enforce its mandates. *See* DOE Opp. 5. In *International Union v. OSHA*, 976 F.2d 749, 750-51 (D.C. Cir. 1992), this Court exercised that jurisdiction where, as here, it had declined to vacate an unlawful rule and remanded the case to the agency. DOE nonetheless argues that the Court cannot ensure that its Response (87 Fed. Reg. 23421 (Apr. 20, 2022)) complies with the mandate because the Response was released

[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 reply.

"within 90 days," and Petitioners "must file a new petition for review" to raise any objections. DOE Opp. 6.

DOE relies upon the "tortured story" of litigation in which *eleven years* passed between this Court's first remand and its subsequent decision and "neither party appear[ed] concerned about the length of time" the litigation had taken. *See Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 3, 6-7, 12 n.12 (D.C. Cir. 2006). Here, "significant harm would result" from delayed resolution of the legality of the Final Rule. *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995). The Final Rule is effective January 2023, and regulated entities must spend enormous sums to comply, leading the Court to require DOE to "fix a deficient rule by a time certain." *APGA*, 22 F.4th at 1030.

DOE claims that "neither this Court's mandate nor its opinion left any room for petitioners' motion." DOE Opp. 5. Not so. The judgment required "appropriate remedial action within 90 days," giving DOE a "limited opportunity to do" what it "represent[ed] that" it could do on remand: "provide a full and sound" justification for the Final Rule. *APGA*, 22 F.4th at 1031 (quoting DOE Supp. Br. 4). There is no basis to claim that the Court cannot consider whether DOE's response on remand was even facially sufficient to prevent automatic vacatur under its mandate.

DOE's response was procedurally improper and flouted the Court's decision by again failing to "engage the arguments raised before it" on a "crucial" part of its analysis. *APGA*, 22 F.4th at 1027. This case falls within the Court's well-established authority to "enforce its mandates, including the power to 'correct any misconception of its mandate.'" *Atl. City Elec. Co. v. FERC*, 329 F.3d 86, 858 (D.C. Cir. 2013) (citation omitted). DOE recognized that authority here in filing its April 15 letter attaching the Response long after the mandate issued. Doc. #1943302.

II. DOE's Response Was Procedurally Defective.

DOE's justification for the Final Rule was based on the results of life-cycle cost ("LCC") analyses indicating its standards would provide economic benefits for consumers. *See APGA*, 22 F.4th at 1023. These analyses used a "random assignment" methodology that effectively assumed that purchasers have no statistically significant preference for economically beneficial efficiency investments or aversion to economically unattractive investments regardless of the economic stakes involved. *See id.* at 1023-24, 1027; Pet. Br. 52-53. Faced with pointed criticism challenging this assumption as "simply … absurd," DOE did not claim that it was valid or justified on the merits. Pet. Br. 53. DOE listed theoretical market failures in a boilerplate response to Executive Orders 12866 and 13563, but did not claim that its assumption was justified by market failures and

"provided no[] actual evidence that these market failures affect the market for commercial packaged boilers" (or "CPBs"). *APGA*, 22 F.4th at 1027.

DOE now argues that there is evidence of market failures and that random assignment is therefore justified. However, its evidence and arguments are new and were never made available for review and thus "exposed to refutation" during the rulemaking process. *Owner-Operator Indep. Drivers Ass'n v. FMCSA*, 494 F.3d 188, 202 (D.C. Cir. 2007) (internal quotation marks omitted). Accordingly, DOE's reliance on this evidence and argument was unlawful. *Id.*; *see also Chamber of Commerce v. SEC*, 443 F.3d 890, 900-02 (D.C. Cir. 2006).

DOE's efforts to justify its leap from *no evidence or argument* to allegedly *sufficient evidence and argument* without notice and comment are meritless. This is not a case involving "supplemental" evidence or argument, because—despite claims to the contrary (DOE Opp. 9)—the Final Rule did not "hypothesize" that DOE's assumption was valid or point to any evidence or "supporting data" to suggest that it was. Pet. Br. 53. "[F]or [new or] extra-record data to be 'supplementary,' it must clarify, expand, or amend *other data that has been offered for comment*," *Chamber of Commerce*, 443 F.3d at 903 (emphasis added), and DOE had "provided no[] actual evidence … to justify the assumptions that underly its analysis." *APGA*, 22 F.4th at 1027. DOE's argument that its assumption "is not the kind of 'critical factual premise' that requires extensive studies or empirical

support," DOE Opp. 10-11, contradicts the Court's conclusion that it "was a crucial part of the analysis supporting" the Final Rule. *APGA*, 22 F.4th at 1027.

DOE's effort to invoke the "good cause" exception to notice-and-comment requirements is unjustified. To avoid vacatur, DOE claimed that it could provide a "full and sound" explanation on remand. At oral argument, it declined an invitation from the Court to suggest that it might need more than 10 days to determine whether it would need more than 90 days on remand. Oral Arg. 59:15-1:00:50. After the Court issued its decision, DOE did nothing to suggest that it needed additional time for either purpose. Instead, it decided to prejudice Petitioners by denying them notice or opportunity for comment on its new justification and now seeks to justify that action by expressing doubt as to whether it "could have known within ten days that the course it would take on remand" would require notice and comment or whether it could have "preemptively" sought additional time. DOE Opp. 13-14.

This behavior reflects miscalculation at best and gamesmanship at worst. DOE cannot reasonably invoke the 90-day deadline to which it acquiesced as good cause for depriving Petitioners any chance to comment on a "crucial part of its analysis." *APGA*, 22 F.4th at 1027. Petitioners were clearly prejudiced by lack of notice and comment, as demonstrated by DOE's disregard of the input they were

able to provide even without notice of DOE's new arguments. *See* Mot. Ex. A; *Chamber of Commerce*, 443 F.3d at 904.

DOE failed to take any procedurally permissible action within the time the Court provided for "appropriate remedial action." By the terms of the Court's mandate, the Final Rule was vacated automatically. Suggestions that DOE should have yet another opportunity to stave off vacatur (*see* Respondent-Intervenor's Opp. 11) are unreasonable and inconsistent with the Court's decision.

III. DOE's Response Was Facially Inadequate to Address a Critical Defect of the Final Rule.

In the Final Rule, DOE failed to "to engage the arguments before it" on a "crucial" part of its analysis: its random-assignment methodology. *APGA*, 22 F.4th at 1027. DOE repeated that mistake on remand. DOE still does not argue that there is a reasonable basis to believe what random assignment assumes: that purchasers *never* consider the economics of potential efficiency investments. Instead, it claims that—based on alleged evidence of market failures—it "would not be realistic or feasible to assume that *all* purchasers of CPBs are already capturing the benefits associated with more efficient boilers." DOE Opp. 2 (emphasis added). Such arguments are misdirected: the relevant issue is whether it is reasonable to assume that purchasers of CPBs *never* consider the economics of potential efficiency investments *regardless of the economic stakes involved*. Pet. Br. 52-53. Claims that "market failures cause some consumers to base purchasing

decisions on factors other than minimizing payback periods" (DOE Opp. 12), are facially inadequate to support "the validity of" the latter assumption.

The most serious problem with random assignment is its unreasonable assignment of high-benefit and high-net-cost efficiency investments that disproportionately influence the outcome of DOE's LCC analysis. DOE's Response did not address this problem and ignored the fact that the most serious issues involve the unreasonable assignment of investments that are largely or completely immune to the influence of potential market failures. *See* Mot. 11-14 & Ex. A at 6-9. DOE's Response included only one argument that is even indirectly responsive to this problem: a claim that random assignment is reasonable because any resulting overstatement of benefits "would be small and would not alter DOE's conclusion that the revised standards are economically justified." 87 Fed. Reg. at 23427. However, DOE provided no factual basis for this assertion. Its unsupported claim that it would be "more realistic[]" to assume that purchasers never consider economics than to assume that they *never consider anything else*, *id.*, provides no basis to conclude that random assignment did not materially overstate the benefits claimed in DOE's analysis. Similarly, DOE's claim that it could potentially have justified its standards based on "numerous factors in addition to any savings to consumers," *id.*, does not suggest that random assignment did not produce a material overstatement of LCC benefits; nor does it

alter the fact that DOE *did* consider "numerous factors in addition to any savings to consumers" *and nevertheless justified its standards on grounds that they would provide LCC benefits for consumers*. *See* Pet. Br. 46-47.

Whether random assignment had a material impact on DOE's analysis is a question of fact that could be answered by review of numbers DOE has never been willing to disclose: the data inputs and outputs for each of the ten thousand trial cases on which its analysis is based. To extract those numbers from DOE's residential-furnace analysis, expert consultants had to purchase the software DOE employed and develop an individually-tailored program enabling them to run DOE's model *with the ten thousand stops* required to capture the hidden numbers on which DOE's LCC results are based. It was those numbers that revealed how grossly random assignment had distorted the outcome of DOE's analysis, the most absurd result being that over half of the benefits claimed were generated by cases in which the more efficient product had lower installed costs. Petitioners repeatedly identified this specific impact of random assignment as an error DOE could not reasonably fail to correct,[2] and Petitioners requested that DOE—before seeking to justify the Final Rule on remand—run its numbers to determine whether

[2] *See* Pet. Br. 54-55 & n. 9, 58-59; Reply Br. 21; Oral Arg. 10:45-11:31; JA258-59; JA328; JA359.

the benefits it relied upon to justify the rule would disappear without the contribution of such spurious regulatory benefits. Mot. Ex. A at 6-11.

DOE's Response did not even mention this critical concern about the impact of random assignment. Nor did it mention Petitioners' request or disclose what its numbers would show. Instead, DOE focused on market-failure arguments that—as Petitioners had explained—are not even relevant to this particular concern. Mot. Ex. A at 9-11.

DOE's Opposition (at 20-22) presents its first effort to address this "important aspect" of the random-assignment problem. *APGA*, 22 F.4th at 1027. The arguments presented are *post hoc* rationalizations insufficient to sustain the Final Rule, *see Sierra Club v. EPA*, 21 F.4th 815, 825-26 (D.C. Cir. 2021), and the fact that DOE had to improvise them in pleadings highlights the inadequacy of its Response. DOE's *post hoc* arguments are meritless in any event.

DOE's suggestion that the dramatic impacts of random assignment in DOE's residential-furnace analysis were not a serious cause for concern in this rulemaking is specious. The argument that the two analyses were prepared in different proceedings involving different products, DOE Opp. 20, overstates the differences between the products involved and ignores the fact that the two analyses used the same assumption in the same basic analysis in cases where the average LCC outcomes were significantly influenced by the assignment of high-consequence

economic outcomes. *See* Pet. Br. 54-55. Whether the same assumption that dramatically skewed the results of DOE's residential-furnace analysis had a material impact in its CPB analysis is not a question for speculation or debate: the answer lies in DOE's numbers. Rather than answer the question, DOE unreasonably suggests that it was up to Petitioners to ferret those numbers out. DOE Opp. 20. It then advances meritless *post hoc* arguments based on purported product-related differences in order to suggest what it does not actually assert (and declined to show): that cases in which the more efficient product was the low-cost option did not materially contribute to the LCC benefits DOE relied upon to justify the Final Rule. *See id.* at 20-21.

DOE's own figures suggest that random assignment had a material impact on its CPB analysis. Pet. Br. 54-56. DOE's efforts to contest that fact are misleading, particularly its *post hoc* argument that "[t]he fact that [the median LCC savings shown in its figures] are positive or zero for all product classes *disposes of petitioners' assertion that DOE was only able to find the revised standards are economically justified because of a handful of outliers.*" DOE Opp. 22 (emphasis added). As Petitioners explained, a "key point" is that the figures in question present a "skewed" distribution of outcomes in which highly beneficial outcomes are over-represented, significant net cost investments are underrepresented, and "the average outcome [is] artificially inflated." Pet. Br. 57. Because this

distribution of outcomes is skewed, the median economic outcome is also skewed, with the result that zero median outcomes would be negative—and near-zero median outcomes would likely be negative—without the impact of random assignment. *See* Reply Br. 21 (explaining that random assignment understates the percentage of purchasers that would incur net costs as a result of new standards). The comparison between DOE's median and average outcomes only illustrates the point that—in DOE's skewed distributions—the average outcomes have been "dragged up by a relatively small percentage of" high-benefit outcomes. Pet. Br. 55-57; Mot. 5.

CONCLUSION

The Court should enforce its mandate by confirming that DOE did not take appropriate remedial action and that the Final Rule is vacated.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with the requirements of Federal Rules of Appellate Procedure 27(d)(2)(C) and 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman font and contains 2,594 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 23rd day of May, 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
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