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.; SPIRE MISSOURI INC., AND SPIRE ALABAMA INC. FOR STAY OF RULE PENDING JUDICIAL REVIEW

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INTRODUCTION

American Public Gas Association; the Air-Conditioning, Heating and Refrigeration Institute ("AHRI"); Spire Inc.; Spire Alabama Inc., and Spire Missouri Inc. (collectively "Petitioners") urge the Department of Energy ("DOE") to stay the effectiveness of its final rule for commercial packaged boilers (Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (2020) ("Original Final Rule")), as supplemented by its final rule and supplemental response to comments (Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers; Response to the United States Court of Appeals for the District of Columbia Circuit Remand in American Public Gas Association v. United States Department of Energy, 87 Fed. Reg. 23421 (2022) ("2022 Final Rule").[1] The 2022 Final Rule is procedurally defective and plainly fails to address a critical defect of the Original Final Rule: DOE's unreasonable random-assignment methodology. Petitioners have filed petitions for review that have been consolidated in the D.C. Circuit. *See American Public Gas Ass'n v. U.S. Dep't of Energy*, No. 22-1111 (D.C. Cir. filed June 14, 2022), Petitioners are likely to succeed on the merits in challenging the 2022 Final Rule, and they will suffer irreparable harm if manufacturers of commercial packaged boilers are forced to come into compliance with the rules in January 2023. Petitioners requested a stay pending judicial review nearly three months ago, and DOE has not responded to that request. Petitioners request that DOE grant a stay within seven days of this filing—*i.e.*, by July 1, 2022—otherwise, Petitioners will treat DOE's continued inaction as a denial of the stay request and will seek a stay from the D.C. Circuit in the consolidated appeals of the 2022 Final Rule.

[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.

BACKGROUND

In Petitioners' challenge to the Original Final Rule, the D.C. Circuit found DOE's justification for the Final Rule unreasonable in several respects and 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." *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). DOE's task on remand was significant, 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. *Id.* at 1027, 1029.

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. *Id.* at 1031. As most relevant here, 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.*

DOE's justification for the standards at issue was based on an analysis suggesting that new standards would provide very modest average life-cycle cost ("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[2]), DOE's projected average LCC benefits barely exceeded $200 over the relatively long life of the expensive products at issue.[3] As Petitioners explained in their supplemental brief in the D.C. Circuit, those modest savings were based on the projected natural gas prices DOE asserted that proved to be grossly overstated.[4] Correction of that one error would likely be sufficient on its own to show that the standards would provide no LCC benefits at all.

In March 2022, Petitioners filed a joint request for deferral of enforcement of the Final Rule or for a stay pending judicial review, explaining that it would be unlikely that DOE could maintain the Final Rule while seriously addressing the Court's concerns. Petitioners explained that DOE's analysis "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*." Joint Request of Petitioners on Remand, for Deferral of Enforcement of Rule, and for Stay of Rule Pending Judicial Review at

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2 *See* Final Rule TSD at p. 9-11, Figure 9.5.1.

3 *See* Final Rule TSD at p. 8-38, Table 8.4.2.

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

5, Document No. EERE-2013-BT-STD-0030-0100 (filed Mar. 23, 2022) ("March 2022 Stay Request"). "As a result," Petitioners explained, "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." *Id.* A recent National Academies of Sciences review of DOE's analytical methods, Petitioners noted, had "reached the same conclusion as the D.C. Circuit, noting that '[i]t is hard to imagine, for example, that supermarket chains are inattentive to the operating costs of commercial refrigeration.'" *Id.* at 5-6 (quoting National Academies of Sciences, Engineering, and Medicine, *Review of Methods Used by the U.S. Department of Energy in Setting Applicance and Equipment Standards* at 77 (2021), *available at* http://nap.edu/25992).

In addition to requesting a stay, Petitioners asked that DOE take several steps to frame its consideration of the issues, including providing "a full and transparent explanation of how it has addressed the several significant flaws the Court identified in the Final Rule." *Id.* at 2.

- Petitioners requested that DOE conduct a "screening analysis" to assign to the "base case"—*i.e.*, the baseline without any new rule needed—cases in which the more efficient boiler had lower installed costs. *See id.* at 6.[5] Petitioners asked that DOE report publicly the resulting change in the average LCC outcome for its standards, as Petitioners expect that this simple correction "would likely be sufficient to eliminate the small average LCC benefits DOE relied upon to justify the standards at issue." *Id.* at 6-7.

- Petitioners also asked that DOE "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," such as when investing in a more efficient boiler "would pay for itself within a year." *Id.* at 7. Again,

[5] 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 the difference in purchase price between high-efficiency condensing boilers and lower-efficiency alternatives.

Petitioners asked that DOE "assign all such economic outcomes to the base case for analysis rather than assigning them randomly" and report its results publicly. *Id.* at 7-8.

- Given DOE's previous reliance on generic assertions of "market failures" with no supporting evidence, Petitioners requested that the Department seek comment on any new evidence or argument regarding such market failures. *See id.* at 9-10. Petitioners specifically explained that "[p]ublic 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)." *Id.* at 10.

DOE did none of those things, however. It did not even acknowledge, let alone respond to, Petitioners' arguments in the March 2022 Stay Request. Instead, without seeking comment on how it should respond to the court's remand, DOE abruptly issued the 2022 Final Rule. The 2022 Final Rule declined to make any changes to the Original Final Rule, instead relying on new information, new arguments, and academic papers from outside the record in an effort to justify DOE's previous reliance on market failures to justify its unreasonable random-assignment approach while failing to address—let alone justify—the most serious impacts of that approach .

ARGUMENT

The interests of justice require that DOE "postpone the effective date" (currently January 10, 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.

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS IN CHALLENGING THE 2022 FINAL RULE.

Petitioners are likely to succeed in challenging the 2022 Final Rule because it fails to muster *record* evidence regarding deficiencies at the heart of the Court's remand, because it was issued without notice and comment in violation of the Administrative Procedure Act, and because it fails to address the most critical defects in DOE's random assignment methodology.

A. The 2022 Final Rule Is Facially Inadequate and Was Issued Without Observance of Procedure Required by Law.

One of Petitioners' key arguments regarding the Original 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." Joint Petitioner Final Reply Brief at 22, *APGA v. DOE*, No. 20-1068 (D.C. Cir. filed Apr. 21, 2021) ("Reply Br."); *see* Joint Petitioner Final Brief at 52-53, *APGA v. DOE*, No. 20-1068 (D.C. Cir. filed Apr. 21, 2021) ("Opening Br."). 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. One of Petitioners' core concerns 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, 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 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, 202 (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); March 2022 Stay Request at 10.

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, the 2022 Final Rule 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, the 2022 Final Rule is legally insufficient to remedy one of the critical errors that the Court identified: DOE's failure to cure the absence of any "actual evidence" justifying its challenged assumption. In short, none of the documents cited in the 2022 Final Rule 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, the 2022 Final Rule plainly seeks to remedy DOE's 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,[6] 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 the 2022 Final Rule 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 the remand approached, Petitioners specifically asked DOE to seek comment on any new arguments or evidence on these issues. *See* March 2022 Stay Request at 3-11.

The 2022 Final Rule invokes the "good cause" exception to notice and comment requirements, reasoning that after DOE declined the Court's invitation to request additional time for remand proceedings, the 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 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). DOE's conclusion that opportunity for

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

comment was "unnecessary" is unreasonable. 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 DOE failed even to acknowledge the fact in the 2022 Final Rule—Petitioners *had already provided comment* that DOE could not overcome on remand. In short, as explained below, the March 2022 Stay Request 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 March 2022 Stay 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 March 2022 Stay Request 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.

The Court is likely to agree with Petitioners that DOE's purported "remedial action" is 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—the 2022

Final Rule 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).

B. The 2022 Final Rule Fails to Address a Critical Defect of DOE's Random-Assigment Methodology.

The 2022 Final Rule 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 life-cycle 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 to not 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 was whether DOE could reasonably justify *its random assignment methodology*, and the 2022 Final Rule 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); *see* 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.

In the 2022 Final Rule, DOE again refused to do anything to correct its analysis. Rather, the 2022 Final Rule suggests that the impacts of DOE's "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 in the Original Final Rule created 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 was unreasonable. *See* Opening Br. at 58-59. The 2022 Final Rule is nonresponsive to this issue, a fact that is especially troubling in light of the March 2022 Stay Request submitted well before DOE issued the 2022 Final Rule. *See* March 2022 Stay Request 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 Original 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. The March 2022 Stay Request asked that DOE perform a simple screening analysis to determine whether this is true. *See* March 2022 Stay Request 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* March 2022 Stay Request at 7-9. Nevertheless, DOE ignored Petitioners' request. Indeed, the 2022 Final Rule 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; March 2022 Stay Request 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 the 2022 Final Rule 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).

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 the 2022 Final Rule 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 Original 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' March 2022 Stay Request asked that DOE perform a simple screening analysis to determine whether this is true. *See* March 2022 Stay Request at 7-8. As with the screening analysis discussed 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. March 2022 Stay Request 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, *see* March 2022 Stay Request 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.[7] 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* March 2022 Stay Request 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 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 reasoning to the contrary in the 2022 Final Rule (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.

The 2022 Final Rule states that purchases of commercial boilers "are most likely subject to several market failures" and concludes without explanation that any "overstatement of the

[7] 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.

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 was incorrect on the former point, 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* March 2022 Stay Request 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 life-cycle 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 legitimately rely on the conclusory claim that the impact of the errors introduced by random assignment were not material.

The 2022 Final Rule'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, the 2022 Final Rule reasons—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. The 2022 Final Rule 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. The 2022 Final Rule 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*. As the Department knows, 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.

II. PETITIONER AHRI AND ITS MEMBERS WILL BE IRREPARABLY INJURED ABSENT A STAY.

Next, AHRI and its members are likely to suffer irreparable injury absent a stay. The D.C. Circuit has "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." *In re NTE Connecticut, LLC*, 26 F.4th 980, 990 (D.C. Cir. 2022) (internal quotation marks omitted). Manufacturers of the covered products have no choice now but to spend millions of dollars preparing to comply with the Final Rule by January 10, 2023, and many of those expenditures will be stranded if the Final Rule is ultimately deemed unlawful. One AHRI member projects the "near term" costs of "approximately $3.5 million" just for that one company to "design and build competitive products" that comply with the Final Rule—and that "number would be higher" but for the company's strategic decisions to attempt to limit that cost, even at the expense of "significantly increasing business risks." Doorhy Decl. ¶ 10.

As declarations from several AHRI member companies explain, the impacts of the 2022 Final Rule go far beyond mere financial injury. WM Technologies, which manufactures

commercial packaged boilers in Indiana and North Carolina, will have to "exit specific business product lines, specifically, multiple cast iron hot water boilers and steam boilers," and will "lose the majority of existing commercial cast iron product lines." Doorhy Decl. ¶¶ 6-8 (Exhibit A). To attempt to comply, WM Technologies will have to "make significant investment in irreversible changes to operations," resulting in a "substantial reduction in the number of commercial cast iron heat exchangers manufactured annually"—losses that cannot be recovered by simply reverting to previous processes if the court vacates the 2022 Final Rule. *Id.* ¶ 9. Mestek, Inc., similarly, faces irreparable harm: the 2022 Final Rule's becoming effective will "require Mestek, Inc. to exit significant lines of its commercial boiler business," resulting in the loss of "important revenue streams that are irreplaceable" in the company's "largest production and revenue" generator. Markel Decl. ¶ 7 (Exhibit B). The loss of volume will mean that "manufacturing centers will be closed" and "will not reopen," even if the court vacates the 2022 Final Rule. *Id.* Burnham, LLC likewise will be forced to "exit its commercial cast iron business," as the "majority of the commercial cast iron products" do not comply with the 2022 Final Rule and cannot "be modified to do so," and "[w]ithout these products the commercial cast iron business is unsustainable." Graham Decl. ¶ 7 (Exhibit C). PB Heat, LLC similarly reports that it will have "exit a significant line of business, lose irreplaceable revenue streams, abandon current product designs and processes in which we have invested large amounts of money, spend enormous amounts of money to design and build new products that are compliant, and make irreversible changes to our operation" if the rule is not stayed. Morgan Decl. ¶ 7 (Exhibit D).

III. A STAY IS IN THE PUBLIC INTEREST AND WILL NOT SUBSTANTIALLY INJURE OTHER PARTIES.

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). A stay would not injure any party, but instead would simply maintain the status quo until the Final Rule's lawfulness is resolved. Indeed, the D.C. Circuit required the Department to issue its response to the remand within 90 days in order to avoid unwarranted delay in resolving the Final Rule's legality. A stay serves the public interest by ensuring that the Court can decide that issue before the Final Rule becomes effective.

A stay also furthers the public interest by preventing the effects on others besides Petitioners that will occur if the Final Rule becomes effective. As the attached declarations explain, the "loss of [business] volume" that the Final Rule will inflict on some companies "will mean that [their] manufacturing centers will be closed, and that no products will be made at the respective locations," reducing the availability of boilers that do not currently comply with the Final Rule *and* "the number of commercial boilers available to the public" that *would* comply with the Final Rule. Markel Decl. ¶ 7. The closure of manufacturing centers will also lead to "job loss and loss of orders to vendors supporting the shuttered manufacturing facilities, the result of which … will likely mean more renvenue and job loss for those entities." *Id.* Customers that companies "have sold these products to for many years" will lose their "unique utility in the marketplace" and "will be forced into expensive redesigns." Graham Decl. ¶ 7. Moreover, expenditures that companies make to attempt to comply with the Final Rule "come at the expense of the development of higher efficiency boilers and next generation technologies." Doorhy Decl. ¶ 8; *see also id.* ¶ 10.

CONCLUSION

DOE should stay the January 10, 2023 effective date of the 2022 Final Rule pending judicial review.

Dated: June 24, 2022

Respectfully submitted,

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Counsel for Air-Conditioning, Heating, and Refrigeration Institute

EXHIBIT A

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

AIR-CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE	)	
Petitioner,	)	
v.	)	Case No. 22-1111 *(consolidated with Case No. 22-1107)*
UNITED STATES DEPARTMENT OF ENERGY	)	
Respondent.	)	

DECLARATION OF MICHAEL DOORHY

I, Michael Doorhy, being duly sworn, state as follows:

1. I am over 18 years of age and suffer from no legal incapacity.

2. I have personal knowledge as to the matters stated herein.

3. I am the Vice President and General Manager for WM Technologies, LLC. My office address is 999 McClintock Dr., Burr Ridge, Illinois 60527.

4. WM Technologies, LLC (hereinafter "WMT") is a member of the Air-Conditioning, Heating, and Refrigeration Institute ("AHRI").

5. AHRI is representing WMT's interests by seeking review of the final rule and supplemental response issued by the Department of Energy entitled Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 87 Fed. Reg. 23421 (Apr. 20, 2022) (EERE-2013-BT-STD-0030) ("Commercial Packaged Boiler Rule"). The Department of Energy issued that final rule "[i]n response to the remand in *American Public Gas Association* v. *United States Department of Energy*," in which the D.C. Circuit remanded the rule based on several deficiencies in the previous version of the final rule. *Id.* at 23422. *See generally American Public Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018 (D.C. Cir. 2022); Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (Jan. 10, 2020) (EERE-2013-BT-STD-0030).

6. WMT will suffer irreparable harm if the Commercial Package Boiler Rule goes into effect before the Court decides this challenge. WMT manufactures commercial packaged boilers, in Michigan City, Indiana and Eden, North Carolina, which are the subject of the Commercial Packaged Boiler Rule. Compliance with the Rule is required as of January 10, 2023, and the Department of Energy has declined to stay the Rule's effective date. The majority of WMT's commercial cast iron products do not currently comply with the upcoming requirements of the Commercial Packaged Boiler Rule.

7. If the Commercial Packaged Boiler Rule is not stayed, the Commercial Packaged Boiler Rule will require WMT to exit significant business product lines, specifically, multiple cast iron hot water boilers and steam boilers. Additionally, at least one replacement product design program will fall short of the current regulatory effective date because of staffing shortages, ongoing global supply chain shortages, and component delays of up to 18 additional months. For these same reasons several other programs are at risk of not meeting the deadline.

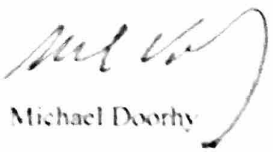
8. The Commercial Packaged Boiler Rule will result in loss of significant and irreplaceable revenue streams to WMT. Specifically, WMT will lose the majority of existing commercial cast iron product lines and more than a quarter of WMT's revenue from this segment is at risk. Additionally, the substantial opportunity costs of meeting these regulatory requirements come at the expense of the development of higher efficiency boilers and next generation technologies.

9. The Commercial Packaged Boiler Rule will require WMT and the distribution channel to make significant investment in irreversible changes to operations in order to comply. Specifically, this will result in a substantial reduction in the number of commercial cast iron heat exchangers manufactured annually. The regulation will cause a reduction of US-made cast iron heat exchangers and skilled union manufacturing labor with the domestic production volume being replaced by imported heat exchangers.

10. The Commercial Packaged Boiler Rule will require WMT to spend enormous amounts of money to design and build competitive products and change business processes specifically to comply using resources, many of which, would otherwise be used to develop higher efficiency products in the short term. For example, today, WMT projects the near term impact to be approximately $3.5 million. This number would be higher, but WMT has strategically deferred four product lines due to resource constraints, significantly increasing business risks. Also, WMT's ability to build inventory of current products prior to the effective date of the regulation, the transition of inventory to future versions of products, and supply chain lead times continue to be impacted by the effects of the pandemic. Further, having to carrying buffer inventory to protect against all too frequent delays, impacts the profitability of WMT and the distribution network.

11. If AHRI's legal challenge in this Court is successful and the Commercial Packaged Boiler Rule is vacated, WMT's products will not need to comply with the Rule's heightened requirements. Without a stay, however, WMT will not be able to obtain relief for the injuries it will suffer as a result of the Commercial Packaged Boiler Rule's going into effect.

I hereby declare under penalty of perjury that the foregoing is true and correct.



Michael Doorhy

Dated: June 23, 2022

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EXHIBIT B

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

AIR-CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE Petitioner, v. UNITED STATES DEPARTMENT OF ENERGY Respondent.	)	Case No. 22-1111 *(consolidated with Case No. 21-1107)*

DECLARATION OF TIMOTHY D. MARKEL

I, Timothy D. Markel, declare as follows:

1. I am over 18 years of age and suffer from no legal incapacity.

2. I have personal knowledge as to the matters stated herein.

3. I am President, Distributor Products Group and Executive Vice President for Mestek, Inc. My office address is 260 North Elm Street, Westfield, Massachusetts 01085.

4. Mestek, Inc. is a member of the Air-Conditioning, Heating, and Refrigeration Institute ("AHRI").

5. AHRI is representing Mestek, Inc.'s interests by seeking review of the final rule and supplemental response issued by the Department of Energy entitled Energy Conservation Program: Energy Conservation Standards for Commercial

Packaged Boilers, 87 Fed. Reg. 23421 (Apr. 20, 2022) (EERE-2013-BT-STD-0030) ("Commercial Packaged Boiler Rule"). The Department of Energy issued that final rule "[i]n response to the remand in *American Public Gas Association* v. *United States Department of Energy*," in which the D.C. Circuit remanded the rule based on several deficiencies in the previous version of the final rule. *Id.* at 23422. *See generally American Public Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018 (D.C. Cir. 2022); Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (Jan. 10, 2020) (EERE-2013-BT-STD-0030).

6. Mestek, Inc. will suffer irreparable harm if the Commercial Packaged Boiler Rule goes into effect before the Court decides this challenge. Mestek, Inc. manufactures commercial packaged boilers that are the subject of the Rule. Compliance with the Rule is required as of January 10, 2023, and the Department of Energy has declined to stay the Rule's effective date. A significant portion of Mestek Inc.'s commercial boiler products, and an equally large volume of products that Mestek, Inc. manufactures for other commercial boiler companies, do not currently comply with the upcoming requirements of the Commercial Packaged Boiler Rule.

7. If the Commercial Packaged Boiler Rule is not stayed the effect of the Commercial Packaged Boiler Rule on Mestek Inc., and other businesses that it supports and utilizes for its commercial boiler manufacturing, sales and service,

will be devastating. Failure to stay the Commercial Packaged Boiler Rule will immediately close down and shutter multiple divisions and subsidiaries of Mestek, Inc; require Mestek, Inc. to exit significant lines of its commercial boiler business; and result in Mestek, Inc. losing important revenue streams that are irreplaceable. Mestek, Inc. provides nearly two thousand jobs in support of its businesses. The commercial boiler business is the largest production and revenue stream for Mestek, Inc. Upon implementation of the Commercial Packaged Boiler Rule, a substantial amount of commercial boiler business that Mestek, Inc. conducts will no longer be in compliance or viable. Moreover, Mestek, Inc. manufactures products for other commercial and residential boiler companies. The mix of products that are manufactured include products that are in compliance with the Commercial Packaged Boiler Rule. However, the loss of volume due to the failure to stay the Commercial Packaged Boiler Rule will mean that the manufacturing centers will be closed, and that no products will be made at the respective locations. The closure of the manufacturing facilities could potentially reduce the number of commercial boilers available to the public that meet the Commercial Packaged Boiler Rule. Once closed, the plants will not reopen, regardless of what transpires in the future with respect to the Commercial Packaged Boiler Rule and there will be significant revenue reduction, job loss and loss of orders to vendors supporting the shuttered manufacturing facilities, the result of which, will likely mean more

revenue and job loss for those entities. If the stay is not continued then the dramatic negative consequences will happen immediately after

8. If AHRI's legal challenge in this Court is successful and the Commercial Packaged Boiler Rule is vacated, Mestek, Inc.'s products will not need to comply with the Rule's heightened energy conservation requirements. Without a stay, however, Mestek, Inc. will not be able to obtain relief for the injuries it will suffer as a result of the Commercial Packaged Boiler Rule's going into effect.

I hereby declare under penalty of perjury that the foregoing is true and correct.

TIMOTHY D. MARKEL

Dated: June 21, 2022

EXHIBIT C

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

AIR-CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE Petitioner, v. UNITED STATES DEPARTMENT OF ENERGY Respondent.	)	Case No. 22-1111 *(consolidated with Case No. 22-1107)*

DECLARATION OF JACOB GRAHAM

I, Jacob Graham, declare as follows:

1. I am over 18 years of age and suffer from no legal incapacity.

2. I have personal knowledge as to the matters stated herein.

3. I am President for Burnham, LLC. My office address is 1237 Harrisburg Ave, Lancaster, PA 17603.

4. Burnham, LLC is a member of the Air-Conditioning, Heating, and Refrigeration Institute ("AHRI").

5. AHRI is representing Burnham, LLC's interests by seeking review of the final rule and supplemental response issued by the Department of Energy entitled Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 87 Fed. Reg. 23421 (Apr. 20, 2022) (EERE-2013-

BT-STD-0030) ("Commercial Packaged Boiler Rule"). The Department of Energy issued that final rule "[i]n response to the remand in *American Public Gas Association* v. *United States Department of Energy*," in which the D.C. Circuit remanded the rule based on several deficiencies in the previous version of the final rule. *Id.* at 23422. *See generally American Public Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018 (D.C. Cir. 2022); Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (Jan. 10, 2020) (EERE-2013-BT-STD-0030).

6. Burnham, LLC will suffer irreparable harm if the Commercial Packaged Boiler Rule goes into effect before the Court decides this challenge. Burnham, LLC manufactures commercial packaged boilers that are the subject of the Rule. Compliance with the Rule is required as of January 10, 2023, and the Department of Energy has declined to stay the Rule's effective date. Burnham, LLC's products do not currently comply with the upcoming requirements of the Commercial Packaged Boiler Rule.

7. If the Commercial Packaged Boiler Rule is not stayed, it will require Burnham, LLC to exit its commercial cast iron business. Currently the majority of the commercial cast iron products do not meet the proposed thermal efficiency requirements, and most products will not be able to be modified to do so, thus rendering the majority of the commercial cast iron boilers obsolete. Without these

products the commercial cast iron business is unsustainable. This will impact the manpower at our assembly plant. Without the tonnage provided by the commercial cast iron product the viability of Casting Solutions, LLC, an affiliated foundry, in Zanesville, OH is put into question. The customers that we have sold these products to for many years will be negatively impacted by the loss of these products given their unique utility in the marketplace. They will be forced into expensive redesigns of their building, potentially forcing higher rents, and compromising comfort and safety.

8. If AHRI's legal challenge in this Court is successful and the Commercial Packaged Boiler Rule is vacated, Burnham, LLC's products will not need to comply with the Rule's heightened energy conservation requirements. Without a stay, however, Burnham, LLC will not be able to obtain relief for the injuries it will suffer as a result of the Commercial Packaged Boiler Rule's going into effect.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Jacob Graham

Dated: June 23, 2022

EXHIBIT D

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

AIR-CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE Petitioner, v. UNITED STATES DEPARTMENT OF ENERGY Respondent.	)	Case No. 22-1111 *(consolidated with Case No. 22-1107)*

DECLARATION OF Peter J. Morgan

I, Peter J. Morgan, declare as follows:

1. I am over 18 years of age and suffer from no legal incapacity.

2. I have personal knowledge as to the matters stated herein.

3. I am Executive Vice President and General Manager for PB Heat, LLC (Peerless Boilers). My office address is 131 S. Church St. Bally, PA 19503.

4. PB Heat, LLC, is a member of the Air-Conditioning, Heating, and Refrigeration Institute ("AHRI").

5. AHRI is representing PB Heat, LLC's interests by seeking review of the final rule and supplemental response issued by the Department of Energy entitled Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 87 Fed. Reg. 23421 (Apr. 20, 2022) (EERE-2013-

BT-STD-0030) ("Commercial Packaged Boiler Rule"). The Department of Energy issued that final rule "in response to the remand in *American Public Gas Association* v. *United States Department of Energy*," in which the D.C. Circuit remanded the rule based on several deficiencies in the previous version of the final rule. *Id.* at 23422. *See generally American Public Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018 (D.C. Cir. 2022); Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (Jan. 10, 2020) (EERE-2013-BT-STD-0030).

6. PB Heat, LLC will suffer irreparable harm if the Commercial Packaged Boiler Rule goes into effect before the Court decides this challenge. PB Heat, LLC manufactures commercial packaged boilers that are the subject of the Rule. Compliance with the Rule is required as of January 10, 2023, and the Department of Energy has declined to stay the Rule's effective date. PB Heat, LLC's products do not currently comply with the upcoming requirements of the Commercial Packaged Boiler Rule.

7. If the Commercial Packaged Boiler Rule is not stayed, it will require us to exit a significant line of business, lose irreplaceable revenue streams, abandon current product designs and processes in which we have invested large amounts of money, spend enormous amounts of money to design and build new products that are compliant, and make irreversible changes to our operation.

Finally, if the Commercial Boiler rule goes forward as is, replacement product designs will fall short of meeting the effective date due to several factors, including Covid-19's worldwide impact, staffing/labor issues, global supply chain shortages and all the associated economic implications..

8. If AHRI's legal challenge in this Court is successful and the Commercial Packaged Boiler Rule is vacated, PB Heat, LLC's products will not need to comply with the Rule's heightened energy conservation requirements. Without a stay, however, PB Heat, LLC will not be able to obtain relief for the injuries it will suffer because of the Commercial Packaged Boiler Rule's going into effect.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Peter J. Morgan
Peter J. Morgan

Dated: June 22, 2022