ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Public Gas Association,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 11-1485
	)	
U.S. Department of Energy,	)	
	)	
Respondent.	)	

MOTION TO INTERVENE
OF THE HEATING, AIR-CONDITIONING & REFRIGERATION DISTRIBUTORS INTERNATIONAL ("HARDI")

Pursuant to Section 336 of the Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6306(b)(1), Federal Rules of Appellate Procedure 15(d) and 27, and Circuit Rules 15(d) and 27, the Heating, Air-Conditioning & Refrigeration Distributors International ("HARDI") moves to intervene in the above-captioned proceeding in support of the Petitioner.

In support of this motion, HARDI states as follows:

I. PROCEDURAL BACKGROUND AND INTERESTS OF INTERVENOR

The American Public Gas Association (hereinafter "APGA") brought this action to review a direct final rule and a notice of effective date and compliance dates for that direct final rule, both promulgated by the Department of Energy

("DOE"). *See* 76 Fed. Reg. 37,408 (June 27, 2011) (to be codified at 10 C.F.R. pt. 300); 76 Fed. Reg. 67,037 (October 31, 2011) (to be codified at 10 C.F.R. pt. 300) (hereinafter "the direct final rule"). The direct final rule, if adopted, would establish an energy conservation standard for residential furnaces and residential central air conditioners and heat pumps. HARDI seeks to intervene in this matter to assert the rights of heating, ventilation, air-conditioning, and refrigeration equipment ("HVACR") distributors who will be negatively affected by the rules.

HARDI is a trade association comprised of nearly 1,000 member companies, over 450 of which are U.S.–based wholesalers. More than 80% of HARDI's distributor members are classified as small businesses. Collectively, HARDI members employ over 30,000 U.S. workers and represent over $25 billion in annual sales and an estimated 90% of the U.S. wholesale distribution market of HVACR equipment, supplies, and controls. HARDI Comment Letter to DOE (Oct. 17, 2011), Docket Number: EERE-2011-BT-STD-0011-0039.

II. HARDI'S REQUEST TO INTERVENE SHOULD BE GRANTED.

HARDI's request to intervene in the above-captioned action should be granted because the direct final rule challenged in this proceeding poses a direct and serious threat to HARDI's membership and the interests of those members will not be adequately represented without HARDI's intervention. This motion is consistent with Fed. R. Civ. P. 24's requirements for motions to intervene—

"timeliness, interest, impairment of interest, and adequacy of representation"—and HARDI also "possess[es] standing under Article III of the Constitution." *Jones v. Prince George's County*, 348 F.3d 1014, 1017 (D.C. Cir. 2003) (citing *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003); *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994)).

A. HARDI Has Standing To Intervene.

Because HARDI will be adversely affected by the direct final rule, it has standing to intervene in an action initiated to review that rule, where, as here, applicable standing requirements are also met. Under the Energy Policy and Conservation Act of 1975 ("EPCA"), "[a]ny person who will be adversely affected by a rule . . . may . . . file a petition with the United States court of appeals . . . for judicial review of such rule." 42 U.S.C. § 6306(b)(1). As this Court noted in *In re Center for Auto Safety*, where an injury is present, "standing to petition for review of . . . standards under EPCA extends to the full limits permitted by Article III," and thus it is unnecessary to "pursue an inquiry into the prudential requirements for standing." 793 F.2d 1346, 1351 (D.C. Cir. 1986); *see, e.g., Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin*., 793 F.2d 1322, 1330 (D.C. Cir. 1986) ("The petitioners plainly satisfy the Article III prerequisites for standing and Congress, in enacting EPCA, has removed any reason to invoke the restraints on judicial review provided by the prudential principles of the standing doctrine.").

The U.S. Supreme Court, in *Lujan v. Defenders of Wildlife*, explained that Article III standing requires (1) an injury-in-fact; (2) a causal connection between the injury and the action complained of; and (3) likelihood that the injury will be redressed by judicial action. 504 U.S. 555, 560-61 (1992). As discussed below, HARDI satisfies the applicable standing requirements.

1. HARDI's members have standing under Article III to challenge the direct final rule.

The direct final rule, by the government's own admission, will injure HARDI's member businesses. The Department of Energy itself stated in its Technical Support Document that "distributors that serve multiple regions will be impacted by additional (*i.e.* differentiated) regional standards." U.S. DEP'T OF ENERGY, TECHNICAL SUPPORT DOCUMENT: ENERGY EFFICIENCY PROGRAM FOR CONSUMER PRODUCTS: RESIDENTIAL CENTRAL AIR CONDITIONERS, HEAT PUMPS, AND FURNACES, at 18-16. Further, the Technical Support Document noted that "DOE expects that distributors serving multiple standard regions may need to manage more variation in demand," and "[t]he resulting change in product mix for distributors serving multiple regions could increase inventory investment and inventory management costs because more product models of equipment are required to meet demand." *Id.* In sum, these distributors, which comprise HARDI's membership, will suffer cost increases as a direct result of the direct final rule. Only by intervening in this proceeding, which was initiated to review

that very rule, can HARDI defend the interests of its members from this significant injury. Relief from this Court can ensure that the harms associated with the direct final rule do not come to pass.

2. HARDI meets Article III's requirements for associational standing.

HARDI has associational standing to represent its members. An association has Article III standing to sue on its members' behalf if "(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002) (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977)). Many members of HARDI are endangered by the prospective cost increases created by the DOE direct final rule and thus can sue in their own right. However, HARDI seeks to protect those interests through this intervention, consistent with its organizational purpose of representing HVACR distributors. If this Court grants HARDI's motion, no individual members will be required to participate in the case. HARDI can and will represent the interests of its membership if it is permitted to intervene in this proceeding.

3. HARDI also has standing based on DOE's violation of administrative procedures.

Additionally, HARDI has standing to intervene on its own behalf. The procedure used to promulgate the direct final rule requires the Secretary of Energy to withdraw a rule if he receives an adverse public comment that may provide a reasonable basis for withdrawing the rule:

> Not later than 120 days after the date on which a direct final rule issued under subparagraph (A)(i) is published in the Federal Register, the Secretary *shall* withdraw the direct final rule if—
>
> > (I) the Secretary receives 1 or more adverse public comments relating to the direct final rule under subparagraph (B)(i) [subparagraph (A)(i)] or any alternative joint recommendation; and
> >
> > (II) based on the rulemaking record relating to the direct final rule, the Secretary determines that such adverse public comments or alternative joint recommendation *may provide a reasonable basis for withdrawing the direct final rule* under subsection (o), section 342(a)(6)(B) [42 USCS § 6313(a)(6)(B)], or any other applicable law.

42 U.S.C.S. § 6295(p)(4)(C)(i) (emphasis added). HARDI submitted a comment on October 17, 2011, wherein it set forth serious concerns with the direct final rule such as "the legitimacy of the agreement which initiated the proposed rule, a flawed economic analysis and the exclusion of relevant information to stakeholders, and defiance of the Regulatory Flexibility Act . . . ." HARDI Comment Letter to DOE (Oct. 17, 2011), Docket Number: EERE-2011-BT-STD-

0011-0039. HARDI specifically requested that the DOE withdraw the proposed direct final rule. *Id*. Nevertheless, DOE "determined that none of the comments requesting withdrawal, taken as a whole or individually, may provide a reasonable basis for the Secretary to withdraw the direct final rule." Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps, 76 Fed. Reg. 67,037, 67,040 (Oct. 31, 2011) (to be codified at 10 C.F.R. pt. 10).

Applying the *Lujan* test, HARDI suffered an injury due to the fact that it provided a significant basis for withdrawing this direct final rule, yet the DOE, contrary to the statute on point, refused to withdraw the rule. Withdrawal of the direct final rule, which HARDI seeks, would grant HARDI the relief it sought from the Secretary and redress the harm caused by the Secretary's failure to follow proper administrative procedures.

B. HARDI May Intervene as of Right.

HARDI seeks intervention in this matter as of right under Fed. R. Civ. P. 24(a)(2) or, in the alternative, permissive intervention. The purpose of intervention, "whether of right or permissive, is to enable those satisfying the requirements of Rule 24 to assert their interests in all pending aspects of the lawsuit, within the limitations of purpose imposed at the time of intervention." *United States v. Bd. of Educ.*, 605 F.2d 573, 576 (2d Cir. 1979) (citing *Park &*

Tilford v. Schulte, 160 F.2d 984, 989 n.1 (2d Cir. 1947), cert. denied, 322 U.S. 761 (1947); *In re Raabe, Glissman & Co.*, 71 F. Supp. 678 (S.D.N.Y.1947)).

> A motion to intervene as of right turns on four factors: (1) the timeliness of the motion; (2) whether the applicant 'claims an interest relating to the property or transaction which is the subject of the action'; (3) whether 'the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest'; and (4) whether 'the applicant's interest is adequately represented by existing parties.'

Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1074 (D.C. Cir. 1998) (citing Fed. R. Civ. P. 24(a)(2)) (other internal citations omitted). HARDI's motion meets all four requirements for intervention.

1. HARDI's motion is timely.

This motion is timely filed, as required by Fed. R. Civ. P. 24(a)(2). Fed. R. App. P. 15(d) provides that "a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties . . . within 30 days after the petition for review is filed." The petition for review in the present matter was filed on December 23, 2011, thus making a motion for intervention timely if filed before January 22, 2012. As this motion was filed on January 20, 2012, it is timely.

2. HARDI has an interest in the direct final rule challenged in this proceeding.

HARDI's motion for intervention is based on the interest of its members in challenging the direct final rule and its own interest in a fair and lawful administrative process for DOE regulations. This Court has stated, with regard to the "interest" component of an intervention of right, that in administrative cases there is a "greater impetus to intervention," *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967), as "[a]dministrative cases . . . often vary from the norm." *Textile Workers Union v. Allendale Co.*, 226 F.2d 765, 767 (D.C. Cir. 1955) (en banc), cert. denied *sub nom. Allendale Co. v. Mitchell*, 351 U.S. 909 (1956). The test for an intervenor's interest is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse*, 385 F.2d at 700.

HARDI and its members are deeply concerned with the direct final rule and are interested in this proceeding insofar as it offers an opportunity to challenge it. HARDI's "interest relating to the property or transaction which is the subject of the action," Fed. R. Civ. P. 24(a)(2), is apparent from the subject matter of the rule. The direct final rule seeks to "establish amended energy conservation standards for residential furnaces and residential central air conditioners and heat pumps . . . ." 76 Fed. Reg. 67037 (to be codified at 10 C.F.R. Pt. 430). As noted previously, HARDI's membership represents $25 billion in annual sales and approximately

90% of the U.S. wholesale distribution market of HVACR equipment, supplies, and controls. HARDI Comment Letter to DOE (Oct. 17, 2011), Docket Number: EERE-2011-BT-STD-0011-0039.

A direct final rule establishing amended energy conservation standards for residential furnaces and residential central air conditioners and heat pumps will significantly affect distributors of such appliances. HARDI members are a central component of the industry that DOE seeks to regulate through the direct final rule and HARDI has an interest in the disposition of that rule.

3. Failure to permit HARDI's intervention would impair its ability to protect its members' interests.

HARDI's intervention is necessary to protect the aforementioned interests. If a would-be intervenor "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," Fed. R. Civ. P. 24(a)(2), intervention may be necessary. This proceeding offers the only opportunity HARDI has to challenge the direct final rule. Thus, HARDI should be allowed to intervene to protect the interests of itself and its members.

Further, though HARDI could file as amicus curiae in this proceeding if this motion is denied, that would not be sufficient to protect HARDI's rights. *Nuesse*, 385 F.2d at 703 n.10 (intervention denial results in movant being "relegated to the status of amicus curiae") (citing *Durkin v. Pet Milk Co.*, 14 F.R.D. 374, 381 (W.D.Ark.1953)). Participating merely as a friend of the court would exclude a

large portion of those affected by the direct final rule from the judicial proceedings, where they would be unable to "tender any evidence, make any motions, or take or prosecute an appeal." *Id.* (citing Holtzoff, *Entry of Additional Parties in a Civil Action*, 31 F.R.D. 101, 102; *Justice v. United States*, 365 F.2d 312, 314 (6th Cir. 1966)).

Given the divergent interests and different economic and technical perspectives that the APGA and HARDI may have, it is necessary to allow HARDI to participate in judicial review of the direct final rule.

4. APGA's challenge to the DOE rules does not adequately represent HARDI's interests and those of its members.

APGA cannot adequately represent the interests of HVACR distributors, an entirely different sector of the regulated industry. APGA is a national association for publicly-owned natural gas distribution systems, with approximately 700 public gas systems in 36 states being APGA members. *See* Comments of the American Public Gas Association (Oct. 13, 2011), Docket Number: EERE-2011-BT-STD-0011-0024. Gas providers and HVACR distributors will be affected in entirely different ways by the implementation of the direct final rule; for example, if it affects consumer choices between electric and gas appliances, this would have a different impact on gas suppliers than on small businesses that supply both gas and electric furnaces.

Just as a rule regulating fuel efficiency standards for automobiles would affect the oil industry differently than auto makers, HVACR wholesalers and publicly-provided gas companies have distinguishable legally-protectable interests. The direct final rule may cause wholesalers and distributors to lose a portion of their businesses that cannot be recouped through price increases in other areas, while APGA's member companies may offset lowered demand in one sector by a simple price hike on other customers. Regardless of the long-term effect of direct final rule on these industries, their legal and economic interests are different.

These interests "need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Nuesse*, 385 F.2d at 703. APGA represents government-owned gas companies, which may receive subsidies and assistance from the very department they brought this action against, the Department of Energy. In response to political pressure, APGA could settle this case in return for concessions that benefit public gas companies but injure private-sector HVACR distributors. Allowing HARDI, which is comprised entirely of privately-owned members, to intervene would ensure that the aspects of the direct final rule that burden small businesses will be vigorously and thoroughly challenged on the merits. Given that the statute under which the direct final rule was promulgated allows "[a]ny person who will be adversely affected by . . . [the] rule" to challenge it in court, 42 U.S.C. §

6306(b)(1), permitting only one narrowly-interested party to represent a broad spectrum of opinions will fail to represent HARDI's interests adequately and contradict the plain intent of the law's option to challenge an agency rule.

C. Alternatively, HARDI Should Be Granted Permission To Intervene.

Should the court find that HARDI is not entitled to intervene as of right, HARDI respectfully requests that it be allowed to permissively intervene. Rule 24(b)(1)(B) permits intervention where a timely motion is made and the movant has a "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). HARDI seeks to challenge the very rule challenged in this proceeding, which demonstrates that HARDI's claim shares with APGA's challenge a common question of law (and potentially fact). Further, permissive intervention has been "allowed in situations where 'the existence of any nominate 'claim' or 'defense' is difficult to find.' And establishing a 'claim or defense' for purposes of permissive intervention is, of course, not dependent upon a showing of 'direct pecuniary interest' in the litigation." *Allendale*, 226 F.2d at 769 (citing 4 Moore, Federal Practice 60 (2d ed. 1950); *Securities and Exchange Comm'n v. United States Realty Co.*, 310 U.S. 434, 458-460 (1940)). Moreover, as previously discussed, HARDI members do, in fact, have a direct pecuniary interest in the disposition of the direct final rule; if the direct final rule is reversed by this Court, this will directly impact HARDI members' businesses. Allowing

intervention also makes sense from a practical and efficiency perspective, as "[m]ultiplicity of suits can be avoided by settling such related controversies in a single action." *Allendale*, 226 F.2d at 769.

Further, allowing this intervention would cause no delay in review of the direct final rule. *Id.* ("discretion under Rule 24(b) . . . must be governed in no small part by the likelihood of undue delay resulting from intervention."). APGA's petition to the court was filed on December 23, 2011, less than one month ago. The Department of Energy has until January 30, 2012, to file procedural motions and until February 13, 2012, to file dispositive motions and, as of this writing, has yet to answer APGA's petition for review. No delay would result from granting HARDI's motion to intervene.

III. CONCLUSION

In summary, HARDI's intervention in this proceeding is appropriate and necessary. HARDI has the right to intervene both on its own behalf and on behalf of its members, distributors of HVACR equipment who, as the Department of Energy acknowledges, will be injured by the direct final rule. The only petitioner in this case, APGA, cannot adequately represent HARDI's members, as APGA's interests diverge significantly from and are in some circumstances adverse to those of small HVACR distribution businesses.

Moreover, should this Court find that HARDI has no right to intervene, permission to intervene should be granted. Both APGA and HARDI seek to challenge the same rule, albeit for different reasons.

HARDI therefore respectfully requests that this Court grant its motion for leave to intervene in this matter.

Respectfully submitted,

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COUNSEL FOR HEATING, AIR-CONDITIONING & REFRIGERATION DISTRIBUTORS INTERNATIONAL

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Heating, Air-Conditioning & Refrigeration Distributors International ("HARDI") submits the following corporate disclosure statement.

HARDI is a non-profit, non-stock corporation with its principal headquarters in Columbus, Ohio. HARDI members market, distribute, and support heating, air-conditioning, and refrigeration equipment, parts and supplies. HARDI members serve installation and service/replacement contractors in residential and commercial markets, as well as commercial/industrial and institutional maintenance staffs. HARDI represents more than 440 distributors with representing nearly 4,000 branch locations and over 500 suppliers, manufacturer representatives, and service vendors. 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.

Respectfully submitted,

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January 20, 2012

IN THE UNITED STATES COURT OF APPEALS
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Petitioner,	)	
	)	
v.	)	Case No. 11-1485
	)	
U.S. Department of Energy,	)	
	)	
Respondent.	)	

CERTIFICATE AS TO PARTIES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1), the Heating, Air-Conditioning & Refrigeration Distributors International ("HARDI") hereby certifies the following:

In Case No. 11-1485, the Petitioner is the American Public Gas Association ("APGA"), and the Respondent is the U.S. Department of Energy. The Air-Conditioning, Heating, and Refrigeration Institute has moved to intervene in this case on behalf of the U.S. Department of Energy, and their motion is currently pending before this Court. Movant HARDI seeks leave to appear in this matter as an Intervenor in support of Petitioner. We believe that no entity has been admitted as an amicus at this time.

Respectfully submitted,

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January 20, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2012, the foregoing Motion to Intervene was filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Four copies were also filed via U.S. Mail.

I certify further that that copies of the foregoing Motion to Intervene were served via CM/ECF and U.S. mail to the following named counsel of record:

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