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VIA CM/ECF

Mr. Mark Langer
Clerk of the Court
U.S. Court of Appeals for the
District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue N.W.
Washington, DC 20001

Re: *Natural Resources Defense Council v. NHTSA*, No. 22-1080 (D.C. Cir.) (consolidated with Nos. 22-1144 and 22-1145)

Dear Mr. Langer:

Respondents submit this response to petitioners' Rule 28(j) letter regarding *American Public Gas Association v. Department of Energy*, 72 F.4th 1324 (D.C. Cir. 2023) (*APGA II*).

APGA II was the second time this Court reviewed the Department of Energy's efficiency standards for commercial boilers. In the first case, *American Public Gas Association v. Department of Energy*, 22 F.4th 1018 (D.C. Cir. 2022) (*APGA I*), the Court found certain aspects of the agency's explanation insufficient and remanded the rulemaking without vacating. *Id.* at 1030-1031. In *APGA II*, the Court found that the agency "again failed to offer a sufficient explanation" as to one of its assumptions and had introduced a new error on remand. 72 F.4th at 1330. The Court stated that it would not, "for the second time," remand without vacatur. *Id.* at 1343.

These cases support respondents' arguments that remand without vacatur is appropriate—at least on a first review—where an error can be remedied on remand

and vacatur would cause disruptive consequences including harm to energy conservation, the environment, and public health. *See* Resp'ts' Br. 78-84.

APGA II does not, as petitioners contend, stand for the proposition that vacatur is the appropriate remedy whenever there is a "way to restore the status quo ante." Pet'rs' Letter 1. Such a rule would have led to vacatur in *APGA I* because even at that time manufacturers could have complied with the restored standard by producing boilers that met either efficiency standard. *See APGA II*, 72 F.4th at 1343. Rather, the Court only determined that vacatur was appropriate the "second time" around in *APGA II* because of its finding that the agency had again failed to provide a sufficient explanation and had introduced a further defect. Indeed, this Court's touchstone cases make clear that the possibility of restoring the status quo ante is not dispositive of the remedy question. *See, e.g.*, *Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993) (declining to vacate an agency's regulatory program where the agency could have restored status quo ante through refunds).

Sincerely,

/s/ *Joshua M. Koppel*
Joshua M. Koppel

cc: All parties (via CM/ECF)