NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals

for the

District of Columbia Circuit

No. 11-1485

AMERICA PUBLIC GAS ASSOCIATION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Respondent,

AIR CONDITIONING CONTRACTORS OF AMERICA,
Intervenor for Petitioner,

HEATING, AIR CONDITIONING & REFRIGERATION DISTRIBUTORS INTERNATIONAL,
Intervenor for Petitioner,

ALLIANCE TO SAVE ENERGY; AMERICAN COUNCIL FOR AN ENERGY-EFFICIENT ECONOMY; CITY OF NEW YORK; CONSUMER FEDERATION OF AMERICA; MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS; NATURAL RESOURCES DEFENSE COUNCIL,
Intervenors for Respondent

Petition for Review from a Decision of the United States Department of Energy in No. DOE-76FR67037

JOINT BRIEF OF INTERVENORS HEATING, AIR-CONDITIONING & REFRIGERATION DISTRIBUTORS INTERNATIONAL AND AIR CONDITIONING CONTRACTORS OF AMERICA IN SUPPORT OF PETITIONER

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

A. Parties and Amici

Because the rulings under review were created through informal agency rulemaking via a direct final rule (DFR), there were no parties, intervenors, or amici before the agency. The parties, intervenors, and amici in this Court are as follows:

American Public Gas Association (Petitioner)
United States Department of Energy (Respondent)
Air-Conditioning, Heating and Refrigeration Institute (Intervenor-Respondent)
Air Conditioning Contractors of America (Intervenor-Petitioner)
Alliance to Save Energy (Intervenor-Respondent)
American Council for an Energy-Efficient Economy (Intervenor-Respondent)
City of New York (Intervenor-Respondent)
Consumer Federation of America (Intervenor-Respondent)
Heating, Air-Conditioning & Refrigeration Distributors International (Intervenor-Petitioner)
Massachusetts Union of Public Housing Tenants (Intervenor-Respondent)
Natural Resources Defense Council (Intervenor-Respondent)

Rule 26.1 Corporate Disclosure Statement:

Intervenor Heating, Air-Conditioning & Refrigeration Distributors International (HARDI) is a non-profit, non-stock corporation with its principal headquarters in Columbus, Ohio. HARDI is the national, non-profit association for heating, ventilation, air-conditioning, and refrigeration (HVACR) distributors, which has nearly 1,000 member companies, over 450 of which are U.S.-based wholesale companies. HARDI's members market, distribute, and support heating,

air-conditioning, and refrigeration equipment, parts, and supplies. HARDI's members serve installation and service/replacement contractors in residential and commercial markets, as well as commercial/industrial and institutional maintenance staffs. HARDI's purpose is promoting the general commercial, professional, legislative, and other interests of its membership. HARDI is a trade association within the meaning of Circuit Rule 26.1(b) and thus is exempt from the requirement to list the names of its members that have issued shares or debt securities to the public.

Intervenor Air Conditioning Contractors of America (ACCA) is the national, non-profit association for HVACR contractors, serving more than 60,000 professionals and 4,000 small businesses that design, install, and maintain indoor environmental systems. ACCA promotes the general commercial, professional, legislative, and other interests of its membership. ACCA has no parent company and has not issued shares or debt securities to the public. No publicly-owned company has a 10% or greater ownership interest in ACCA. ACCA is a trade association within the meaning of Circuit Rule 26.1(b) and thus is exempt from the requirement to list the names of its members that have issued shares or debt securities to the public.

B. Rulings Under Review

(1) *Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps*, Direct Final Rule, 76 Fed. Reg. 37,408 (Jun. 27, 2011) (codified at 10 C.F.R. pt. 430) (R.EERE-2011-BT-STD-0011-0001); and

(2) *Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps*, Notice of Effective Date and Compliance Dates for Direct Final Rule, 76 Fed. Reg. 67,037 (Oct. 31, 2011) (codified at 10 C.F.R. pt. 430) (R.EERE-2011-BT-STD-0011-0058).

C. Related Cases

Counsel for Intervenors HARDI and ACCA are not aware of any other related cases currently pending in this Court or any other court. The regulations challenged here were promulgated by the U.S. Department of Energy pursuant to a voluntary remand of a case that was before the United States Court of Appeals for the Second Circuit, *State of New York et al. v. Dep't. of Energy et al.*, 08-0311-ag(L); 08-0312-ag(con) (2d Cir. 2008). *See* R.EERE-2011-BT-STD-0011-0001 at 37,415.

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TABLE OF AUTHORITIES

United States Supreme Court Cases:

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Other United States Court of Appeals Cases:

Federal District Court Cases:

State Court Cases:

Statutes:

Regulations:

Federal Register:

Other:

GLOSSARY OF ABBREVIATIONS

ACCA ..... Air Conditioning Contractors of America

ACEEE ..... American Council for an Energy-Efficient Economy

AHRI ..... Air-Conditioning, Heating, and Refrigeration Institute

APGA ..... American Public Gas Association

Correction ..... *Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps*, Direct Final Rule; Correction, 76 Fed. Reg. 39,245 (July 6, 2011)

DOE ..... United States Department of Energy

DFR ..... *Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps*, Direct Final Rule, 76 Fed. Reg. 37,408 (Jun. 27, 2011) (codified at 10 C.F.R. pt. 430)

EISA ..... Energy Independence and Security Act of 2007, Pub. L. No. 111-140, 121 Stat. 1492 (2007).

EPCA ..... Energy Policy and Conservation Act, Section 325, 42 U.S.C. §6295

HARDI ..... Heating, Air-Conditioning & Refrigeration Distributors International

JSC ..... Joint Stakeholders' Comments on Energy Conservation Standards for Residential Central Air Conditioners, Heat Pumps (Docket No. EERE-2008-BT-STD-0006/RIN 1904-AB47) and Residential Furnaces (Docket No. EE-RM/STD-01-350/RIN 1904-AA78) (Jan. 15, 2010)

LCC ..... Life Cycle Cost(s)

NODA ..... Notice of Data Availability

Notice ..... *Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps*, Direct Final Rule, 76 Fed. Reg. 37,408 (Jun. 27, 2011) (codified at 10 C.F.R. pt. 430)

NOPR ..... Notice of Proposed Rulemaking

SNOPR ..... Supplemental Notice of Proposed Rulemaking

TSD ..... Technical Support Document

INTRODUCTION

The U.S. Department of Energy (DOE) repeatedly disregarded clear limits on its statutory authority in the course of issuing and confirming the direct final rule (DFR) at issue here.

DOE is statutorily authorized to issue a DFR prescribing noncontroversial energy-conservation standards upon receipt of a joint statement submitted by relevant parties. Here, the agency published a major DFR prescribing controversial energy-conservation standards for central air conditioners, furnaces, and heat pumps based on a joint comment that two-thirds of the HVAC supply chain, consumers, utilities, energy suppliers, and States were not parties to.

DOE admittedly ignored statutorily required lead times and established accelerated compliance dates. The DFR prescribed standby- and off-mode standards that were not mentioned in the joint comment and were opposed by its signatories, and which were independently prohibited because DOE had not first prescribed statutorily required test procedures. The agency did not measure enforcement and compliance costs or perform a regulatory flexibility analysis assessing the DFR's impact on HVAC distributors and contractors, even though it was required to do both. And DOE relied on old data that inflated its life-cycle-cost savings estimates to support its economic analysis and, when confronted, refused to extend the comment period.

DOE is statutorily required to withdraw a DFR if it receives one or more adverse comments that, considered cumulatively, may provide a reasonable basis for withdrawal. DOE received *thirty-two adverse comments* raising the foregoing issues. But instead of withdrawing the DFR and using normal notice-and-comment rulemaking, DOE confirmed the rule anyway.

JURISDICTIONAL STATEMENT

On October 31, 2011, DOE published a Notice confirming and setting an effective date for a DFR prescribing energy-conservation standards; DOE had subject-matter jurisdiction to issue that DFR under 42 U.S.C. §6295. This Court has jurisdiction to review DOE's final action under 42 U.S.C. §6306(b) and 5 U.S.C. §702. On December 23, 2011, Petitioner American Public Gas Association (APGA) timely filed a Petition for Review pursuant to 42 U.S.C. §6306(b)(1), within sixty days after DOE published its Notice. Intervenor Heating, Air-Conditioning & Refrigeration Distributors International (HARDI) timely moved to intervene pursuant to 42 U.S.C. §6306(b)(1) on January 20, 2012, and Intervenor Air Conditioning Contractors of America (ACCA) so moved on January 23, 2012. On February 14, 2012, this Court granted HARDI and ACCA leave to intervene.

STATEMENT OF ISSUES

(1) Whether DOE's failure to withdraw the DFR after receiving thirty-two adverse public comments raising numerous procedural and substantive objections was contrary to 42 U.S.C. §6295(p)(4), unsupported by substantial evidence, and/or arbitrary and capricious.

(2) Whether DOE set accelerated compliance dates that are contrary to EPCA's plain language.

(3) Whether DOE erred when it issued a DFR including standby- and off-mode standards even though those standards were not recommended or mentioned in the Joint Stakeholders' Comments (JSC) that DOE used as the basis for issuing the DFR and DOE had not prescribed test procedures to measure standby- and off-mode energy consumption.

(4) Whether DOE's conclusion that the JSC was "fairly representative of relevant points of view" is contrary to 42 U.S.C. §6295(p)(4), unsupported by substantial evidence, and/or arbitrary and capricious when no States, small manufacturers, distributors, contractors, utilities, energy suppliers, or advocates for consumers' economic interests were signatories to the JSC.

(5) Whether the DFR was issued and confirmed in violation of the Regulatory Flexibility Act (RFA), 5 U.S.C. §§601-612.

(6) Whether DOE erred by failing to propose an enforcement plan for regional energy-conservation standards or consider, before prescribing those standards, the impact of enforcement- and compliance-related costs on HVAC distributors and contractors.

(7) Whether it was arbitrary and capricious for DOE to make publicly available materially revised data and analysis two business days before the comment period closed and then to refuse to extend the comment period or withdraw the DFR.

STATUTES AND REGULATIONS

The relevant statutory provisions and regulations not set forth in Petitioner's Addendum A are set forth in Addendum I.

STATEMENT OF FACTS

Section 325 of EPCA, 42 U.S.C. §6295, authorizes DOE to set energy-conservation standards for central air conditioners, heat pumps, and furnaces. Congress generally requires DOE to do so through notice-and-comment rulemaking. *See* 42 U.S.C. §6295(p)(1)-(3).

However, in limited circumstances, Congress authorizes DOE to set standards through "direct final rules" (DFRs), in which a final rule is published simultaneously with a notice of proposed rulemaking (NOPR). *See* 42 U.S.C. §6295(p)(4).

To do so, DOE must receive "a statement…submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary, and contains recommendations with respect to an energy…conservation standard…." 42 U.S.C. §6295(p)(4)(A). Then DOE must "determine[] that the recommended standard contained in the [joint] statement is in accordance with" EPCA's other requirements for new or amended energy-conservation standards. 42 U.S.C. §6295(p)(4)(A)(i). EPCA requires DOE to provide a five-year lead time before standards applicable to furnaces, central air conditioners, and heat pumps take effect[1] and to prescribe test procedures to determine compliance.[2]

If DOE properly determines that a joint statement recommending energy-conservation standards satisfies these requirements, then it issues a DFR setting a standard, 42 U.S.C. §6295(p)(4)(A)(i), and solicits public comment for at least 110 days with respect thereto, 42 U.S.C. §6295(p)(4)(B). If DOE "receives 1 or more adverse public comments…that the Secretary determines…may provide a reasonable basis for withdrawing the direct final rule under subsection (o) [of

[1] *See* 42 U.S.C. §6295(m)(4)(A)(ii); 42 U.S.C. §6295(n)(3); 42 U.S.C. §6295(f)(4)(C); 42 U.S.C. §6295(d)(3)(B).
[2] *See* 42 U.S.C. §6295(o)(3)(A).

EPCA]…or any other applicable law," DOE must withdraw the DFR.[3] 42 U.S.C. §6295(p)(4)(C)(i).

In January 2010, six advocacy groups, one trade association, several large manufacturers, and the California Energy Commission (the "Joint Stakeholders") submitted the "Joint Stakeholders' Comments" (JSC), called by DOE a "consensus agreement," proposing energy-efficiency standards for furnaces, central air conditioners, and heat pumps.[4] The actual "agreement" attached to the JSC was dated October 13, 2009.[5] The Joint Stakeholders did not mention, much less recommend, standby- and off-mode standards for central air conditioners, heat pumps, and furnaces. The so-called "consensus agreement" did not include any States, consumers' advocates, small-business owners, HVAC contractors or distributors, small manufacturers, appliance installers, HVAC technicians, utilities, or energy suppliers.

[3] This is consistent with standard federal administrative practice, for agencies do not regulate controversial matters through DFRs. *See, e.g.,* 33 C.F.R. §1.05-55(a); 49 C.F.R. §5.35; *Sierra Club v. EPA*, 99 F.3d 1551, 1554 (10th Cir. 1996) ("[D]irect final rule becomes effective without further administrative action, unless adverse comments are received within the time limit specified in the proposed rule…."). Consequently, adverse comments cause agencies to withdraw DFRs. *E.g.,* 76 Fed. Reg. 76,048, 76,048 (Dec. 6, 2011)("EPA received a comment. EPA interprets this comment as adverse and, therefore, EPA is withdrawing the direct final rule.").

[4] *See* R.EERE-2011-BT-STD-0011-0016 at 1,12-21. (J.A. ***)

[5] *Id.* at 13-17. (J.A. ***)

Nevertheless, DOE issued a DFR setting efficiency and standby- and off-mode standards, but without first prescribing standby- and off-mode test procedures for heat pumps and central air conditioners.[6] DOE did not propose an enforcement plan or address the impact of enforcement- and compliance-related costs on HVAC distributors and contractors, manufacturers, consumers, and other market participants.[7] Moreover, DOE admittedly set accelerated compliance dates—May 1, 2013, for non-weatherized furnaces and mobile-home gas furnaces and January 1, 2015, for weatherized gas furnaces, central air conditioners, and heat pumps—"that are at least eighteen months earlier than the compliance dates for these products" mandated by EPCA's five-year lead-time requirement.[8]

The DFR's publication generated thirty-two adverse comments highlighting its procedural and substantive deficiencies and requesting the DFR's total or partial withdrawal.[9] Two Joint Stakeholders protested the inclusion of standby- and off-mode standards in the DFR. Joint Stakeholder American Council for an Energy-Efficient Economy (ACEEE) stressed that standby- and off-mode standards "were not part of the consensus agreement presented to DOE" and "request[ed] that DOE

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[6] R.EERE-2011-BT-STD-0011-0001 at 37,416, 37,433-37,438. (J.A. ***) DOE published a supplemental notice of proposed rulemaking (SNOPR) to establish test procedures for measuring off-mode energy use of central air conditioners and heat pumps on October 24, 2011. *See* 76 Fed. Reg. 65,616 (Oct. 24, 2011).
[7] *See* R.EERE-2011-BT-STD-0011-0058 at 67,047. (J.A. ***)
[8] R.EERE-2011-BT-STD-0011-0001 at 37,423. (J.A. ***)
[9] *See Pet'r's Br.* at 4-5 &n.1.

withdraw off mode standards for residential central air conditioners and heat pumps…."[10] Joint Stakeholder Air-Conditioning, Heating, and Refrigeration Institute (AHRI) and Earth Justice submitted a joint comment affirming that point and recommending that DOE withdraw those off-mode standards because they "remain controversial."[11] AHRI and Earth Justice further emphasized that DFRs "MUST ONLY BE ISSUED FOR NON-CONTROVERSIAL MATTERS," because "EPCA authorizes DOE to establish a [energy-conservation] standard, using the direct final rule alternative to ordinary notice and comment rulemaking, only where DOE has reason to know that the standard will be noncontroversial because the standard has the support of a consensus of interested parties…."[12] In a subsequent comment, AHRI asserted that "[t]he off-mode standards proposed by DOE are too stringent and will eliminate the majority of air conditioners and heat pumps currently sold in the market place."[13] AHRI reiterated that it "does not support the off-mode standards for residential central air conditioners and heat pumps" and "strongly recommend[ed] that DOE sever the off-mode standards for central air conditioners and heat pumps from the direct final rule…."[14]

[10] R.EERE-2011-BT-STD-0011-0053-A1 at 1. (J.A. ***)
[11] R.EERE-2011-BT-STD-0011-0052-A1 at 1. (J.A. ***)
[12] *Id.*at 2 (emphasis in original). (J.A. ***)
[13] R.EERE-2011-BT-STD-0011-0046-A1 at 6. (J.A. ***)
[14] *Id.* at 1. (J.A. ***)

Earth Justice and AHRI explained that EPCA conditions establishment of standby- and off-mode standards on prescription of test procedures to measure standby- and off-mode energy consumption; without them, "DOE's prescription of off-mode standards for these products was not appropriate."[15]

HARDI observed that DOE's failure to propose an enforcement plan made it "impossible for the DOE to fully assess the economic impact of the rule…."[16] HARDI also noted that the DFR was prescribed in violation of the Regulatory Flexibility Act (RFA), 5 U.S.C. §§601-612, because DOE did not conduct an Initial Regulatory Flexibility Analysis (IRFA) and Final Regulatory Flexibility Analysis (FRFA) assessing the DFR's impact on small HVAC distributors and contractors.[17]

Numerous commenters protested that the JSC reflected the views of only a narrow subset of interested parties. Several comments, including a bipartisan submission by two U.S. Senators, pointed out that advocates for consumers' economic interests (particularly those of low-income consumers) were not parties to the "consensus agreement," even though the DFR would raise consumer costs and disproportionately affect low-income occupants of multi-family dwellings and

[15] R.EERE-2011-BT-STD-0011-0052-A1 at 2. (J.A. ***)
[16] R.EERE-2011-BT-STD-0011-0039-A1 at 2. (J.A. ***)
[17] *Id.* at 4-5. (J.A. ***)

senior citizens on fixed incomes.[18] HARDI commented that the JSC "exclude[d] the input of U.S. small business owners, who represent two-thirds of the HVAC supply chain and 32,264 HVAC contracting and distribution companies nationwide," and that of "small manufacturers, none of whom signed the" JSC.[19] The JSC also lacked input from appliance installers and energy suppliers, who, as one commenter observed, "have the best, most practical information and data" concerning the DFR's effects.[20]

On October 31, 2011, DOE confirmed the DFR.[21] After purportedly "weigh[ing] the substance of any adverse comment(s) received against the anticipated benefits of the Consensus Agreement and the likelihood that further consideration of the comment(s) would change the results of the rulemaking," DOE concluded "that none of the comments requesting withdrawal, taken as a whole or individually," required DOE to withdraw the DFR.[22]

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[18] *See* R.EERE-2011-BT-STD-0011-0057-A1 (J.A. ***); R.EERE-2011-BT-STD-0011-0023-A1 (J.A. ***); R.EERE-2011-BT-STD-0011-0013-A1 at 7-8 (J.A. ***); R.EERE-2011-BT-STD-0011-0021-A1 (J.A. ***); R.EERE-2011-BT-STD-0011-0014-A1 at 5 (J.A. ***).

[19] R.EERE-2011-BT-STD-0011-0039-A1 at 1,4. (J.A. ***)

[20] R.EERE-2011-BT-STD-0011-0031-A1 at 3. (J.A. ***) Another commenter noted that the DFR may cause thousands of HVAC technicians to lose their jobs. R.EERE-2011-BT-STD-0011-0014-A1 at 5. (J.A. ***)

[21] R.EERE-2011-BT-STD-0011-0058 at 67,037. (J.A. ***)

[22] *Id.* at 67,038, 67,040. (J.A. ***)

SUMMARY OF ARGUMENT

Both the energy-conservation standards prescribed by the DFR and the process by which those standards were established reflect a pattern of disregard for EPCA's plain language and dozens of adverse comments by interested parties highlighting substantive and procedural flaws with the DFR and urging its total or partial withdrawal.

EPCA requires DOE to withdraw a DFR if it receives one or more adverse comments that, considered as a whole, may provide a reasonable basis for using normal notice-and-comment rulemaking. Without exception, every issue addressed in Intervenors' and Petitioner's briefs was raised in one or more of the *thirty-two adverse comments* DOE received during the comment period. DOE's conclusion that those *thirty-two adverse comments*, considered cumulatively, could not provide a reasonable basis for withdrawing the DFR was not only contrary to EPCA's plain language but unsupported by substantial evidence and arbitrary and capricious.

EPCA specifically mandates a five-year lead period between publication of energy-conservation standards that apply to residential central air conditioners, heat pumps, and residential furnaces and the compliance date. DOE concluded that it had "flexibility" to ignore statutory lead times and its own policy and set

accelerated compliance dates based on the JSC and attached "agreement"—dated October 13, 2009 (almost *two years* before the DFR was issued).

The JSC neither mentioned nor proposed standby- and off-mode standards. DOE included those standards in the DFR anyway, even though it was statutorily prohibited from prescribing off-mode standards for heat pumps and central air conditioners because it had not established statutorily required test procedures for those products. Further, DOE subsequently ignored Joint Stakeholders' comments strongly opposing those standards.

DOE's conclusion that the JSC provided by a narrow subset of interested parties was submitted by "interested persons that are fairly representative of relevant points of view," as required by EPCA, likewise reflects a disregard for both EPCA's text and the views of the vast majority of individuals and entities that will be affected by this DFR.

The DFR prescribed regional energy-conservation standards that directly apply to thousands of small HVAC distributors and contractors, causing them to incur increased compliance- and enforcement-related costs. DOE did not propose an enforcement plan for those regional standards and admittedly could not accurately measure the compliance and enforcement costs. And DOE failed to conduct a regulatory flexibility analysis assessing and attempting to mitigate the

DFR's impact on HVAC distributors and contractors, as required by the Regulatory Flexibility Act—or even address comments urging the agency to do so.

DOE's decision to make publicly available a revised life-cycle-cost (LCC) savings analysis revealing that its earlier estimates were substantially inflated less than two business days before the comment period closed and subsequent refusal to use its express statutory authority to extend the comment period or withdraw the DFR further illustrates the extent to which the DFR was a *fait accompli*.

For these reasons, as further explained below, the DFR and Notice should be vacated.

STANDING

The DFR establishes regional energy-conservation standards that directly regulate and create enforcement- and compliance-related costs for HVAC distributors and contractors. This Court may redress their injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555,560-61 (1992). As trade associations representing HVAC distributors and contractors, HARDI and ACCA have standing to sue on behalf of their individual members, as the interests they seek to protect are germane to their purpose and neither the claim asserted nor relief requested require individual members to participate.[23]

[23] *See* ACCA Motion to Intervene, Case No. 11-1485, Doc. No. 1254058 (Jan. 23, 2012); HARDI Motion to Intervene, Case No. 11-1485, Doc. No. 1353893 (Jan.

STANDARD OF REVIEW

The rule cannot be affirmed unless DOE's factual findings are supported by substantial evidence.[24] 42 U.S.C. §6306(b)(2); *see NRDC v. Herrington*, 768 F.2d 1355, 1369 (D.C. Cir. 1985). To meet its burden under this standard, DOE """must present on the record "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," taking into consideration the "record in its entirety…including the body of evidence opposed to…[its] view."""" *S&F Mkt. St. Healthcare LLC v. NLRB*, 570 F.3d 354, 361 n.* (D.C. Cir. 2009)(citations omitted).

This Court must set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right…." 5 U.S.C. §706(2)(C). "[A]n agency's interpretation of a statute" is reviewed "under the familiar two-step analysis of *Chevron*…." *Int'l Union v. MSHA*, 626 F.3d 84, 90 (D.C. Cir. 2010)(citing *Chevron USA, Inc. v. Nat'l Res. Def. Council,* 467 U.S. 837, 842-44 (1984)). Under *Chevron* step one, questions of statutory interpretation are reviewed *de novo*, *Int'l Union*, 626 F.3d at 90, using "traditional tools of

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20, 2012); Addendum II; *see also Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

[24] The substantial evidence standard is less deferential than arbitrary-and-capricious review, placing a higher burden on DOE to support its factual findings. *See Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 413 n.7 (1983); *Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 729 F. Supp. 2d 246, 251 (D.D.C. 2010).

statutory construction," *Chevron*, 467 U.S. at 843 n.9. Courts "[b]egin[]…'with the plain language of the statute'" but may also look to its "structure, purpose, and legislative history…." *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 663-64 (D.C. Cir. 2009)(citations omitted). If the statute is clear, the agency's construction is not entitled to deference; the Court's sole task "'is to enforce [the statutory language] according to its terms.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459 (2006)(citation omitted). Exceptions to notice-and-comment rulemaking are narrowly construed. *See Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754-55 (D.C. Cir. 2001).

Under *Chevron* step two, if, after exhausting traditional tools of statutory interpretation, the Court concludes that a statute is ambiguous, then the Court "defer[s] to…[the agency's] interpretation so long as it is reasonable." *Nat'l Cable & Telecomms. Ass'n*, 567 F.3d at 663. *Cf. Railway Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994)(en banc)(rejecting argument "that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power"). But "[e]ven where an agency's 'construction satisfies *Chevron*,'" it must be rejected if it is "'otherwise arbitrary and capricious.'" *Int'l Union*, 626 F.3d at 90 (citation omitted).

This Court must "set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law…." 5 U.S.C. §706(2)(A). The arbitrary-and-capricious standard requires that an agency's "decision be reasonable and reasonably explained." *Mobil Pipe Line Co. v. FERC*, 2012 U.S. App. LEXIS 7625,*9 (D.C. Cir. 2012). This Court must ensure that "the agency examine[d] the relevant data…[and] compl[ied] with its own regulations." *Environmental, LLC v. FCC*, 661 F.3d 80,84-85 (D.C. Cir. 2011)(citation omitted). "The agency's explanation cannot 'run[] counter to the evidence'…." *Kristin Brooks Hope Ctr. v. FCC*, 626 F.3d 586,588 (D.C. Cir. 2010). Agency actions can only be upheld "on the basis articulated by the agency itself.'" *Butte County v. Hogen*, 613 F.3d 190, 196 (D.C. Cir. 2010).

ARGUMENT

I. Because DOE received *thirty-two adverse comments* detailing material substantive and procedural problems with the DFR, DOE violated both the Energy Policy and Conservation Act and the Administrative Procedure Act by determining that those comments *could not possibly provide a reasonable basis for withdrawing the DFR.*

DOE's failure to withdraw the DFR in response to thirty-two adverse comments protesting its substance and the process by which it was issued is contrary to EPCA's plain language and unsupported by substantial evidence. EPCA provides that DOE "*shall* withdraw the direct final rule if…the Secretary receives 1 or more adverse public comments" concerning the DFR and, "based on

the rulemaking record relating to the direct final rule, the Secretary determines that such adverse public comments…*may* provide a *reasonable basis* for withdrawing the direct final rule under subsection (o)…or any other applicable law." 42 U.S.C. §6295(p)(4)(C)(i)(I)-(II)(emphasis added). The statute requires DOE to withdraw a DFR if the Secretary determines that adverse comments relating to that DFR—considered cumulatively—*possibly* provide a reasonable basis for withdrawing it.[25]

EPCA instructs DOE to look only at whether withdrawal *might* be reasonable—not whether adverse comments do, in fact, provide a reasonable basis for withdrawing the rule or will, in fact, result in changes to the rule. Congress intended that those determinations be made during the ordinary notice-and-comment rulemaking process. EPCA's statutory timeline makes this clear: DOE must determine whether to withdraw a DFR within *10 days or less* after the comment period closes,[26] which does not provide DOE sufficient time to evaluate the *merits* of adverse comments. Section 6295(p)(4)'s plain language and structure

[25] "Shall" is mandatory, making clear that DOE does not have discretion. *See United States v. Monzel*, 641 F.3d 528, 531 (D.C. Cir. 2011). And courts have consistently interpreted "may," as used in this context, to mean "possibly." *See, e.g., Berndt v. Cal. Dep't of Corr.*, 2010 U.S. Dist. LEXIS 57833, *7 (N.D. Cal. 2010)("'May' denotes merely a possibility."); *Culpepper v. Inland Mortg. Corp.*, 243 F.R.D. 459, 467-468 (N.D. Ala. 2006)("'[M]ay' means that something could possibly be true."); *Nalle v. Taco Bell Corp.*, 914 S.W.2d 685, 687 (Tex. App. 1996).

[26] *Compare* 42 U.S.C. § 6295(p)(4)(B)(requiring comment period of "*at least* 110 days" (emphasis added)), *with* 42 U.S.C. § 6295(p)(4)(C)(i)(DOE must determine whether to withdraw DFR "[n]ot later than 120 days" after publication).

are consistent with the well-established administrative-law principle that exceptions to notice-and-comment rulemaking are limited in scope and narrowly construed. *See Utility Solid Waste Activities Group*, 236 F.3d at 754.

The legislative history of section 6295(p)(4), codifying section 308 of the Energy Independence and Security Act of 2007 (EISA), Pub. L. No. 110-140, 121 Stat. 1492, 1560 (2007),[27] confirms that section 6295(p)(4) merely allows DOE to confirm DFRs establishing noncontroversial consensus standards, consistent with established federal agency practice.[28] Section 308 of EISA was an ancillary provision that received relatively little congressional attention.[29] Congress did not intend to delegate to DOE the authority to publish and confirm controversial DFRs in a way that is radically inconsistent with established agency practice and the APA's general notice-and-comment requirements for legislative rules.[30] "Congress…does not alter the fundamental details of a regulatory scheme in vague

[27] EISA was an omnibus energy bill.

[28] *See supra* note 3 (discussing standard practice). Historically, "[i]f even one person files an adverse comment or notice, the agency must withdraw the rule." Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1,1 (1995).

[29] If section 308 was intended to give DOE unprecedented authority to prescribe controversial major legislative rules without using notice-and-comment rulemaking, it would have spurred greater debate and controversy. *Cf. Common Cause v. FEC*, 842 F.2d 436, 447 (D.C. Cir. 1988)("a major statutory revision in existing…[law] would likely have spurred some greater debate or controversy").

[30] *See* 5 U.S.C. §553. If Congress had so intended, it would have clearly stated as much in the text of section 6295(p)(4). "'[W]hen two statutes are capable of co-existence,…absent a clearly expressed congressional intention to the contrary,…[courts must] regard each as effective.'" *Pittsburgh & L.E.R.Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989).

terms or ancillary provisions—it does not…hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001); *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

DOE, however, misconstrued the statutory language by adopting a standard that reads the word "may" out of the statute, rendering it meaningless.[31] Based on this misinterpretation, DOE has stated that 42 U.S.C. §6295(p)(4)(C) permits it to "weigh[]…the anticipated benefits of the Consensus Agreement [i.e., the JSC] and the likelihood that further consideration of the comment(s) would change the results of the rulemaking" against "the substance of any adverse comment(s) received…."[32] This unreasonable construction contradicts EPCA's plain language and is not entitled to *Chevron* deference. For this reason alone, the DFR should be vacated.

Even if DOE's construction passed muster under *Chevron*, its failure to withdraw the DFR was nonetheless unsupported by substantial evidence and arbitrary and capricious. To the extent that DOE "is vested with discretion" to determine whether adverse comments *may* provide a reasonable basis for withdrawing the DFR, "it must exercise that discretion in a well-reasoned, consistent, and evenhanded manner." *Portland Cement Ass'n v. EPA*, 665 F.3d

[31] "It is a hallowed maxim of statutory interpretation that…[courts] must give effect, if possible, to all words in a statute." *Seven-Sky v. Holder*, 661 F.3d 1,12 (D.C. Cir. 2011).

[32] R.EERE-2011-BT-STD-0011-0001 at 37,422. (J.A. ***)

177, 188 (D.C. Cir. 2011)(citation omitted). DOE's refusal to withdraw the DFR after receiving thirty-two adverse comments highlighting numerous material substantive and procedural flaws "suggest[s] too closed a mind. Consideration of comments as a matter of grace is not enough." *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988); *see Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998)("agency's mind must be open to considering" comments).

Without exception, DOE received adverse comments raising every issue discussed in Intervenors' and Petitioner's briefs, each of which, standing alone, was sufficient to require withdrawal of the DFR.

First, commenters pointed out that the DFR's accelerated compliance dates are much earlier than the compliance dates required by EPCA.[33]

Second, commenters explained that the DFR included standby- and off-mode standards that were not recommended or mentioned in the JSC,[34] which even the Joint Stakeholders opposed.[35]

Third, commenters pointed out that EPCA prohibited DOE from prescribing off-mode standards for central air conditioners and heat pumps when DOE had not prescribed test procedures to measure the off-mode energy use of those products.[36]

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[33] *E.g.,* R.EERE-2011-BT-STD-0011-0050-A1 at 6. (J.A. ***)
[34] *E.g., id.* at 3. (J.A. ***)
[35] *E.g.,* R.EERE-2011-BT-STD-0011-0046-A1 at 1. (J.A. ***)

Fourth, commenters explained that the JSC was not submitted by parties "that are fairly representative of relevant points of view," as required by 42 U.S.C. §6295(p)(4), and did not even satisfy the minimum statutory criteria for publishing a DFR.[37] As AHRI noted, DFRs are inappropriate for controversial matters.[38]

Fifth, commenters pointed out that even though small HVAC distributors and contractors would be directly regulated by the DFR's regional standards, DOE did not conduct a regulatory flexibility analysis assessing the impact those standards would have on literally thousands of small businesses, as required by the Regulatory Flexibility Act.[39]

Sixth, commenters explained that DOE's economic analysis was inadequate because it failed to either account for the enforcement- and compliance-related costs of the DFR's regional standards, notwithstanding that those costs will fall directly on parties excluded from the JSC, or even to propose an enforcement plan.[40]

Seventh, commenters pointed out that it was improper for DOE to make publicly available less than two business days before the comment period closed revised technical data revealing that its prior LCC savings estimates were

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[36] *E.g.*, R.EERE-2011-BT-STD-0011-0052-A1 at 2. (J.A. ***)
[37] *E.g.,* R.EERE-2011-BT-STD-0011-0031-A1 at 2-3. (J.A. ***)
[38] *See* R.EERE-2011-BT-STD-0011-0052-A1 at 2. (J.A. ***)
[39] *E.g.,* R.EERE-2011-BT-STD-0011-0039-A1 at 4-5. (J.A. ***)
[40] *E.g.,* R.EERE-2011-BT-STD-0011-0050-A1 at 1,5-6. (J.A. ***)

materially inflated because DOE used old data and did not use marginal-price analysis.[41]

Eighth, as addressed at length in Petitioner's brief,[42] commenters explained that the DFR not only prescribed energy-conservation standards that effectively banned certain categories of covered products in violation of 42 U.S.C. §6295(o)(4) but relied on flawed scientific and economic data and analysis to justify those standards.

DOE acknowledges that it is statutorily required to evaluate each "comment individually and all comments cumulatively to determine whether they [may] provid[e] a reasonable basis for withdrawal of the final rule."[43] The agency's decision to confirm a DFR of unprecedented scope in the face of strong opposition by the majority of parties directly affected by it is even more unreasonable when the totality of reasons for withdrawing the DFR provided by the comments DOE received are considered cumulatively.[44] DOE's conclusion that *thirty-two adverse comments* pointing out substantial substantive and procedural problems with the DFR, considered as a whole, *could not* provide any reasonable basis for withdrawing the DFR was contrary to EPCA, unsupported by substantial evidence, and arbitrary and capricious.

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[41] *E.g., id.* at 3. (J.A. ***)
[42] *See Pet'r's Br.* at 32-50.
[43] R.EERE-2011-BT-STD-0011-0058 at 67,050. (J.A. ***)
[44] *See Pet'r's Br.* at 4-5 n.1 (listing comments).

II. The DFR's accelerated compliance dates for amended energy-conservation standards are contrary to EPCA's plain language and DOE policy.

DOE did not have the authority to ignore EPCA's plain language and set accelerated compliance dates that are more than one-and-a-half years earlier than the statutorily required lead periods.[45] EPCA expressly limits DOE's discretion to determine the compliance dates for amended energy-conservation standards by requiring specific minimum lead periods (here, five years) between the date on which amended standards are published and the compliance date. *See* 42 U.S.C. §6295(m)(4)(A)(ii); 42 U.S.C. §6295(n)(3); 42 U.S.C. §6295(f)(4)(C); 42 U.S.C. §6295(d)(3)(B). These provisions are designed to give manufacturers of covered products "adequate lead time…to retool their operations."[46]

Every provision in EPCA addressing lead times for energy-conservation standards applicable to central air conditioners, heat pumps, and furnaces requires a five-year lead period. 42 U.S.C. §6295(m)(4)(A)(ii) provides that amended energy-conservation standards "*shall* apply…with respect to central air conditioners, heat pumps,…and furnaces,…[to] a product that is manufactured after the date that is 5 years after publication of the final rule establishing an

[45] R.EERE-2011-BT-STD-0011-0001 at 37,423. (J.A. ***)
[46] *Id.* at 37,426. (J.A. ***)

applicable standard."[47] (emphasis added). Concordantly, 42 U.S.C. §6295(n)(3)(B) states that "in no case may an amended standard apply to products manufactured within…5 years [for central air conditioners and heat pumps,…furnaces] after publication of the final rule establishing a standard." 42 U.S.C. §6295(f)(4)(C) and 42 U.S.C. §6295(d)(3)(B) also establish five-year lead periods.

DOE must act in accordance with explicit statutory commands. "[A]n agency literally has no power to act…unless and until Congress confers power upon it." *La. Pub. Serv. Com. v. FCC*, 476 U.S. 355, 374 (1986). And DOE acknowledged that its stated policy is to adhere to statutorily-required lead times in the DFR itself.[48] *See* 10 C.F.R. pt. 430, Appendix A, Subpart C,§6; *Environmental, LLC*, 661 F.3d at 85 (agency "must comply with its own regulations").

Yet DOE ignored clear statutory language and its own policy and set compliance dates that it admits "are at least eighteen months earlier than the compliance dates for these products as determined under 42 U.S.C. 6295(d)(3)(B) and (f)(4)(C)."[49] The agency asserts that the JSC, which proposed accelerated compliance dates, gives it "flexibility in establishing the compliance dates for

[47] "'[S]hall'…is mandatory…, not merely precatory." *Monzel*, 641 F.3d at 531(citation omitted).
[48] R.EERE-2011-BT-STD-0011-0001 at 37,425-37,427. (J.A. ***)
[49] *Id.* at 37,423. (J.A. ***)

amended energy conservation standards."[50] But Congress did not give DOE "flexibility" to set lead times.

DOE's decision to prescribe accelerated compliance dates is reviewed *de novo*.[51] *Chevron*, 467 U.S. at 842-43 & n. 9; *Int'l Union v. MSHA*, 626 F.3d at 90. DOE's construction is not entitled to *Chevron* deference. Where, as here, "Congress has directly spoken to the precise question at issue…[,] the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Because the accelerated compliance dates violate a clear statutory directive, they are unlawful.[52]

III. DOE erred by including controversial standby- and off-mode standards in the DFR because those standards were neither proposed nor discussed in the JSC and DOE had not prescribed the necessary test procedures.

DOE also exceeded its authority and violated EPCA's unambiguous language by including in the DFR standby- and off-mode standards that were not recommended or mentioned in the JSC, were opposed by Joint Stakeholders, and

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[50] *Id.* at 37,426. (J.A. ***) The actual "agreement" proposing accelerated compliance dates was dated October 13, 2009—almost two years before the DFR was published. *See* R.EERE-2011-BT-STD-0011-0016 at 13-21. (J.A. ***)

[51] EPCA does not explicitly or implicitly delegate to DOE the authority to establish accelerated compliance dates and thus this Court need not defer to DOE's construction of the statute. *See Railway Labor Executives' Ass'n*, 29 F.3d at 670-71.

[52] Even under Chevron step two, the accelerated compliance dates are unlawful. Further, DOE's decision to set accelerated compliance dates contrary to DOE policy was arbitrary and capricious.

were issued without energy-consumption test procedures required by 42 U.S.C. §6295(o)(3)(A).

Under EPCA, DOE may only use the DFR process to promulgate "the recommended standard contained in the [joint] statement." 42 U.S.C. §6295(p)(4)(A)(i). The JSC did not recommend or even discuss standby- or off-mode standards, as DOE acknowledges.[53] In their correspondence with DOE after the DFR's publication, Joint Stakeholders stressed that they did not even consider the possibility of including standby- and off-mode standards in the JSC[54] and requested that DOE "address the issues of standby mode and off mode energy consumption…in separate rulemakings…."[55]

However, DOE included standby- and off-mode standards anyway. The agency asserts that it was compelled to do so by EPCA's provision requiring inclusion of standby- and off-mode standards in final rules "revising…standard[s] for…covered product[s]" where it is "feasible" or "justified under subsection(o)." 42 U.S.C. §6295(gg)(3)(A)-(B). But DOE failed to establish standby- and off-mode test procedures required by EPCA prior to publication of these standards and thus could not prescribe them, subsection (gg)(3) notwithstanding.

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[53] R.EERE-2011-BT-STD-0011-0001 at 37,423. (J.A. ***)
[54] *See, e.g.,* R.EERE-2011-BT-STD-0011-0046-A1 at 11,21. (J.A. ***)
[55] R.EERE-2011-BT-STD-0011-0001 at 37,424. (J.A. ***)

Indeed, subsection (o) explicitly prohibited DOE from establishing standards for central air conditioners and heat pumps under these circumstances. Subsection (o) provides that "[t]he Secretary *may not prescribe an amended or new standard* if…*a* test procedure has not been prescribed pursuant to section 323 [42 U.S.C. §6293] *with respect to that type (or class)* of product…."[56] 42 U.S.C. §6295(o)(3)(A)(emphasis added). DOE prescribed energy-conservation standards for central air conditioners and heat pumps *prior to* prescribing required standby- and off-mode test procedures for those classes of covered products pursuant to 42 U.S.C. §6293 in violation of 42 U.S.C. §6295(o)(3)(A).

Moreover, as a Joint Stakeholder explained, DOE's failure to amend its test procedures made "it impossible for stakeholders to comment on the practicality or reasonableness of the standards…."[57] Therefore, including those standards was not "feasible," as required by 42 U.S.C. §6295(gg)(3)(A).

DOE's decision to prescribe standby- and off-mode standards is contrary to EPCA's plain language and thus not entitled to *Chevron* deference. Further, the off-mode standards for air conditioners and heat pumps were not supported by substantial evidence.

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[56] DOE violated its own policy when it prescribed standby- and off-mode standards before finalizing test procedures to measure standby- and off-mode energy use. *See* 10 C.F.R. pt. 430, Appendix A, Subpart C,§7 ("Final, modified test procedures will be issued prior to the NOPR on proposed standards.").

[57] R.EERE-2011-BT-STD-0011-0052-A1 at 2. (J.A. ***)

IV. The JSC was not "submitted…by interested persons that are fairly representative of relevant points of view," as required by EPCA.

Not only did DOE establish controversial standby- and off-mode standards nowhere addressed in the JSC in the face of opposition from Joint Stakeholders, it acted without input from interested parties, as required by EPCA. DOE cannot publish energy-conservation standards via a DFR unless it receives "a statement…submitted jointly by interested persons that are fairly representative of *relevant* points of view (*including* representatives of manufacturers of covered products, *States, and* efficiency advocates)…." 42 U.S.C. §6295(p)(4)(A)(emphasis added). The JSC used as the basis for this DFR fails that standard.

DOE has limited discretion to determine whether a statement satisfies 42 U.S.C. §6295(p)(4)(A)'s criteria for issuing a DFR. DOE can only use a DFR to prescribe energy-conservation standards if a broad coalition of interested groups, entities, and States with widely divergent interests sign the joint statement; moreover, certain signatories are necessary (but not sufficient) to allow DOE to issue a DFR.[58]

[58] Per 42 U.S.C. §6295(p)(4), multiple States, manufacturers, and energy-efficiency advocates must sign a joint statement before DOE may issue a DFR based on that statement.

A. The JSC was not submitted on behalf of parties fairly representative of relevant points of view.

The JSC did not represent the interests of parties whose comments must be considered before DOE can issue a DFR. DOE concedes that "States…are relevant parties to any consensus recommendation," yet, the agency admits, "States were not signatories to" the JSC.[59] *Cf.* 10 C.F.R. §430.2 (DOE definition of "State" does not include "State entity"). DOE also recognized that "consumers [and] utilities" are parties "interested in the outcome of the [energy-conservation] standards development process." 10 C.F.R. pt. 430, Appendix A, Subpart C, §8(b); *see* 42 U.S.C. §6295(o)(2)(B)(i)(I). But no advocates for consumers' economic interests or utilities were parties to the JSC. And "DOE [has] acknowledge[d] that appliance installers and energy suppliers may also be relevant parties within the meaning of 42 U.S.C. 6295(p)(4)."[60] Yet no appliance installers or energy suppliers signed the JSC. Likewise, two-thirds of the HVAC supply chain, including small businesses and 32,264 HVAC contracting and distribution companies, were excluded from the JSC, as were small manufacturers.[61] Instead, the JSC was submitted by some large manufacturers, one trade association, six energy-efficiency advocacy organizations, and one State entity. This narrow

[59] R.EERE-2011-BT-STD-0011-0001 at 37,422. (J.A. ***)
[60] R.EERE-2011-BT-STD-0011-058 at 67,040. (J.A. ***)
[61] *See* R.EERE-2011-BT-STD-0011-0039-A1 at 1,4. (J.A. ***)

subset of interested parties cannot (and did not) represent the interests of the many groups that did not sign the JSC.

B. The JSC was not representative of relevant views.

The JSC was not representative of the views of the vast majority of individuals and entities affected by the energy-conservation standards prescribed in the DFR. The JSC did not express any views (including those of both small and large manufacturers) concerning controversial standby- and off-mode standards, which DOE estimates will cost manufacturers as much as $250,000,000.[62] Likewise, the JSC did not reflect the views of thousands of small HVAC distributors and contractors that will likely incur the majority of enforcement- and compliance-related costs arising out of regional standards prescribed in the DFR.[63] Utilities' views were not included in the JSC, even though DOE recognizes that the DFR will likely have adverse employment and investment effects on the utility sector.[64] And though DOE admits that consumers will confront increased upfront

[62] R.EERE-2011-BT-STD-0011-0001 at 37,412. (J.A. ***) As DOE admits, increased production costs may force manufacturers to "shift [production] to lower-labor-cost countries," which could cause significant domestic job losses. *Id.* at 37,512-37,513. (J.A. ***)

[63] DOE is aware that the DFR "may increase the purchase price of appliances, including the retail price plus sales tax, and increase installation costs"; DOE assumes that "[t]he increased cost of appliances leads to…lower employment in…[nonmanufacturing] economic sectors." R.EERE-2011-BT-STD-0011-0012-A14 at 13-1-13-2. (J.A. ***)

[64] *Id.* at 13-2. (J.A. ***)

costs because of the DFR, their views were not expressed in the JSC.[65] DOE's conclusion that these parties' perspectives need not be considered prior to prescribing a major rule was unreasonable.

V. DOE violated the Regulatory Flexibility Act when it failed to conduct a regulatory flexibility analysis assessing the effect of regional energy-conservation standards on small HVAC distributors and contractors.

The majority of HVAC distributors and contractors are small businesses that are directly subject to the DFR's regional energy-conservation standards.[66] Because DOE failed to conduct an Initial Regulatory Flexibility Analysis (IRFA) and Final Regulatory Flexibility Analysis (FRFA) assessing and attempting to mitigate the DFR's impact on small HVAC distributors and contractors, the DFR was prescribed in violation of the Regulatory Flexibility Act (RFA), 5 U.S.C. §§601-612.

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[65] *See* R.EERE-2011-BT-STD-0011-0001 at 37,425, 37,483, 37,532 (J.A. ***); R.EERE-2011-BT-STD-0011-0002 at 37,558-37,559; R.EERE-2011-BT-STD-0011-0012-A14 at 13-2 (J.A. ***).

[66] *See* R.EERE-2011-BT-STD-0011-0001 at 37,545-37,546. (J.A. ***); 10 C.F.R. §430.32. The Regional Standards Enforcement Framework Document posted by DOE in connection with a subsequent rulemaking makes clear that HVAC distributors and contractors are directly subject to the DFR's regional energy-conservation standards and will incur increased compliance-and-enforcement costs as a direct result of those standards. *See* http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/furncac_regstnd_enforceframework.pdf (last visited May 25, 2012); 76 Fed. Reg. 76,328 (December 7, 2011).

Unless an agency certifies that a "rule will not, if promulgated, have a significant economic impact on a substantial number of small entities" under 5 U.S.C. §605(b), the agency must comply with the RFA's procedural requirements, which include publishing both an IRFA and FRFA, *see* 5 U.S.C. §§603-604; *Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 176-77 (D.C. Cir. 2007). A FRFA must contain "a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments…."[67] 5 U.S.C. §604(a)(2). *Cf. Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977)("[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public."). Significantly, a FRFA must also describe in considerable detail "the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record…." 5 U.S.C. §604(a)(5).

DOE knew that the DFR would affect small businesses and required an IRFA and FRFA under the RFA. HARDI and ACCA submitted comments urging DOE to perform a review under the RFA including HVAC contractors and

[67] *See generally Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) (discussing requirements for FRFA).

distributors.[68] HARDI explained that "two-thirds of the HVAC supply chain" is primarily comprised of small businesses and that regional standards "will undoubtedly alter the way an entire industry of small businesses operate."[69] DOE has acknowledged that HVAC "distributors are overwhelmingly small businesses,"[70] and that "[t]he large majority of [HVAC] contractors operate as small businesses" in a "market…even more fragmented than the distribution industry."[71] The DFR's regional energy-efficiency standards will have a substantial—and still unknown—economic impact on these small businesses.[72] Consequently, DOE was required to conduct an IRFA and FRFA assessing the DFR's impact on small HVAC distributors and contractors.

[68] R.EERE-2011-BT-STD-0011-0050-A1 at 6 (J.A. ***); R.EERE-2011-BT-STD-0011-0039-A1 at 4-5 (J.A. ***).

[69] R.EERE-2011-BT-STD-0011-0039-A1 at 1,4-5. (J.A. ***)

[70] DOE estimates that there were 5,156 "independent [HVAC] distribution branches" in 2002. R. EERE-2011-BT-STD-0011-0012-A19 at 18-10. (J.A. ***)

[71] *Id*. at 18-13. (J.A. ***) According to DOE, "[t]here are 36,345 HVAC branches that specialize 51 percent or more in HVAC, 25,496 of which specialize entirely in the industry."

[72] DOE acknowledged in a TSD that regional energy-conservation standards will increase enforcement-and-compliance-related costs incurred by HVAC distributors, contractors, and other small businesses (which DOE admittedly was unable to measure) and may also have non-enforcement costs, e.g., they "could increase inventory investment and inventory management costs" for distributors. R.EERE-2011-BT-STD-0011-0012-A19 at 18-27. (J.A. ***)

Although DOE characterized part of the DFR's preamble as a FRFA,[73] this purported FRFA did not address the DFR's impact on the majority of small businesses that will be adversely affected by the rule and its regional-standards regime: small HVAC contractors and distributors and other small market participants.[74] In a Correction, DOE subsequently recharacterized the so-called FRFA as an IRFA and stated that it would "publish its final regulatory flexibility analysis (FRFA), including responses to any comments received, in a separate notice at the conclusion of the 110-day comment period."[75]

Yet DOE ignored HARDI's and ACCA's comments.[76] The Notice published after the comment period failed to mention or address these comments and did not include either an IRFA or FRFA addressing the DFR's effects on small HVAC distributors and contractors.[77]

If DOE had decided that the DFR's regional standards will not substantially affect these small businesses, its failure to issue the certification required by 5

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[73] DOE acknowledged in the DFR's preamble that "multiple" manufacturers of "products covered by" the DFR "qualify as…small business[es]," R.EERE-2011-BT-STD-0011-0001 at 37,490 (J.A. ***), and that it must comply with the RFA's procedural requirements with respect to small manufacturers, *see id.* at 37,514 (J.A. ***).

[74] *See id.* at 37,540-37,542. (J.A. ***)

[75] R.EERE-2011-BT-STD-0011-0003 at 39,245-39,246. (J.A. ***)

[76] DOE's failure to respond to comments raising relevant, significant points was arbitrary and capricious in itself. *See, e.g., Sierra Club v. Van Antwerp*, 661 F.3d 1147,1157 (D.C. Cir. 2011).

[77] *See* R.EERE-2011-BT-STD-0011-0058. (J.A. ***)

U.S.C. §605(b) would, standing alone, violate the RFA. But DOE acknowledged the DFR's consequences for small HVAC distributors and contractors and simply failed to publish either an IRFA or FRFA addressing these effects, let alone a FRFA that described in detail the projected reporting, recordkeeping, and other compliance requirements of the rule. DOE's decision to ignore a statutory command is not entitled to deference. This Court should vacate the DFR for this reason or, in the alternative, remand the DFR and order DOE to conduct an IRFA and FRFA and defer enforcement of the regional standards against small HVAC distributors and contractors.[78]

VI. DOE erred when it failed to measure the compliance and enforcement costs of regional standards, as required by EPCA.

DOE also failed to "consider the impact of…regional standards on…product distributors, dealers, contractors, and installers" and other market participants before prescribing regional energy-conservation standards.[79] 42 U.S.C. §6295(o)(6)(D)(ii). DOE has acknowledged that there are "unique burdens associated with introducing differentiated energy conservation standards based on

[78] *See* 5 U.S.C. §611(a)(4)(remedies for RFA violations); *see also United States Telecom Ass'n v. FCC*, 400 F.3d 29, 42-44 (D.C. Cir. 2005).

[79] 42 U.S.C. §6295(o)(6)(G)(ii)(I) requires DOE to "initiate a rulemaking to develop and implement an effective enforcement plan" for regional standards within "90 days after the date of…a final rule that establishes…regional standard[s]…."

geography,"[80] and that "prescribing an enforcement plan only after publishing a final rule is problematic," U.S. DEP'T OF ENERGY, MULTI-YEAR PROGRAM PLAN—BUILDING REGULATORY PROGRAMS, §5.5, p.48 (Oct. 2010). But DOE nevertheless prescribed regional standards without considering how the enforcement- and compliance-related costs of those standards would affect small HVAC distributors and contractors and other market participants.

DOE has acknowledged that compliance and enforcement costs related to regional standards can impact market participants differently than national standards. For example, DOE noted in a preliminary Technical Support Document that regional standards could increase compliance costs for HVAC distributors "as a result of additional record-keeping and reporting related to the regional standards."[81] DOE also recognized that it could only "determine whether regional standards are economically justified, after considering the impacts on market participants attributable to such standards."[82] But the agency acknowledged that "[b]ecause DOE has not established an enforcement plan for regional standards, DOE is not able to capture any enforcement impacts in this analysis"[83] and conceded that "at this point DOE cannot accurately assess any impacts of

[80] R.EERE-2011-BT-STD-0011-0001 at 37,432. (J.A. ***)
[81] R.EERE-2008-BT-STD-0006-0053 at 17-17. (J.A. ***)
[82] *Id.* at 17-5. (J.A. ***)
[83] *Id.* at 17-15. (J.A. ***)

compliance due to regional standards because no enforcement mechanism and compliance requirements have yet been established."[84]

Comments from HARDI and ACCA urged DOE to assess the impact of enforcement- and compliance-related costs from regional standards on HVAC distributors, contractors, installers, and other market participants, none of which were parties to the JSC.[85] Problems are likely to arise in enforcement, such as the need to test for compliance with national standards at the point of manufacture or import and perform a second test using regional standards at the installation location;[86] further, the "rising trend of the sale of residential HVAC equipment over the [I]nternet" will cause "'leakage effects,' when installers [and homeowners] purchase products in less stringent regions and carry them into a region with a more stringent standard."[87]

Yet DOE refused to withdraw the DFR and simply prescribe regional standards through normal notice-and-comment rulemaking, which would permit DOE adequate time to propose an enforcement plan and meaningfully study—and at least attempt to quantify—the impact that plan will have on distributors, contractors, installers, and other market participants. Instead, DOE dismissed

[84] *Id.* at 17-18. (J.A. ***)
[85] *See* R.EERE-2011-BT-STD-0011-0039-A1 at 4 (J.A. ***); R.EERE-2011-BT-STD-0011-0050-A1 at 1-2 (J.A. ***).
[86] R.EERE-2011-BT-STD-0011-0050-A1 at 1.
[87] *Id.* at 6. (J.A. ***)

commenters' concerns, denying that "the cost of enforcement of regional standards impacts the…factors considered in the establishment of energy conservation standards differently than the costs of enforcement of national energy conservation standards."[88] But that claim is belied by DOE's subsequent statement accepting that regional standards will increase HVAC distributors' and contractors' compliance- and enforcement-related costs,[89] as well as its prior statements.

This clear and fundamental inconsistency, standing alone, renders DOE's actions arbitrary and capricious. *See, e.g., Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1460 (D.C. Cir. 1997); *Air Line Pilots Ass'n v. FAA*, 3 F.3d 449, 453 (D.C. Cir. 1993). Because DOE failed to meaningfully answer "objections that on their face seem legitimate, its [conclusion]…can hardly be classified as reasoned." *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 209 (D.C. Cir. 2011)(citation omitted). Further, DOE's finding that regional standards were economically justified, as required by 42 U.S.C. §6295(o)(6)(D), was not supported by substantial evidence, as DOE admittedly failed to measure the enforcement and compliance costs of those standards. *See Safe Extensions, Inc.*

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[88] R.EERE-2011-BT-STD-0011-0058 at 67,047. (J.A. ***)

[89] *See* http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/furncac_regstnd_enforceframework.pdf (last visited May 25, 2012).

v. FAA, 509 F.3d 593,605 (D.C. Cir. 2007)("'[A]gency's unsupported assertion does not amount to substantial evidence.'"(citation omitted)).

VII. DOE denied the public the opportunity to meaningfully comment on substantially revised data and analysis it made publicly available less than two business days before the comment period closed.

DOE's failure to extend the comment period or withdraw the DFR after making publicly available a substantially revised life-cycle-cost (LCC) savings analysis just before the comment period closed was arbitrary and capricious. As discussed in Petitioner's brief,[90] on October 14, 2012—less than two business days before the comment period closed—DOE published on its website a spreadsheet using the most recent data and apparently using marginal-price analysis. DOE's last-minute corrected analysis revealed that the agency's earlier LCC savings estimates were substantially inflated for at least two reasons: DOE's estimates were calculated without using marginal-price analysis and were based on outdated, stale data.

On the last day of the public comment period, ACCA submitted a comment objecting to DOE's release of the revised analysis less than two business days before the comment period closed and pointing out that it was "unreasonable to expect stakeholders to be able to review this new information and provide

[90] *See Pet'r's Br.* at 39-50. Because Petitioner discusses DOE's flawed economic analysis in great detail, Intervenors will not do so here.

comments" within this time period.[91] DOE not only refused to withdraw the DFR but did not even extend the comment period.[92]

DOE's refusal to use its statutory authority to extend the comment period to provide sufficient time for the public to comment on its tardily corrected LCC savings analysis was arbitrary and capricious. Rulemaking involving energy-conservation standards is, by necessity, heavily informed by technical analysis. When rulemaking is subject to public comment, the agency "must…reveal[] for public evaluation…the 'technical studies and data' upon which the agency relies." *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006)(citation omitted). As the D.C. Circuit recently reaffirmed, "'[i]n order to allow for useful criticism, it is especially important for the agency to identify and make available *technical studies and data* that it has employed in reaching…[its] decisions….'" *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008)(citation omitted). The public cannot provide "'useful criticism'" unless the agency makes the technical analysis it uses to justify a rule publicly available "'in

[91] R.EERE-2011-BT-STD-0011-0050-A1 at 3. (J.A. ***)

[92] EPCA expressly requires DOE to "solicit public comment for a period of at least 110 days" for every DFR, making clear that DOE has the authority to extend the comment period. 42 U.S.C. §6295(p)(4)(B). DOE's proffered reason for not extending the comment period was that doing so would "jeopardiz[e] its ability to meet the requirements of EPCA." R.EERE-2011-BT-STD-0011-0058 at 67,050. (J.A. ***)

time to allow for *meaningful* commentary…[and] 'a genuine interchange'" between interested parties. *Id.* at 236-37 (citation omitted and emphasis added).

Here, DOE gave the public less than two business days to comment on substantially revised LCC savings estimates, foreclosing the possibility of a meaningful interchange of ideas regarding DOE's analysis. Relevant parties were not on notice that DOE's initial LCC savings analysis was flawed and inflated and thus that other aspects of its technical analysis could be inaccurate until just prior to the close of the comment period, materially prejudicing their interests. *See id.* Indeed, because DOE relied on flawed data, the DFR was not supported by substantial evidence.

CONCLUSION

For the foregoing reasons, this Court should vacate and remand the DFR and Notice with appropriate instructions regarding the limits of DOE's discretion under EPCA.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. 32(a)(7)(B) and Circuit Rule 32(a)(2)(B) because this brief contains 8,746 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

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Date: May 29, 2012

United States Court of Appeals
for the District of Columbia Circuit

CERTIFICATE OF SERVICE

AMERICAN PUBLIC GAS ASSOC. v DEPT OF ENERGY, No. 11-1485

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by CAUSE OF ACTION, Counsel for HEATING, AIR-CONDITIONING & REFRIGERATION DISTRIBUTORS INTERNATIONAL to print this document. I am an employee of Counsel Press.

On **May 29, 2012**, Counsel for Appellant has authorized me to electronically file the foregoing **Brief of Intervenors** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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A courtesy copy has also been mailed to the above counsel.

Unless otherwise noted, 8 paper copies have been filed with the Court on the same date via Express Mail.

May 29, 2012

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ADDENDUM I

Table of Contents

Statutes:

Regulations:

42 U.S.C. §603. Initial Regulatory Flexibility Analysis.

(a) Whenever an agency is required by section 553 of this title [5 USCS § 553], or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter [5 USCS §§ 601 et seq.] applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain--

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as--

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

(d) (1) For a covered agency, as defined in section 609(d)(2) [5 USCS § 609(d)(2)], each initial regulatory flexibility analysis shall include a description of—

(A) any projected increase in the cost of credit for small entities;

(B) any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and

(C) advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).

(2) A covered agency, as defined in section 609(d)(2) [5 USCS § 609(d)(2)], shall, for purposes of complying with paragraph (1)(C)--

(A) identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and

(B) collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).

42 U.S.C. §604. Final Regulatory Flexibility Analysis.

(a) When an agency promulgates a final rule under section 553 of this title [5 USCS § 553], after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a) [5 USCS § 603(a)], the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain--

(1) a statement of the need for, and objectives of, the rule;

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; and

[(7)](6) for a covered agency, as defined in section 609(d)(2) [5 USCS § 609(d)(2)], a description of the steps the agency has taken to minimize any additional cost of credit for small entities.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

42 U.S.C. §605. Avoidance of Duplicative or Unnecessary Analysis.

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title [5 USCS §§ 602, 603, and 604] in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title [5 USCS §§ 603 and 604] shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title [5 USCS §§ 602, 603, 604, and 610].

42 U.S.C. §611. Judicial Review. [Subsections (b)-(d) omitted.]

(a) (1) For any rule subject to this chapter [5 USCS §§ 601 et seq.], a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 [5 USCS §§ 601, a604, 605(b), 608(b), and 610] in accordance with chapter 7 [5 USCS §§ 701 et seq.]. Agency compliance with sections 607 and 609(a) [5 USCS §§ 607 and 609(a)] shall be judicially reviewable in connection with judicial review of section 604 [5 USCS § 604].

(2) Each court having jurisdiction to review such rule for compliance with section 553 [5 USCS § 553], or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 [5 USCS §§ 601, 604, 605(b), 608(b) and 610] in accordance with chapter 7 [5 USCS §§ 701 et seq.]. Agency compliance with sections 607 and 609(a) [5 USCS §§ 607 and 609(a)] shall be judicially reviewable in connection with judicial review of section 604 [5 USCS § 604].

(3) (A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter [5 USCS § 608(b)], an action for judicial review under this section shall be filed not later than--

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7 [5 USCS §§ 601 et seq., 701 et seq.], including, but not limited to--

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

42 U.S.C. §6295. Energy Conservation Standards.

[Subsections (a)-(c),(e)-(f)(3), (g)-(l), (o)-(ff), (hh)-(ii) omitted.]

(d) Standards for central air conditioners and heat pumps.
(1) The seasonal energy efficiency ratio of central air conditioners and central air conditioning heat pumps shall be not less than the following:
(A) Split Systems: 10.0 for products manufactured on or after January 1, 1992.
(B) Single Package Systems: 9.7 for products manufactured on or after January 1, 1993.
(2) The heating seasonal performance factor of central air conditioning heat pumps shall be not less than the following:
(A) Split Systems: 6.8 for products manufactured on or after January 1, 1992.
(B) Single Package Systems: 6.6 for products manufactured on or after January 1, 1993.
(3) (A) The Secretary shall publish a final rule no later than January 1, 1994, to determine whether the standards established under paragraph (1) should be amended. Such rule shall contain such amendment, if any, and provide that the amendment shall apply to products manufactured on or after January 1, 1999. The Secretary shall publish a final rule no later than January 1, 1994, to determine whether the standards established under paragraph (2) shall be amended. Such rule shall contain such amendment, if any, and provide that the amendment shall apply to products manufactured on or after January 1, 2002.
(B) The Secretary shall publish a final rule after January 1, 1994, and no later than January 1, 2001, to determine whether the standards in effect for central air conditioners and central air conditioning heat pumps should be amended. Such rule shall provide that any amendment shall apply to products manufactured on or after January 1, 2006.

(f) Standards for furnaces and boilers.
(4) (A) The Secretary shall publish a final rule no later than January 1, 1992, to determine whether the standards established by paragraph (2) for mobile home furnaces should be amended. Such rule shall provide that any amendment shall apply to products manufactured on or after January 1, 1994.
(B) The Secretary shall publish a final rule no later than January 1, 1994, to determine whether the standards established by this subsection for furnaces (including mobile home furnaces) should be amended. Such rule shall provide that any amendment shall apply to products manufactured on or after January 1, 2002.
(C) After January 1, 1997, and before January 1, 2007, the Secretary shall publish a final rule to determine whether standards in effect for such products

should be amended. Such rule shall contain such amendment, if any, and provide that any amendment shall apply to products manufactured on or after January 1, 2012.

(D) Notwithstanding any other provision of this Act, if the requirements of subsection (o) are met, not later than December 31, 2013, the Secretary shall consider and prescribe energy conservation standards or energy use standards for electricity used for purposes of circulating air through duct work.

(m) Amendment of standards.

(1) In general. Not later than 6 years after issuance of any final rule establishing or amending a standard, as required for a product under this part, the Secretary shall publish—

(A) a notice of the determination of the Secretary that standards for the product do not need to be amended, based on the criteria established under subsection (n)(2); or

(B) a notice of proposed rulemaking including new proposed standards based on the criteria established under subsection (o) and the procedures established under subsection (p).

(2) Notice. If the Secretary publishes a notice under paragraph (1), the Secretary shall--

(A) publish a notice stating that the analysis of the Department is publicly available; and

(B) provide an opportunity for written comment.

(3) Amendment of standard; new determination.

(A) Amendment of standard. Not later than 2 years after a notice is issued under paragraph (1)(B), the Secretary shall publish a final rule amending the standard for the product.

(B) New determination. Not later than 3 years after a determination under paragraph (1)(A), the Secretary shall make a new determination and publication under subparagraph (A) or (B) of paragraph (1).

(4) Application to products.

(A) In general. Except as provided in subparagraph (B), an amendment prescribed under this subsection shall apply to--

(i) with respect to refrigerators, refrigerator-freezers, freezers, room air conditioners, dishwashers, clothes washers, clothes dryers, fluorescent lamp ballasts, and kitchen ranges and ovens, such a product that is manufactured after the date that is 3 years after publication of the final rule establishing an applicable standard; and

(ii) with respect to central air conditioners, heat pumps, water heaters, pool heaters, direct heating equipment, and furnaces, such a product that is

manufactured after the date that is 5 years after publication of the final rule establishing an applicable standard.

(B) Other new standards. A manufacturer shall not be required to apply new standards to a product with respect to which other new standards have been required during the prior 6-year period.

(5) Reports. The Secretary shall promptly submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Energy and Natural Resources of the Senate—

(A) a progress report every 180 days on compliance with this section, including a specific plan to remedy any failures to comply with deadlines for action established under this section; and

(B) all required reports to the Court or to any party to the Consent Decree in State of New York v Bodman, Consolidated Civil Actions No. 05 Civ. 7807 and No. 05 Civ. 7808.

(n) Petition for an amended standard.

(1) With respect to each covered product described in paragraphs (1) through (11) and in paragraphs (13) and (14) of section 322(a) [42 USCS § 6292(a)], any person may petition the Secretary to conduct a rulemaking to determine for a covered product if the standards contained either in the last final rule required under subsections (b) through (i) of this section or in a final rule published under this section should be amended.

(2) The Secretary shall grant a petition if he finds that it contains evidence which, assuming no other evidence were considered, provides an adequate basis for amending the standards under the following criteria--

(A) amended standards will result in significant conservation of energy;

(B) amended standards are technologically feasible; and

(C) amended standards are cost effective as described in subsection (o)(2)(B)(i)(II).

The grant of a petition by the Secretary under this subsection creates no presumption with respect to the Secretary's determination of any of the criteria in a rulemaking under this section.

(3) An amendment prescribed under this subsection shall apply to products manufactured after a date which is 5 years after--

(A) the effective date of the previous amendment pursuant to this part; or

(B) if the previous final rule published under this part [42 USCS §§ 6291 et seq.] did not amend the standard, the earliest date by which a previous amendment could have been in effect, except that in no case may an amended standard apply to products manufactured within 3 years (for refrigerators, refrigerator-freezers, and freezers, room air conditioners, dishwashers, clothes washers, clothes dryers,

fluorescent lamp ballasts, general service fluorescent lamps, incandescent reflector lamps, and kitchen ranges and ovens) or 5 years (for central air conditioners and heat pumps, water heaters, pool heaters, direct heating equipment and furnaces) after publication of the final rule establishing a standard.

(gg) Standby mode energy use.
(1) Definitions.
(A) In general. Unless the Secretary determines otherwise pursuant to subparagraph (B), in this subsection:
(i) Active mode. The term "active mode" means the condition in which an energy-using product—
(I) is connected to a main power source;
(II) has been activated; and
(III) provides 1 or more main functions.
(ii) Off mode. The term "off mode" means the condition in which an energy-using product--
(I) is connected to a main power source; and
(II) is not providing any standby or active mode function.
(iii) Standby mode. The term "standby mode" means the condition in which an energy-using product--
(I) is connected to a main power source; and(II) offers 1 or more of the following user-oriented or protective functions:
(aa) To facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer.
(bb) Continuous functions, including information or status displays (including clocks) or sensor-based functions.
(B) Amended definitions. The Secretary may, by rule, amend the definitions under subparagraph (A), taking into consideration the most current versions of Standards 62301 and 62087 of the International Electrotechnical Commission.
(2) Test procedures.
(A) In general. Test procedures for all covered products shall be amended pursuant to section 323 [42 USCS § 6293] to include standby mode and off mode energy consumption, taking into consideration the most current versions of Standards 62301 and 62087 of the International Electrotechnical Commission, with such energy consumption integrated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product, unless the Secretary determines that—
(i) the current test procedures for a covered product already fully account for and incorporate the standby mode and off mode energy consumption of the covered product; or

(ii) such an integrated test procedure is technically infeasible for a particular covered product, in which case the Secretary shall prescribe a separate standby mode and off mode energy use test procedure for the covered product, if technically feasible.

(B) Deadlines. The test procedure amendments required by subparagraph (A) shall be prescribed in a final rule no later than the following dates:

(i) December 31, 2008, for battery chargers and external power supplies.

(ii) March 31, 2009, for clothes dryers, room air conditioners, and fluorescent lamp ballasts.

(iii) June 30, 2009, for residential clothes washers.

(iv) September 30, 2009, for residential furnaces and boilers.

(v) March 31, 2010, for residential water heaters, direct heating equipment, and pool heaters.

(vi) March 31, 2011, for residential dishwashers, ranges and ovens, microwave ovens, and dehumidifiers.

(C) Prior product standards. The test procedure amendments adopted pursuant to subparagraph (B) shall not be used to determine compliance with product standards established prior to the adoption of the amended test procedures.

(3) Incorporation into standard.

(A) In general. Subject to subparagraph (B), based on the test procedures required under paragraph (2), any final rule establishing or revising a standard for a covered product, adopted after July 1, 2010, shall incorporate standby mode and off mode energy use into a single amended or new standard, pursuant to subsection (o), if feasible.

(B) Separate standards. If not feasible, the Secretary shall prescribe within the final rule a separate standard for standby mode and off mode energy consumption, if justified under subsection (o).

10 C.F.R. pt. 430, Appendix A, Subpart C—Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products.

[Table of Contents and Sections 1-5, 9-14 omitted.]

6. Effective Date of a Standard

The effective date for new or revised standards will be established so that the period between the publication of the final rule and the effective date is not less than any period between the dates for publication and effective date provided for in EPCA. The effective date of any revised standard will be established so that the period between the effective date of the prior standard and the effective date of such revised standard is not less than period between the two effective dates provided for in EPCA.

7. Test Procedures

(a) Identifying the need to modify test procedures. DOE, in consultation with interested parties, experts, and the National Institute of Standards and Technology, will attempt to identify any necessary modifications to established test procedures when initiating the standards development process.

(b) Developing and proposing revised test procedures. Needed modifications to test procedures will be identified in consultation with experts and interested parties early in the screening stage of the standards development process. Any necessary modifications will be proposed before issuance of an ANOPR in the standards development process.

(c) Issuing final test procedure modification. Final, modified test procedures will be issued prior to the NOPR on proposed standards.

(d) Effective date of modified test procedures. If required only for the evaluation and issuance of updated efficiency standards, modified test procedures typically will not go into effect until the effective date of updated standards.

8. Joint Stakeholder Recommendations

(a) Joint recommendations. Consensus recommendations, and supporting analyses, submitted by a representative group of interested parties will be given substantial

weight by DOE in the development of a proposed rule. See section 5(e)(2). If the supporting analyses provided by the group addresses all of the statutory criteria and uses valid economic assumptions and analytical methods, DOE expects to use this supporting analyses as the basis of a proposed rule. The proposed rule will explain any deviations from the consensus recommendations from interested parties.

(b) Breadth of participation. Joint recommendations will be of most value to the Department if the participants are reasonably representative of those interested in the outcome of the standards development process, including manufacturers, consumers, utilities, states and representatives of environmental or energy efficiency interest groups.

(c) DOE support of consensus development, including impact analyses. In order to facilitate such consensus development, DOE will make available, upon request, appropriate technical and legal support to the group and will provide copies of all relevant public documents and analyses. The Department also will consider any requests for its active participation in such discussions, recognizing that the procedural requirements of the Federal Advisory Committee Act may apply to such participation.

10 C.F.R. §430.2. Definitions.

[Other defined terms omitted.]

For purposes of this part, words shall be defined as provided for in section 321 of the Act and as follows --

State means a State, the District of Columbia, Puerto Rico, or any territory or possession of the United States.

ADDENDUM II

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AFFIDAVIT OF Talbot Gee
ON BEHALF OF HEATING, AIR-CONDITIONING & REFRIGERATION DISTRIBUTORS INTERNATIONAL (HARDI)

I, Talbot Gee, under oath, do hereby state and aver as follows:

1. I am 37 years of age, of sound mind, and fully competent to make this affidavit. I have personal knowledge of the matters set forth in this affidavit and could and would so testify if I was called as a witness.
2. I am the Executive Vice President and Chief Operating Officer for Air-Conditioning & Refrigeration Distributors International (HARDI). My business address is 3455 Mill Run Drive, Suite 820, Columbus, Ohio 43026-7578.
3. I have been employed by HARDI since May, 2006 as Vice President until December, 2010, and in my current role since. Professionally I've represented wholesale distributors since 2001 in five different lines of trade, and served in government affairs capacities for one of them and HARDI in my prior role.
4. HARDI, a non-stock corporation, is the national, non-profit trade association for heating, ventilation, air-conditioning, and refrigeration (HVACR) distributors. HARDI is comprised of nearly 1,000 member companies, over 460 of which are U.S.-based wholesale companies.

5. HARDI's purpose is promoting the general commercial, professional, legislative, and other interests of our membership.
6. HARDI's members market, distribute, and support heating, air-conditioning, and refrigeration equipment, parts, and supplies.
7. HARDI's members serve installation and service/replacement contractors in residential and commercial markets, as well as commercial/industrial and institutional maintenance staffs.
8. More than 80% of HARDI's distributor members are classified as small businesses that collectively employ over 30,000 U.S. workers, representing over $25 billion in annual sales and an estimated 90% of the U.S. wholesale distribution market of HVACR equipment, supplies, and controls.
9. There are approximately 5,000 independent HVAC distribution branches in the United States.
10. HVAC distribution is a highly competitive and low-margin business. Consequently, in order for HVAC distributors to remain profitable, it is critical that they are able to manage their inventory efficiently. Small HVAC distributors are particularly sensitive to even small cost increases.
11. On October 17, 2011, HARDI submitted comments on behalf of our members (EERE-2011-BT-STD-0011-0039-A1) outlining the reasons why our members will be directly harmed by the direct final rule (DFR) at issue

in this case, *Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps*, Direct Final Rule, 76 Fed. Reg. 37,408 (Jun. 27, 2011). I explained in considerable detail why HARDI's members will be significantly harmed by regional energy-conservation standards prescribed by the DFR.

12. Specifically, in addition to base national energy-conservation standards, the DFR established one additional regional standard for furnaces and two additional regional standards for central air conditioners and heat pumps that are different from the national base standard. Basically, this means that furnaces, central air conditioners, and heat pumps that are legal in one part of the country are illegal in another part of the country. Whether a covered product complies with the applicable base national energy-conservation standard for that product is determined at the time of its manufacture (or importation). Under regional standards, however, compliance with the applicable standard is determined at the installation location of the covered product.

13. Unlike national energy-conservation standards (the cost of which is generally borne by manufacturers), the regulatory compliance and enforcement costs of regional energy-conservation standards will be borne by HVAC distributors and contractors. Regional standards will be enforced

directly against HVAC distributors, i.e., HARDI's members. In other words, HARDI's members are directly subject to the regulatory framework established by the DFR and directly harmed by it.

14. On Wednesday, December 7, 2011, DOE published a Notice of Data Availability (NODA) in the Federal Register concerning enforcement of regional standards for residential furnaces and central air conditioners and heat pumps that were prescribed in the DFR and subsequently confirmed by DOE. DOE subsequently made publicly available on its website a Regional Standards Enforcement Framework Document, available at http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/furncac_regstnd_enforceframework.pdf, in which it outlined three general approaches to enforcing the regional energy-conservation standards prescribed in the DFR. Neither of these documents was publicly available until after the DFR had been both published and confirmed.

15. DOE's Regional Standards Enforcement Framework Document confirms that HARDI's members will incur increased compliance and enforcement costs as a direct result of the regional standards DOE established through the DFR. In the Framework Document, DOE takes the position that it may impose compliance requirements on and has enforcement authority over HVAC distributors.

16. All three enforcement approaches DOE is considering will directly increase compliance and enforcement costs for HVAC distributors to varying degrees, e.g., by requiring distributors to maintain a record of purchasers' signed acknowledgements of regional standard requirements; requiring distributors to track unit sales to contractors; requiring distributors to inform installers about appropriate regions; and requiring distributors to track serial number, installer, and installation location information for units sold and to submit information to DOE on a regular basis. These proposed compliance requirements will prove both time consuming and costly for small HVAC distributors. Indeed, some of these proposed requirements could prevent HVAC distributors from even selling large quantities of equipment. Moreover, in the Framework Document, DOE indicated that it may audit HVAC distributors for compliance with regional standards established by the DFR.

17. The regional energy-conservation standards prescribed by the DFR will almost certainly increase nonenforcement costs for HARDI's members as well, particularly for HVAC distributors that are located near one or more regional borders; for example, regional standards will likely increase inventory investment and inventory management costs for many HVAC distributors. Regional standards will alter the business model of HVAC

distributors by changing longstanding warehouse practices and complicating central distribution centers.

18. HARDI believes that the energy-conservation standards prescribed by the DFR will also harm HARDI's members by increasing the retail price of heating and air-conditioning equipment, thereby reducing consumer demand.

I, Talbot Gee, swear or affirm, under penalty of perjury, that I have read this document and that, to the best of my knowledge and belief, the facts and information stated in the foregoing Affidavit are true, accurate, and complete.

5/24/12
Date

Talbot Gee

Columbus, Ohio

AMANDA L. AVON
Notary Public, State of Ohio
My Commission Expires 05-28-2013

BEFORE ME, the undersigned notary, Amanda L. Avon, on this 24th day of May, 2012, personally appeared Talbot Gee, known to me to be a credible person of lawful age who was duly sworn by me, and on her oath declared to be true, the above matters set forth in this Affidavit.

AFFIDAVIT OF MICHAEL WEBER

MICHAEL WEBER, being first duly sworn, hereby deposes and says:

1. My name is MICHAEL WEBER. I am President of Thomas & Galbraith Heating and Cooling, Inc. I have personal knowledge of the matters set forth in this affidavit.
2. Thomas & Galbraith Heating and Cooling, Inc. installs, services, and maintains residential and commercial central air conditioners, heat pumps, and furnaces. We serve customers in the Cincinnati, Ohio Metropolitan Statistical Area.
3. Thomas & Galbraith Heating and Cooling is a residential heating and cooling contractor providing services, sales, and installation of heating, cooling, and indoor air quality products.
4. My company is a member of the Air Conditioning Contractors of America ("ACCA").
5. My company is a small business, as defined by the U.S. Small Business Administration's Small Business Size Standards under the category of HVAC contractor (NAICS code 238220)
6. In addition to base national energy-conservation standards, the Department of Energy direct final rules published at 76 Fed. Reg. 37,408 (June 27, 2011) and 76 Fed. Reg. 67,037 (Oct. 31, 2011) established one additional regional

standard for furnaces and two additional regional standards for central air conditioners and heat pumps that are different from the national base standard. This means that certain types of furnaces and central air conditioners that are legal to be installed in one part of the country are illegal to be installed in another part of the country. Whether a covered product complies with the applicable base national energy-conservation standard for that product is determined at the time of its manufacture (or importation). Under regional standards, however, compliance with the applicable standard is determined when, and where, the covered product is installed.

7. Thomas & Galbraith Heating and Cooling, Inc. is located near a border between two regions with energy-conservation standards for air conditioners and furnaces that are different from the base national standard. As a result, the impact of regional energy-conservation standards will be particularly severe for Thomas & Galbraith Heating and Cooling, Inc.

8. Because of the location of Thomas & Galbraith Heating and Cooling, Inc. and the geographic area that we serve, regional energy-efficiency standards may require us and other "border" location heating and cooling contractors to carry a larger inventory and manage our inventory in a different way to adequately assist our customers in each region and comply with the regulation.

9. Because the U.S. Department of Energy intends to enforce and attempt to ensure compliance with regional energy-conservation standards through imposing some form of additional recordkeeping requirements and information reporting on HVAC contracting companies, such as Thomas & Galbraith Heating and Cooling, Inc., we know that our costs will increase if these regional energy conservation standards take effect. We do not know how much our costs will increase yet only because DOE has not yet finalized an enforcement plan.

10. The establishment of regional energy conservation standards may expose air conditioning contractors to liability if a contractor were to install the wrong appliance in a location subject to the regional standards.

11. The standard put forth in the regional standards rule requires the installation of condensing furnaces in the North region. In the common occurrence where a condensing furnace is replacing a non-condensing furnace, in many cases the installation will necessitate supplemental work to adequately and safely address the exhaust and condensate of the condensing furnace. These extra measures to accommodate the condensing furnace can add hundreds or even thousands of dollars to the installation costs over a non-condensing furnace.

12. Because unscrupulous contractors will be able to able to obtain covered products that are illegal to be installed in the North region but legal to install in the nearby base national region. These contractors will be able to easily underbid legitimate contractors and undermine the customer base of Thomas & Galbraith, Inc.

13. If the Department of Energy's proposed enforcement of the regional standards cannot protect compliant contractors from economic harm due to the illegal installations, then Thomas and Galbraith, Inc. could lose customers, and ultimately contract in size.

I affirm, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

May 24, 2012
Date

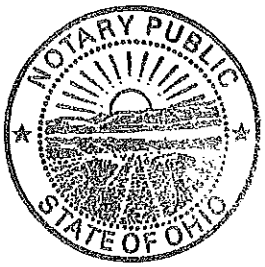
Michael Weber

Thomas & Galbraith Heating and Cooling, Inc.

407 Southland Boulevard

Cincinnati, OH 45240

BEFORE ME, the undersigned notary, Allison Wood, on this 24 day of May, 2012, personally appeared Michael Weber, known to me to be a credible person of lawful age who was duly sworn by me, and on her oath declared to be true, the above matters set forth in this Affidavit.



ALLISON WOOD
Notary Public, State of Ohio
My Commission Expires
November 1, 2014