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

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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,

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