ORAL ARGUMENT NOT YET SCHEDULED

No. 11-1485

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

AMERICAN PUBLIC GAS ASSOCIATION,

Petitioner,

v.

U.S. DEPARTMENT OF ENERGY,

Respondent.

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

On Petitions for Review of 76 Fed. Reg. 37,408 (June 27, 2011)
and 76 Fed. Reg. 67,037 (October 31, 2011)

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

A. Parties and Amici

Because the rulings under review were the result of 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)
California Energy Commission (Amicus-Respondent)
Commonwealth of Massachusetts (Amicus-Respondent)
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)
Laclede Gas Company (Amicus-Petitioner Applicant)
Massachusetts Union of Public Housing Tenants (Intervenor-Respondent)
Natural Resources Defense Council (Intervenor-Respondent)
State of New York (Amicus-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)(to be codified at 10 C.F.R. pt. 430)(JA-357-JA-497); 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)(to be codified at 10 C.F.R. pt. 430)(JA-993-JA-1007).

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* JA-364.

D. Scope of this Brief

HARDI and ACCA jointly argue respecting the standards. ACCA does not join, and takes no position on, the argument respecting HARDI's motion to substitute as petitioner.

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[*] ACCA does not join HARDI in Section III and takes no position on the issues raised therein

TABLE OF AUTHORITIES

United States Supreme Court Cases:

* Authorities upon which we chiefly rely are marked with asterisks.

United States Court of Appeals for the District of Columbia Circuit Cases:

Other United States Court of Appeals Cases:

Statutes:

Energy Independence and Security Act of 2007 (EISA)

Energy Policy and Conservation Act of 1975 (EPCA), as amended by EISA

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
APGA-DOE Settlement Motion	Joint Motion of Petitioner and Respondent to Vacate and Remand For Further Rulemaking, Case No. 11-1485, Doc. No. 1414812 (Jan. 11, 2013)
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 of 1975, as amended, 42 U.S.C. §§6201-6422

HARDI …….……	Heating, Air-Conditioning & Refrigeration Distributors International
HARDI Motion to Intervene……	Motion to Intervene of Heating, Air-Conditioning & Refrigeration Distributors International, Case No. 11-1485, Doc. No. 1353893 (Jan. 20, 2012)
HARDI Motion to Substitute…..……..	Intervenor HARDI's Response to the APGA-DOE Settlement Motion and Motion to Substitute As Petitioner, Case No. 11-1485, Doc. No. 1417261 (Jan. 25, 2013)
HVAC…….	Heating, ventilation, and air conditioning
JSC……..	Joint Stakeholders' Comments on Energy Conservation Standards for Residential Central Air Conditioners, Heat Pumps (Doc. No. EERE-2008-BT-STD-0006/RIN 1904-AB47) and Residential Furnaces (Doc. 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
Respondent-Intervenors' Opposition...	Opposition by Intervenor-Respondents City of New York et al., Case No. 11-1485, Doc. No. 1417337(Jan. 25, 2013)

SNOPR…… Supplemental Notice of Proposed Rulemaking

TSD……. Technical Support Document

INTRODUCTION

The U.S. Department of Energy (DOE) disregarded clear congressional limits on its authority when it promulgated the direct final rule (DFR) at issue here.

DOE may issue a DFR establishing noncontroversial energy-conservation standards upon receipt of a joint statement submitted by relevant parties. Here, however, DOE issued a DFR establishing highly controversial energy-conservation standards for air conditioners, furnaces, and heat pumps based on a joint statement submitted by a group that excluded two-thirds of the HVAC supply chain (distributors and contractors), consumers, utilities, energy suppliers, and States.

DOE violated the Act by setting optional regional energy-conservation standards without considering the views of HVAC distributors and contractors, as it was required to do.

DOE admittedly ignored statutorily mandated lead times and accelerated the compliance dates. It added standby- and off-mode standards not included in the joint statement: standards which the signatories opposed and which are invalid because DOE failed to prescribe test procedures first. Furthermore, DOE 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. Instead, DOE supported its economic analysis using old data that inflated its life-cycle-cost savings estimates. When confronted,

DOE refused to extend the comment period—but posted a revised technical analysis *after* the comment period closed.

DOE must 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. Instead of withdrawing the DFR and commencing notice-and-comment rulemaking, DOE confirmed the rule.

After distributors and contractors challenged DOE's extrastatutory abuse of its limited DFR authority and final briefs were filed in this case, DOE sought to enter into a settlement agreement with natural gas distributors that excluded all nine intervenors. This agreement disposed of distributors' properly raised claims and imposed duties and obligations on them without their consent. In so doing, DOE yet again wrongfully denied distributors a seat at the table.

JURISDICTIONAL STATEMENT

Pursuant to 42 U.S.C. §6295, DOE published a Notice confirming and setting an effective date for a DFR prescribing energy-conservation standards for air conditioners, heat pumps, and furnaces on October 31, 2011. 76 Fed. Reg. 67,037 (Oct. 31, 2011). On December 23, 2011, Petitioner American Public Gas Association (APGA) timely filed a Petition for Review challenging the DFR and Notice. This Court has jurisdiction under 42 U.S.C. §6306(b).

Intervenor Heating, Air-Conditioning & Refrigeration Distributors International (HARDI) timely moved to intervene 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 erred by failing to withdraw the DFR after receiving adverse public comments raising material procedural and substantive objections.

(2) Whether DOE's conclusion that a joint comment submitted by a narrow subset of interested parties was submitted by stakeholders that are "fairly representative of relevant points of view" is contrary to 42 U.S.C. §6295(p)(4).

(3) Whether the DFR's accelerated compliance dates contravene EPCA's plain language.

(4) Whether DOE erred by including standby- and off-mode standards in the DFR when those standards were not mentioned in the Joint Stakeholders' Comments (JSC) that formed the basis for issuing the DFR, and DOE had not prescribed test procedures to measure standby- and off-mode energy consumption.

(5) Whether DOE violated the Regulatory Flexibility Act by failing to conduct a regulatory flexibility analysis assessing the DFR's effects on thousands of affected small businesses.

(6) Whether DOE erred by failing to consider the impact of enforcement- and compliance-related costs on distributors and contractors before setting regional energy-conservation standards.

(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 refuse to extend the comment period or withdraw the DFR.

(8) Whether HARDI should be permitted to substitute as petitioner to allow this Court to reach the merits of HARDI's remaining claims.

(9) Whether this Court should deny the APGA-DOE Settlement Motion to the extent it disposes of HARDI's remaining claims and imposes duties and obligations on its members without their consent.

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

A. Statutory Background.

Section 325 of the Energy Policy and Conservation Act (EPCA), 42 U.S.C. §6295, authorizes DOE to set energy-conservation standards for air conditioners,

heat pumps, and furnaces, generally through notice-and-comment rulemaking. *See* 42 U.S.C. §6295(p)(1)-(3).

In limited circumstances, DOE may set standards through "direct final rules" (DFRs), wherein 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 …States…)…[that] 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" complies with EPCA's other requirements for new or amended energy-conservation standards. 42 U.S.C. §6295(p)(4)(A)(i).

If DOE determines that a joint statement recommending energy-conservation standards satisfies these requirements, then it may issue a DFR setting a standard, 42 U.S.C. §6295(p)(4)(A)(i), and solicit 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

EPCA]…or any other applicable law," DOE must withdraw the DFR.[1] 42 U.S.C. §6295(p)(4)(C)(i). According to DOE, under 42 U.S.C. §6295(p)(4)(C)(i), DOE must either confirm the DFR or withdraw the DFR in its entirety. (*See* JA-357; JA-993.)

EPCA requires DOE to provide a five-year lead time before standards applicable to air conditioners, heat pumps, and furnaces take effect[2] and to prescribe test procedures to determine compliance.[3] EPCA also gives DOE the *option* of establishing regional energy-conservation standards. 42 U.S.C. §6295(o)(6). But to do this, DOE must meet additional statutory prerequisites, 42 U.S.C. §6295(o)(6)(D), and must "consider the impact…on consumers,…distributors, dealers, contractors,…installers," and others, 42 U.S.C. §6295(o)(6)(D)(i)(II).

B. The DFR Process.

In January 2010, six advocacy groups, one trade association, several large manufacturers, and the California Energy Commission (the "Joint Stakeholders")

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[1] 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 n.4 (10th Cir. 1996) ("[D]irect final rule becomes effective…, unless adverse comments are received…."). Consequently, adverse comments cause agencies to withdraw DFRs. *E.g.*, 76 Fed. Reg. 76,048 (Dec. 6, 2011)("EPA received a comment…[it interprets] as adverse and, therefore,…is withdrawing the direct final rule.").

[2] *See* 42 U.S.C. §6295(m)(4)(A)(ii); 42 U.S.C. §6295(n)(5); 42 U.S.C. §6295(f)(4)(C); 42 U.S.C. §6295(d)(3)(B).

[3] *See* 42 U.S.C. §6295(o)(3)(A).

submitted the "Joint Stakeholders' Comments" (JSC), called by DOE a "consensus agreement," proposing energy-efficiency standards for air conditioners, heat pumps, and furnaces. (JA-22; JA-33-JA-42.) The actual "agreement" is dated October 13, 2009. (JA-34-JA-38.) The so-called "consensus agreement" did not include any States, consumers' advocates, small-business owners, HVAC contractors or distributors, small manufacturers, appliance installers or technicians, utilities, or energy suppliers.

The JSC proposed *regional* energy-conservation standards (JA-22-JA-42), which are *optional* under EPCA, 42 U.S.C. §6295(o)(6)(A), and unprecedented, even though distributors, contractors, and others were not parties to it (JA-32; JA-36-JA-38).[4] The JSC made no mention of standby- or off-mode standards for air conditioners, heat pumps, or furnaces.

[4] The DFR's regional energy-conservation standards directly regulate at the point of *installation*, i.e., point of sale. (JA-496-JA-497.) *See* 42 U.S.C. §6295(o)(6)(A),(B)(ii),(E)(ii). Regional standards directly regulate and *primarily affect* distributors and contractors and necessarily increase their enforcement- and compliance-related costs. *See* Addendum II (affidavits demonstrating standing); DOE, Regional Standards Enforcement Framework Document (attached as Addendum III); 76 Fed. Reg. 76,328 (December 7, 2011). Coupled with the DFR's accelerated compliance dates, they also create a "stranded-inventory" problem causing additional harm. *See* 42 U.S.C. §6295(o)(6)(E)(ii); Addendum II; DOE, Final Guidance Document (June 28, 2012)(accelerated compliance dates tied to "installation" date)(attached as Addendum IV). This Court may take judicial notice of DOE documents not subject to factual dispute. *See CMCAA* v. *Bowen*, 852 F.2d 581, 587-88 (D.C. Cir. 1988).

Nevertheless, DOE issued a DFR setting efficiency and standby- and off-mode standards, without first prescribing standby- and off-mode test procedures for heat pumps and central air conditioners.[5] (JA-365; JA-382-JA-387.) The DFR included regional energy-conservation standards. (JA-496-JA-497.) Yet DOE did not address the impact of enforcement- and compliance-related costs on HVAC distributors and contractors and other market participants. (*See* JA-1003.) Moreover, DOE set accelerated compliance dates "that are at least eighteen months earlier than the compliance dates for" air conditioners, heat pumps, and furnaces mandated by EPCA's five-year lead-time requirement. (JA-372.)

The DFR generated thirty-two adverse comments highlighting its procedural and substantive deficiencies and urging its total or partial withdrawal.[6] Even "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 withdraw off-mode standards for…air conditioners and heat pumps…." (JA-513.) Joint Stakeholders Air-Conditioning, Heating, and Refrigeration Institute (AHRI) and Earth Justice submitted a joint comment recommending that DOE withdraw those

[5] DOE subsequently published a supplemental notice of proposed rulemaking (SNOPR) to establish test procedures for measuring the off-mode energy use of these products. *See* 76 Fed. Reg. 65,616 (Oct. 24, 2011).
[6] *See* Pet'r's Br. 4-5 & n.1.

off-mode standards because they "remain controversial." (JA-503.) They 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…." (JA-504 (emphasis in original).)

Earth Justice and AHRI explained that EPCA conditions establishment of standby- and off-mode standards on the existence 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." (JA-504.) AHRI subsequently noted 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." (JA-903.) 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…[them] from the direct final rule…." (JA-898.)

HARDI noted that the DFR violated the Regulatory Flexibility Act, because DOE did not conduct an Initial Regulatory Flexibility Analysis (IRFA)

and Final Regulatory Flexibility Analysis (FRFA) assessing its impact on small HVAC distributors and contractors. (JA-860-JA-861.)

Numerous commenters protested that the JSC reflected the views of only a narrow subset of interested parties. Commenters pointed out that advocates for consumers' economic interests (particularly 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 senior citizens on fixed incomes. (*See* JA-526-JA-527; JA-533; JA-542-46; JA-533; JA-569-JA-570; JA-941-JA-942.) HARDI commented that the JSC "exclude[d] the input of…small business owners, who represent two-thirds of the HVAC supply chain and 32,264 HVAC contracting and distribution companies and branches nationwide," and that of "small manufacturers, none of whom signed" it. (JA-857; JA-860.) The JSC also excluded appliance installers and energy suppliers, who, as one commenter observed, "have the best, most practical information and data" concerning the DFR's effects.[7] (JA-824.)

APGA also commented on "the direct final rule (DFR) issued by…[DOE] to establish…standards for residential furnaces, heat pumps, and other products and

[7] Another commenter noted that the DFR may cause thousands of HVAC technicians to lose their jobs. (JA-533.)

"urge[d]…withdrawal of the [DFR]…."[8] (JA-571; *accord* JA-890.) HARDI and ACCA did too. (JA-861; JA-938.)

On October 31, 2011, DOE confirmed the DFR anyway. (JA-993.) After purportedly "weigh[ing] the substance of…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. (JA-994; JA-996.)

C. DOE-APGA Settlement Agreement.

APGA, HARDI, and ACCA subsequently challenged the entire DFR in this Court. APGA's Petition for Review asked "this Court to review (i) a direct final rule and (ii) a notice…[confirming the] direct final rule,"[9] timely putting DOE on notice that it would have to defend the validity of the complete DFR. Underscoring this, APGA attached copies of the entire DFR and Notice as exhibits to its Petition. Before APGA filed its preliminary statement of issues, numerous parties moved to intervene to challenge or defend the entire DFR.[10]

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[8] APGA did not ask DOE to withdraw only the furnace standards.

[9] APGA Pet. for Review 1. APGA's brief reflects this. *See* Pet'r's Br. ii, 3-4 (citing JA-357; JA-993).

[10] Motions to intervene filed by HARDI, ACCA, AHRI, the City of New York, and NRDC universally recognized that APGA challenged the entire DFR. *See* Addendum V (excerpts).

APGA's preliminary statement of issues sought review of the DFR as a whole, including "[w]hether…DOE…[unlawfully]…adopt[ed] a direct final rule on the basis of analysis and evidence not found in" it and "[w]hether…DOE issued the direct final rule in violation of the Regulatory Flexibility Act."[11] APGA also challenged DOE's "us[e of] the direct final rule process…to issue a final rule regarding…furnace efficiency…given…known substantive opposition of relevant parties…."[12] Likewise, APGA requested review of "[w]hether…DOE…[unlawfully] declin[ed] to withdraw the direct final rule…in light of adverse comments…."[13] HARDI and ACCA raised the same issues.

But APGA and HARDI, though aligned against the DFR, represent different stakeholders with different interests.[14] This divergence of interests materialized after this case was fully briefed by the nine intervenors, APGA, and DOE. On January 11, 2013, DOE and APGA filed a motion to vacate and remand the furnace standard (APGA-DOE Settlement Motion) without consent from any of the other nine parties to this litigation, including HARDI. They moved "for an

[11] Pet'r's Statement of Issues 4, ¶¶8, 11.
[12] *Id.* 1, ¶1.
[13] *Id.* 2, ¶2.
[14] *Compare* Addendum II, *with* Pet'r's Br. 29-34. HARDI represents (generally small) HVAC distributors; APGA represents (generally large) natural gas companies. Unlike APGA, HARDI's members are uniquely harmed by the DFR's regional energy-conservation standards for air conditioners and heat pumps and accelerated compliance dates.

order vacating in part the rule under review,"[15] stating that "APGA and DOE [decided]…vacatur should be limited to…portions of the direct final rule…[establishing] standards for…furnaces."[16]

Intervenors for both APGA and DOE opposed this. Six Intervenors for DOE jointly stated that they "did not agree with…the settlement…and do not support the motion."[17] HARDI moved to substitute as petitioner for APGA and, alternatively, requested that the APGA-DOE Settlement Motion be denied in part if substitution was denied.[18]

SUMMARY OF ARGUMENT

The DFR's energy-conservation standards and the process by which they were established disregarded both EPCA's plain language and the dozens of adverse comments.

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 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. DOE's conclusion that those comments,

[15] APGA-DOE Settlement Motion 2.
[16] *Id.* at 5.
[17] Respondent-Intervenors' Opposition 2.
[18] HARDI Motion to Substitute 9, 19, 24.

considered cumulatively, could not provide a reasonable basis for withdrawal violates EPCA's plain language.

DOE's determination that the JSC from 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 parties harmed by the DFR.

The JSC proposed regional energy-conservation standards, which are optional under EPCA and primarily affect HVAC distributors and contractors. EPCA expressly requires that DOE "shall" consider distributors' and contractors' views before doing this. HARDI and ACCA neither negotiated nor agreed to the JSC. Yet DOE included regional standards in the DFR anyway.

EPCA specifically mandates a five-year lead period between publication of energy-conservation standards for air conditioners, heat pumps, and furnaces and the compliance date. Yet DOE decided it had "flexibility" to ignore statutory lead times and DOE policy and set accelerated compliance dates based on the JSC and attached "agreement," which was dated October 13, 2009, almost *two years* before the DFR was published.

The JSC neither mentioned nor proposed standby- and off-mode standards. DOE included those standards in the DFR even though the Act prohibited DOE from prescribing off-mode standards for heat pumps and air conditioners without

first establishing test procedures for those products. DOE subsequently ignored Joint Stakeholders' comments opposing those standards.

DOE admittedly could not accurately measure the compliance and enforcement costs of regional standards. Yet it failed to conduct a regulatory flexibility analysis assessing and attempting to mitigate the DFR's impact on thousands of small-business HVAC distributors and contractors, as required by the Regulatory Flexibility Act, or to even address comments urging DOE to do so.

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

Then, DOE attempted to shield its DFR abuse from judicial review by strategically settling the case with *one* of *ten* other parties. DOE thereby wrongfully attempted to dispose of HARDI's properly raised remaining claims, imposing onerous duties, costs, and obligations on its members, without HARDI's consent.

For these reasons, the DFR and Notice should be vacated.

STANDING

The DFR establishes regional energy-conservation standards and accelerated compliance dates 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 claims asserted nor relief requested require individual members to participate.[19]

STANDARD OF REVIEW

This Court must set aside agency action that is "in excess of statutory…authority, or limitations, or short of statutory right…." 5 U.S.C. §706(2)(C).

Because the DFR's regulations set substantive energy-conservation standards and do not implement EPCA's DFR provision, and because DOE's DFR process does not remotely resemble notice-and-comment rulemaking, DOE's interpretation of its DFR authority under 42 U.S.C. §6295(p)(4) is ineligible for *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). For this reason, the DFR itself is also not entitled to deference. To the

[19] *See* Addendum II (affidavits demonstrating standing); *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

extent *Chevron* applies, the DFR is reviewed under *Chevron*'s two-step analysis. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)(citing *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984)).

Under *Chevron* step one, courts "apply[]…ordinary tools of statutory construction…." *City of Arlington*, 133 S. Ct. at 1868 (citation omitted). *Chevron* step one review is de novo, and "[t]he Court is…free to consider 'the text, structure, purpose, and history of…[the] statute to determine whether a statutory provision admits of congressional intent on the precise question at issue.'" *Hearth, Patio & Barbecue Ass'n v. DOE*, 706 F.3d 499, 503 (D.C. Cir. 2013)(citation omitted). If Congress's intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *City of Arlington*, 133 S. Ct. at 1868 (citation omitted).

Under *Chevron* step two, if, after exhausting traditional tools of statutory interpretation, a statute is ambiguous, then the Court need only defer if the agency's interpretation is "reasonable." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698-99 (D.C. Cir. 2005). But "the existence of ambiguity is not enough per se to warrant deference….[I]t…must…appear that Congress…explicitly or implicitly delegated [DOE] authority to cure that ambiguity." *Hearth*, 706 F.3d at 504 (citing *ABA v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005)); *accord 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"). "[D]eference is wholly inappropriate where it provides a backdoor for a[n agency]…to circumvent…limits on its authority." *Hearth*, 706 F.3d at 506 n.8.

"Even where an agency's 'construction satisfies *Chevron*,'" it must be rejected if it is "'otherwise arbitrary and capricious.'" *Int'l Union v. MSHA*, 626 F.3d 84, 90 (D.C. Cir. 2010)(citation omitted); 5 U.S.C. §706(2)(A). This standard requires that DOE's "decision be reasonable and reasonably explained." *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098, 1102 (D.C. Cir. 2012). This Court must ensure that DOE "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). DOE's "explanation cannot 'run[] counter to the evidence'…." *Kristin Brooks Hope Ctr. v. FCC*, 626 F.3d 586,588 (D.C. Cir. 2010). The DFR 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. DOE'S USE OF THE DIRECT FINAL RULEMAKING PROCESS TO ESTABLISH CONTROVERSIAL STANDARDS OVER STAKEHOLDER OBJECTIONS VIOLATES EPCA.

A. DOE's Determination That Thirty-Two Adverse Comments Could Not Possibly Provide a Reasonable Basis For Withdrawing the DFR Violates EPCA and the APA.

DOE's failure to withdraw the DFR despite receiving thirty-two adverse comments is contrary to EPCA's plain language. EPCA provides that DOE "*shall* withdraw the direct final rule if…the Secretary receives 1 or more adverse public comments"[20] concerning the DFR that "the Secretary determines…*may* provide a *reasonable basis* for withdrawing the direct final rule under subsection (o)…or any other applicable law."[21] 42 U.S.C. §6295(p)(4)(C)(i)(I)-(II)(emphasis added). The statute requires DOE to withdraw a DFR if adverse comments *possibly* provide a reasonable basis for withdrawal.

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[20] "Shall" is mandatory, making clear that DOE lacks discretion. *See United States v. Monzel*, 641 F.3d 528, 531 (D.C. Cir. 2011).

[21] "May," as used in this context, means "possibly." *See, e.g., United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 410-11 (1914)(construing word "may" in "may render…article[s] injurious to health" to mean "may possibly" and exempting only such articles that "*cannot by any possibility*" be injurious); *Berndt v. Cal. Dep't of Corr.*, 2010 U.S. Dist. LEXIS 57833, *7 (N.D. Cal. 2010)("'May'…denotes mere[]…possibility."); *see* BLACK'S LAW DICTIONARY 1000 (8th ed. 2004)(defining "may" as "[t]o be a possibility"); WEBSTER'S NEW WORLD DICTIONARY 373 (1983)(defining "may" as "an auxiliary expressing 1. possibility [it *may* rain]….").

EPCA instructs DOE to consider only whether adverse comments "may" provide a basis for withdrawal; DOE is not permitted to conclusively determine whether adverse comments do provide a reasonable basis for withdrawing the rule or will result in changes to it. 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,[22] which does not provide DOE sufficient time to evaluate the *merits* of adverse comments. "'[T]he words of a statute must be read in…context'" as a "symmetrical" scheme. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)(citations omitted); *see Hearth*, 706 F.3d at 504. EPCA's 10-day withdrawal window only makes sense if Congress intended that DOE "shall" withdraw a DFR whenever it received significant adverse comments *without* assessing the merits of those comments or purporting to conduct a complex, extrastatutory cost-benefit analysis.

Section 6295(p)(4)'s plain language and structure are thus 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 v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001).

[22] *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).

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),[23] confirms that section 6295(p)(4) merely allows DOE to finalize DFRs establishing noncontroversial consensus standards, consistent with established federal agency practice.[24] Section 308 was an ancillary provision that received relatively little congressional attention.[25] Congress did not intend to delegate to DOE the authority to issue 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.[26] "Congress…does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not…hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *see Brown & Williamson*, 529 U.S. at 160.

[23] EISA was an omnibus energy bill.

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

[25] 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. *See 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").

[26] *See* 5 U.S.C. §553. If Congress had so intended, it would have clearly said so in the text of section 6295(p)(4). *See Pittsburgh & L.E.R.Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989).

Moreover, DOE repeatedly told Congress in 2006 and 2007 that it only wanted narrow authority under EPCA to use DFRs for truly noncontroversial matters. The Executive Branch's understanding of a provision at the time of its enactment is probative of statutory meaning. *See, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379, 390-91 (2009). In March 2006, then-Secretary of Energy Samuel Bodman proposed to Congress statutory language authorizing DOE to issue DFRs with a letter explaining the scope of DOE's requested DFR authority.[27] Secretary Bodman, believing that the APA did not authorize DOE to promulgate DFRs absent an emergency, requested statutory authorization to use DFRs to set noncontroversial energy-conservation standards.[28]

DOE's proposal provided that it "shall withdraw a…[DFR]….if the Secretary receives…one or more significant and legally relevant adverse public comments."[29] Secretary Bodman assured Congress that, if DOE's proposal was adopted, DOE could only issue and confirm DFRs "in the absence of apparent stakeholder objection" and that "[i]f any person files a significant adverse

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[27] Letter from Samuel Bodman, Sec'y Energy, to Richard Cheney, Senate President (March 23, 2006)(Bodman Letter)(attached as Addendum C to Petitioner's Brief).

[28] *See id.* at 2. *Cf.* 60 Fed. Reg. 43,108, 43,110-43,111 (Aug. 18, 1995)("The…[DFR]…process is based upon the notion that receipt of 'significant adverse' comment will prevent the rule from automatically becoming final. Although direct final rulemaking is viewed by the [Administrative] Conference as permissible under the APA…, Congress may wish to expressly authorize the process…[to] alleviate any uncertainty and reduce…potential for litigation.").

[29] Bodman Letter, Enclosure, p. 2.

comment…, the Secretary would be required to withdraw the" DFR.[30] DOE's January 2006 report to Congress described DOE's "forthcoming process improvements," and further elucidated DOE's—and Congress's—understanding of DOE's requested DFR authority: "An…expedited rulemaking process can sometimes be applied…[using] a direct final rule. If there are no substantial adverse comments received during the comment period, the…[DFR] can take effect." DOE, Energy Conservation Standards Activities, v, 42, 48 (Jan. 2006); *accord* DOE, Implementation Report: Energy Conservation Standards Activities, 13 (Feb. 2007).

The Senate's version of 42 U.S.C. §6295(p)(4)(C) is consistent with that provision's final language and DOE's previously articulated understanding.[31] It required withdrawal if "the Secretary *tentatively determines* that the adverse public comments are *relevant* under subsection (o)…or any other applicable law."[32] H.R.

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[30] Bodman Letter at 1-2.

[31] The most extensive legislative consideration of the DFR provision occurred in two *subcommittee* hearings. The Senate version was adopted after these hearings. DOE assured Congress at *both* hearings that DFRs could only be issued if "clear consensus" existed among "manufacturers, efficiency advocates, and other stakeholders," i.e., "all relevant interests." *See Achieving—At Long Last—Appliance Efficiency Standards, Hearing Before H. Subcomm. On Energy and Air Quality*, 110th Cong., 8, 16 (2007)(Alexander Karsner, Asst. Sec'y, DOE); *Energy Efficiency Promotion Act of 2007: Hearing on S. 1115 Before S. Comm. On Energy and Nat'l Resources*, 110th Cong. 4, 6 (2007)(John Mizroch, Principal Deputy Ass. Sec'y, DOE).

[32] The circumstances requiring withdrawal were not the subject of significant congressional debate. *Cf. Common Cause* v. *FEC*¸ 842 F.2d 436, 447 (D.C. Cir.

6, 110th Cong. § 224 (as passed by Senate, June 21, 2007)(emphasis added). Congress ultimately adopted almost exactly the statutory language Secretary Bodman proposed.

DOE did not request and Congress did not give to DOE the unprecedented power to promulgate *controversial* major legislative rules outside of normal notice-and-comment rulemaking. Instead, Congress gave DOE exactly what it asked for: the authority to issue and confirm direct final rules for noncontroversial matters.

In the DFR at issue, DOE wrongly expanded its DFR authority by reading the word "may" out of the statute. *See Carcieri*, 555 U.S. at 391 (courts "'obliged to give effect, if possible, to every word Congress used'" (citation omitted)). Thus, DOE stated that 42 U.S.C. §6295(p)(4)(C) permits it to "weigh[]…the anticipated benefits of 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…." (JA-371.) However, this construction contradicts both EPCA's plain language and DOE's promises to Congress. *Cf. Hearth*, 706 F.3d at 507.

As in *Hearth, Patio & Barbecue*, where this Court recently invalidated DOE's attempt to regulate decorative fireplaces under EPCA,

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1988). *See generally* C.R.S., Energy Independence and Security Act of 2007: A Summary of Major Provisions, RL34294 (Dec. 21, 2007)(discussing controversial, debated provisions of EISA).

"Congress…established—and DOE simply chose to ignore—the means by which DOE could" regulate. *Id*. There, as here, "DOE was free to…[regulate] through the statutorily provided for means, but chose instead to push the outermost limits of interpretive credulity…." *Id.* at 506. DOE is "'bound[] not only by the ultimate purposes Congress has selected, but by the means…[Congress] has deemed appropriate, and prescribed….'" *Id.* at 507 (citation omitted). Here, DOE chose to advance EPCA's purpose through plainly *proscribed* means. But DOE "cannot choose to ignore statutory limits on…[its] authority and expect deference to come of…[its] intransigence." *Id.* at 506. The DFR should be vacated.

Even if DOE's construction passed muster under *Chevron*, its failure to withdraw the DFR was 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 withdrawal, "it must exercise that discretion in a well-reasoned, consistent, and evenhanded manner." *Portland Cement Ass'n v. EPA*, 665 F.3d 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." *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).

DOE received adverse comments raising every issue discussed in Intervenors' and Petitioner's briefs,[33] 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. (*E.g.*, JA-938.)

Second, commenters explained that the DFR included standby- and off-mode standards that were not recommended or mentioned in the JSC (*e.g.*, JA-935), and which even the Joint Stakeholders opposed (*e.g.*, JA-898).

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. (*E.g.*, JA-504.)

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

[33] *All* issues raised in adverse comments are, *at minimum*, necessarily "essential predicates" to APGA's, HARDI's, and ACCA's argument that the DFR should have been withdrawn in response to comments. *See E. Ky. Power Coop. v. FERC*, 489 F.3d 1299, 1305 (D.C. Cir. 2007).

a DFR. (*E.g.*, JA-823-JA-824.) As AHRI noted, DFRs are inappropriate for controversial matters. (JA-504.)

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 thousands of small businesses, as required by the Regulatory Flexibility Act. (*E.g.*, JA-860-JA-861.)

Sixth, commenters explained that DOE's economic analysis was inadequate because it failed to 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. (*E.g.*, JA-933; JA-937-JA-938.)

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 life-cycle-cost savings estimates were materially inflated because DOE used old data and did not use marginal-price analysis. (*E.g.*, JA-935.)

Eighth, as addressed at length in Petitioner's brief,[34] 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.

[34] *See* Pet'r's Br. 43-65.

§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 "all comments cumulatively to determine whether they [may] provid[e] a reasonable basis for withdrawal of the final rule." (JA-1006.) The agency's decision to confirm a DFR of unprecedented scope despite strong opposition by most of the parties directly affected by it is even more unreasonable when the totality of reasons for withdrawing the DFR provided by the comments to DOE is considered.[35] DOE's conclusion that *thirty-two adverse comments*, 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.

B. DOE's Decision to Issue the DFR Violates EPCA.

DOE's interpretation of its authority to *issue* DFRs is likewise contrary to EPCA's plain language. DOE cannot establish 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)…."[36] 42

[35] *See* Pet'r's Br. 4-5 & n.1 (listing comments).
[36] Congress's use of "including" underscores that this list is illustrative, not exhaustive.

U.S.C. §6295(p)(4)(A)(emphasis added). The JSC underlying 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 the direct final rulemaking process 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 solely sufficient) to allow DOE to issue a DFR.[37]

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

The JSC did not represent the interests of the parties whose views should have been considered before DOE issued the DFR.

For example, DOE concedes that "States…are relevant parties to any consensus recommendation" yet admits "States were not signatories to" the JSC. (JA-371.) *Cf.* 10 C.F.R. §430.2 (DOE definition of "State" does not include "State entity"). Also, the JSC proposed regional energy-conservation standards. EPCA requires that, if DOE exercises its *purely optional* regional-standards authority, 42 U.S.C. §6295(o)(6)(A), it "shall…consider the impact…on consumers,…distributors, dealers, contractors, and installers," 42 U.S.C. §6295(o)(6)(D)(ii). But *none* of this list of stakeholders were parties to the JSC.

[37] For example, 42 U.S.C. §6295(p)(4) reflects Congress's intent that multiple States must sign a joint statement before DOE may issue a DFR based on that statement.

To the contrary, two-thirds of the HVAC supply chain was excluded from the JSC, as were small manufacturers. (*See* JA-857; JA-860.) "DOE acknowledges that…energy suppliers" are "relevant parties" (JA-996), as are utilities, 10 C.F.R. pt. 430, Appendix A, Subpart C, §8(b); *see* 42 U.S.C. §6295(o)(2)(B)(i)(I). Yet they, too, were excluded.

Instead, the JSC was submitted by some large manufacturers, one trade association, six energy-efficiency advocacy organizations, and one State entity. This narrow subset of interested parties cannot, and did not, represent the interests of the many stakeholders that did not sign the JSC.

2. The JSC was not representative of relevant views.

The JSC was not representative, let alone "fairly representative," of the views of the vast majority of those affected by its "recommended" energy-conservation standards. It expressed no views concerning controversial standby- and off-mode standards, which DOE estimates will cost manufacturers as much as $250,000,000. (JA-361.) Likewise, the JSC did not reflect the views of thousands of small HVAC distributors and contractors likely to incur the majority of enforcement- and compliance-related costs arising from regional standards it recommended.[38] Utilities' views were also ignored, even though DOE recognizes

[38] DOE knew that the DFR would increase retail and installation costs and assumed this would "lead[] to…lower employment in…[nonmanufacturing] economic sectors." (JA-274-JA-275.)

that the DFR will likely have adverse employment and investment effects on the utility sector. (JA-275.) And although DOE admits that consumers will confront increased upfront costs because of the DFR, their views were also absent from the JSC. (*See* JA-275; JA-374; JA-432; JA-481; JA-499-JA-500.) DOE's conclusion that these parties' perspectives need not be considered before promulgating a major rule was unreasonable.

II. THE DFR'S ENERGY-CONSERVATION STANDARDS VIOLATE EPCA.

A. The DFR's Accelerated Compliance Dates Violate EPCA's Plain Language.

The DFR's substance is as fundamentally flawed as the process by which it was issued and confirmed. To begin with, DOE ignored 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. (JA-372.)

To provide "adequate lead time" (JA-375), EPCA expressly requires 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)(5); 42 U.S.C. §6295(f)(4)(C); 42 U.S.C. §6295(d)(3)(B). Every provision in EPCA addressing lead times for energy-conservation standards applicable to air conditioners, heat pumps, and furnaces requires a five-year lead period. 42 U.S.C. §6295(m)(4)(A)(ii) provides that

amended standards "*shall* apply…with respect to central air conditioners, heat pumps,…and furnaces,…[to] a product…manufactured after the date that is 5 years after publication of the final rule establishing an applicable standard."[39] (emphasis added). Likewise, 42 U.S.C. §6295(n)(5)(B) states that "in no case may an amended standard apply to products manufactured within…5 years (for central air conditioners and heat pumps,…and furnaces) after publication of the final rule…." Sections 6295(f)(4)(C) and 6295(d)(3)(B) also establish five-year lead periods.

DOE must comply with explicit statutory commands and "literally has no power to act…unless…Congress confers power upon it." *La. Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 374 (1986). DOE admitted in the DFR that it is "bound by" EPCA's statutorily required lead times. (JA-374-JA-376.) *See* 10 C.F.R. pt. 430, Appendix A, Subpart C, §6 (DOE must adhere to EPCA's statutory lead periods).

Yet DOE ignored clear statutory language and set compliance dates that "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)." (JA-372.) DOE claims

[39] "'[S]hall'…is mandatory…, not…precatory." *Monzel*, 641 F.3d at 531(citation omitted).

that the JSC somehow gave it "flexibility in establishing…compliance dates…."[40] (JA-375.) But Congress did not give DOE any such "flexibility."[41]

DOE's decision to prescribe accelerated compliance dates is reviewed *de novo*.[42] *Hearth*, 706 F.3d at 503. Because the accelerated compliance dates violate a clear statutory directive, they are unlawful.[43]

B. 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 violated EPCA's plain language by including in the DFR standby- and off-mode standards that were not mentioned in the JSC, were opposed by Joint Stakeholders, and 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-

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[40] The actual "agreement" proposing accelerated compliance dates was dated October 13, 2009—almost two years before the DFR was published. (JA-33-JA-42.)

[41] 42 U.S.C. §6295(p), a purely procedural provision (hence its title: "Procedures for prescribing new or amended standards"), does not give DOE authority to alter EPCA's substantive statutory lead periods.

[42] EPCA does not delegate to DOE authority to ignore EPCA's plain language, and thus this Court should not defer to DOE's construction. *See Railway Labor*, 29 F.3d at 670-71.

[43] For that matter, they fail Chevron step two and are arbitrary and capricious.

mode standards, as DOE acknowledges. (JA-372.) After DOE issued the DFR, Joint Stakeholders stressed that they never even considered the possibility of including standby- and off-mode standards in the JSC (*see, e.g.*, JA-908; JA-918) and asked DOE to address these "in separate rulemakings…." (JA-373). However, DOE refused to withdraw the DFR.

DOE claims that it was compelled to do this 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.

Indeed, subsection (o) explicitly prohibited DOE from establishing standards for air conditioners and heat pumps under these circumstances. Subsection (o) provides that DOE "*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…."[44] 42 U.S.C. §6295(o)(3)(A)(emphasis added). DOE established energy-conservation standards for air conditioners and heat pumps *before* establishing statutorily required standby- and off-mode test

[44] 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…NOPR on proposed standards.").

procedures for those products. 42 U.S.C. §6293; 42 U.S.C. §6295(o)(3)(A). Section 6295(o)(3)(A)'s specific requirements trump section 6295(gg)(3)'s general rule. *See RadLAX Gateway Hotel v. Amalgamated Bank*, 132 S. Ct. 2065, 2071-72 (2012).

Moreover, DOE's failure to amend its test procedures made "it impossible for stakeholders to comment on the practicality or reasonableness of the standards…." (JA-504.) Therefore, including those standards was not "feasible," as required by 42 U.S.C. §6295(gg)(3)(A).

DOE's action contravenes EPCA's plain language and thus is not entitled to *Chevron* deference.

C. DOE's Failure to Consider the DFR's Harm to Small HVAC Distributors and Contractors Violated the Regulatory Flexibility Act.

Most HVAC distributors and contractors are small businesses directly regulated by the DFR's regional energy-conservation standards.[45] (JA-494-JA-495.) *See* 10 C.F.R. §430.32(c)(5),(e)(iii); 42 U.S.C. §6295(o)(6)(E)(ii). Because DOE failed to conduct an Initial Regulatory Flexibility Analysis (IRFA) and a Final Regulatory Flexibility Analysis (FRFA) assessing and attempting to mitigate

[45] The Regional Standards Enforcement Framework Document (Addendum III) posted by DOE in connection with the EPCA-required regional-standards enforcement rulemaking confirms this. *See supra* note 4; 76 Fed. Reg. 76,328.

the DFR's impact on small HVAC distributors and contractors, the DFR violated the Regulatory Flexibility Act (RFA), 5 U.S.C. §§601-612.

Unless an agency certifies that a "rule will not…have a significant economic impact on a substantial number of small entities" under 5 U.S.C. §605(b), it 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…significant issues raised by…public comments in response to the" IFRA, the agency's assessment of those issues, and any changes to the rule in response to public comments.[46] 5 U.S.C. §604(a)(2). Significantly, a FRFA must also describe in considerable detail "the projected reporting, recordkeeping and other compliance requirements of the rule…." 5 U.S.C. §604(a)(5). DOE did not do any of this.

Public comments advised DOE 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 an RFA review that included HVAC contractors and distributors. (JA-860-JA-861; JA-938.) HARDI explained that regional standards "will undoubtedly alter the way an entire industry of small businesses operate." (JA-861; *see* JA-857.) DOE has acknowledged that "[t]he vast majority

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

of independent [HVAC] distributors are small, private companies"[47] (JA-277), and that "[t]he large majority of [HVAC] contractors operate as small businesses" (JA-288). The DFR's regional energy-efficiency standards will have a substantial economic impact on distributors and contractors.[48] Consequently, DOE should have conducted an IRFA and FRFA.

Although DOE characterized part of the DFR's preamble as a FRFA,[49] this did not address the DFR's impact on small HVAC contractors and distributors and other small market participants. (JA-489-JA-491.) In a Correction, DOE subsequently recharacterized the so-called FRFA as an IRFA and stated that it would "publish its…FRFA…, including responses to any comments received, in a separate notice" after the comment period. (JA-501-JA-502.) It did not do this. Instead, DOE ignored HARDI's and ACCA's comments.[50] Its Notice published after the comment period failed to address either comment and did not include an

[47] DOE estimates that there were 5,156 "independent [HVAC] distribution branches" in 2002. (JA-277.)

[48] DOE acknowledged in a TSD that regional energy-conservation standards will increase enforcement-and-compliance-related costs for distributors, contractors, and other small businesses (which DOE admittedly could not measure) and may also have non-enforcement costs, e.g., "increas[ing] inventory investment…[and] management costs" for distributors. (JA-279-JA-283.)

[49] DOE acknowledged in the DFR that it must comply with the RFA's procedural requirements with respect to small manufacturers. (JA-439; JA-463.)

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

IRFA or FRFA addressing the DFR's effects on small HVAC distributors and contractors. (JA-993-JA-1007.)

If DOE believed that the DFR's regional standards would not substantially affect these small businesses, its failure to issue the certification required by 5 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. DOE's decision to ignore a statutory command is not entitled to deference. This Court should vacate the DFR for this reason or, alternatively, 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.[51]

D. DOE's Failure to Measure the Compliance and Enforcement Costs of Regional Standards Violates EPCA.

DOE also unlawfully failed to "consider the impact of…regional standards on" distributors, contractors, and other market participants *before* choosing to establish those standards.[52] 42 U.S.C. §6295(o)(6)(D)(ii). DOE knew that there are "unique burdens associated with" regional standards (JA-381), and that "prescribing an enforcement plan only after publishing a final rule is problematic,"

[51] *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).

[52] 42 U.S.C. §6295(o)(6)(G)(ii)(I) requires DOE to "initiate a rulemaking to develop…an effective enforcement plan" for regional standards within "90 days after the date of…a final rule that establishes…regional standard[s]…."

U.S. DEP'T OF ENERGY, MULTI-YEAR PROGRAM PLAN—BUILDING REGULATORY PROGRAMS, §5.5, p.48 (Oct. 2010). DOE nevertheless established 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 is aware 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…regional standards." (JA-66.) DOE admitted that it could only "determine whether regional standards are economically justified, after considering the impacts on market participants attributable to such standards." (JA-60.) 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" (JA-64) and conceded that "DOE cannot accurately assess any impacts of compliance due to regional standards because no enforcement mechanisms and compliance requirements have…been established" (JA-67).

HARDI and ACCA urged DOE to assess the impact of enforcement- and compliance-related costs from regional standards on distributors, contractors, and

other stakeholders excluded from the JSC. (*See* JA-860; JA-933-JA-934; JA-938.) Yet DOE refused to withdraw the DFR and establish regional standards through normal notice-and-comment rulemaking, which would have permitted DOE adequate time to propose an enforcement plan and meaningfully assess the standards' impact on distributors, contractors, and others. Instead, DOE dismissed 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." (JA-1003.) That claim is belied by both DOE's subsequent statement accepting that regional standards will increase HVAC distributors' and contractors' compliance- and enforcement-related costs[53] and DOE's prior statements.

This inconsistency alone renders the DFR 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 facially legitimate objections, its conclusion "can hardly be classified as reasoned." *PSEG Energy 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 failed to measure the enforcement and

[53] *See* Regional Standards Enforcement Framework Document (Addendum III).

compliance costs of those standards. *See Safe Extensions v. FAA*, 509 F.3d 593, 605 (D.C. Cir. 2007)("'[U]nsupported assertion does not amount to substantial evidence'"(citation omitted)).

E. DOE's Reliance on Thirteenth-Hour Technical Analysis Was Arbitrary and Capricious.

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,[54] on October 14, 2012, less than two business days before the comment period closed, DOE posted on its website a spreadsheet with new technical analysis. (*See* JA-890-JA-891.)

ACCA submitted a comment objecting to DOE's last-minute release of this substantially revised analysis. (JA-935.) DOE not only refused to withdraw the DFR, but did not even use its statutory authority to extend the comment period. 42 U.S.C. §6295(p)(4)(B). DOE later admitted to altering this spreadsheet again on October 21 *after* the comment period had closed without disclosing this in the Notice.[55]

Energy-conservation rules are, by necessity, heavily informed by technical analysis. "'It is especially important for the agency to identify and make available

[54] *See* Pet'r's Br.13-14,43-64. Because Petitioner discusses DOE's flawed economic analysis in detail, Intervenors will not do so here.
[55] *See* Pet'r's Br. 14 n.17.

technical studies and data that it has employed in reaching…[its] decisions….'" *Am. Radio Relay League 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 time to allow for meaningful commentary…[and] 'a genuine interchange'" between interested parties. *Id.* at 236-37 (citation omitted).

Here, DOE gave the public less than two business days to comment on substantially revised LCC savings estimates and then posted additional technical analysis on the Internet *after* the comment period had closed (after refusing to extend it). Commenters were not notified 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 before the close of the comment period, materially prejudicing their interests. *See id.*

III. THIS COURT SHOULD DECIDE THIS CASE ON THE MERITS.

A. HARDI Should Be Permitted to Substitute for APGA.

HARDI only objects to the APGA-DOE Settlement Motion insofar as it disposes of HARDI's remaining claims, *see U.S. Steel Corp. v. EPA*, 614 F.2d 843, 844-46 (3d Cir. 1979), by "cutting…[HARDI] off from…remed[ies] to which [it

is]…entitled….”[56] *Lawyer v. DOJ*, 521 U.S. 567, 579 (1997). HARDI does not object to it insofar as it vacates and remands the DFR’s furnace standards. HARDI lacks the power to do so. *See id.* at 578-80.

1. Substitution is Proper.

The APGA-DOE Settlement Motion would impose duties and obligations on HARDI’s members and dispose of its valid, properly raised claims without its consent. But because HARDI is a party to this case on equal footing with APGA and DOE, its right to seek relief from the DFR cannot be extinguished by the APGA-DOE Settlement Motion. *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 529 (1986); *see New Mexico v. DOI*, 820 F.2d 441, 445 (D.C. Cir. 1987).

HARDI should therefore be permitted to substitute as petitioner. An intervenor may step into a petitioner’s shoes so long as the intervenor has standing (as HARDI does)[57] and its claims are properly before the Court (as HARDI’s

[56] ACCA does not join HARDI in Section III of this brief and takes no position on these issues.

[57] *See* Addendums II, III, & IV. Intervenors must demonstrate Article III standing *because* an “intervenor seeks to participate on an equal footing with the original parties to the suit….” *City of Cleveland v. NRC*, 17 F.3d 1515, 1517 (D.C. Cir. 1994); *see Ala. Mun. Distributors Group v. FERC*, 300 F.3d 877,879 n.2 (D.C. Cir. 2002)(same Article III standard for petitioner and FRAP 15(d) intervenor). HARDI meets this requirement. Under EPCA, prudential standing is coterminous with Article III. *See Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1324 (D.C. Cir. 1986). Therefore, HARDI necessarily has prudential standing.

are).[58] *See S. Pac. Transp. Co. v. ICC*, 69 F.3d 583, 587 (D.C. Cir. 1995); *see also Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 478 (2007).

HARDI "will be adversely affected by" the DFR, 42 U.S.C. § 6306(b)(1), fully participated in the agency proceedings, and timely moved to intervene after APGA timely petitioned for review of the entire DFR. Substitution is appropriate where, as here, the Court has subject-matter jurisdiction over the original petitioner's claims; the intervenor and its claims are within the zone of interests protected by the statute conferring jurisdiction; the intervenor's claims are within the scope of those raised by the petitioner or otherwise properly before the Court; and the intervenor timely raised its objections in proceedings before the agency and subsequently filed a timely motion to intervene. *See S. Pac.*, 69 F.3d at 587-88; *Ala. Power Co. v. ICC*, 852 F.2d 1361, 1367-68 (D.C. Cir. 1988). Therefore, HARDI should be permitted to substitute for APGA. *See, e.g., U.S. Steel*, 614 F.2d at 845-46 (allowing intervenor to substitute for withdrawing petitioner in challenge to EPA regulations); *Benavidez v. Eu*, 34 F.3d 825, 830-31,834 (9th Cir. 1994).

The *Alabama Power* Court explained that if an intervenor "ha[d] taken steps to protect its interest, and made clear in timely fashion to both agency and court the existence of its interest,…[it] should not be denied its day in court when the

[58] There are at least two ways to do this: This Court may convert HARDI's Motion to Intervene into a petition for review, as many Circuits do. *See Benavidez v. Eu*, 34 F.3d 825, 830 (9th Cir. 1994). Alternatively, this Court may substitute HARDI for APGA under FRAP 43(b)(permitting substitution of parties on motion).

original petitioner withdraws." 852 F.2d at 1367-68 (citing *U.S. Steel*, 614 F.2d at 846 & n.4). The Court suggested that substitution is particularly appropriate where, as in *U.S. Steel*, the original petitioner timely filed a petition for review; the intervenor made vigorous efforts to present its arguments to the agency and to the Court; the intervenor represented to the Court that it could not rely on the original petitioner because of disparate interests and timely intervened; and the Court had subject-matter jurisdiction over the intervenor's and original petitioner's claims. *See id.* at 1367-68 (citing *U.S. Steel*, 614 F.2d at 846 & n.4, and *Simmons v. ICC*, 716 F.2d 40 (D.C. Cir. 1983)).

This case is well within the four corners of the *U.S. Steel* decision, as described by this Court in *Alabama Power*. Here, as in *U.S. Steel*:

- The petitioner timely filed a petition for review and the intervenor timely filed a motion to intervene after the 60-day petition-filing period but within the 30-day intervention window. *See U.S. Steel*, 614 F.2d at 845.
- The petitioner and intervenor had disparate interests. *Compare id.* at 843-44 (petitioner-steel company; intervenor-paper company), *with* HARDI Motion to Intervene 11-13 (publicly owned natural gas distributors versus HVAC companies).
- The intervenor vigorously sought to protect its interests in proceedings before and timely presented its arguments to the agency. *See U.S. Steel*, 614

F.2d at 844, 846 n.4; JA-96-JA-98; JA-855-JA-861 (HARDI fully participated in rulemaking, attended public meetings, and timely filed comments).

- The agency "was on notice…that a major industry was challenging its regulations" within the 60-day petition-filing period. *U.S. Steel*, 614 F.2d at 846.

Therefore, under *U.S. Steel* and *Alabama Power*, substitution is proper here. In *Southern Pacific*, this Court reaffirmed that substitution for a withdrawing petitioner is appropriate where, as here, the intervenor has Article III and prudential standing and its claims are properly before the Court. *See* 69 F.3d at 587; *see also id.* at 589-91 (Rogers, J., dissenting)(majority denied substitution because intervenor was not "party aggrieved" under Hobbs Act).

This Circuit has consistently recognized that in cases *factually* analogous to *U.S. Steel*, an intervenor may substitute for a petitioner. HARDI so closely mirrors the *U.S. Steel* intervenor that a decision to deny substitution here would amount to a repudiation of this Court's precedents and imposition of an absolute bar on substitution by intervenors.

2. EPCA Does Not Bar Substitution.

DOE may cite pre-*Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), authorities and argue that HARDI's timely motion to intervene cannot be treated as a petition

for review because it was not filed within the 60-day petition-filing period and therefore HARDI cannot substitute. But those cases all involved very different statutes, and in each case substitution was denied for other reasons. *See Simmons*, 716 F.2d at 43-46 (original petitioner not "party aggrieved" under Hobbs Act, so Court lacked jurisdiction); *Ala. Power*, 852 F.2d at 1367-68 (intervenor neither participated in agency proceedings nor timely moved to intervene and was not "party aggrieved" under Hobbs Act); *Process Gas v. FERC*, 912 F.2d 511, 514-15 (D.C. Cir. 1990)(intervenor neither participated in agency proceedings nor petitioned for rehearing, as required by Natural Gas Act); *S. Pac.*, 69 F.3d at 589 (intervenor not "party aggrieved" under Hobbs Act).

Nothing in EPCA suggests that the APGA-DOE Settlement Motion would somehow divest this Court of jurisdiction in any respect.[59] *See Reed Elsevier v. Muchnick*, 559 U.S. 154, 160-63 (2010)(clear-statement requirement for

[59] 42 U.S.C. §6306(b)(2) conditions jurisdiction on filing of the petition; a different EPCA provision, 42 U.S.C. §6306(b)(1), establishes the general 60-day petition-filing period. The rule is that general language setting a time for filing a petition does not limit jurisdiction or bar courthouse doors. *See Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011); *Avia Dynamics v. FAA*, 641 F.3d 515, 518-19 (D.C. Cir. 2011)(statutory "'[f]iling deadlines…generally nonjurisdictional'" (citation omitted)). "[A] rule [is not]…jurisdictional unless it governs a court's…subject-matter or personal jurisdiction." *Henderson*, 131 S. Ct. at 1202-03 (citations omitted). Critically, 42 U.S.C. §6306(b) neither conditions jurisdiction on timely filing of a petition nor specifies any consequence for noncompliance with this deadline. *See Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010).

jurisdictional limitations); *Gonzalez v. Thaler*, 132 S. Ct. 641, 648-49 (2012)(reaffirming "clear-statement principle").

3. Judicial Economy and the Public Interest Favor Substitution.

Substitution promotes judicial economy, avoids senseless delay, and preserves litigants' resources. *See Benavidez*, 34 F.3d at 830-31. Otherwise, HARDI must file a rulemaking petition with DOE and then seek judicial review of DOE's petition-denial. *See Edison Electric Inst. v. ICC*, 969 F.2d 1221, 1229-30 (D.C. Cir. 1992). Resolving these issues now would be quicker and more efficient for all involved. Doing so—and ensuring DOE's compliance with EPCA—is also in the public interest.

B. Alternatively, this Court Should Exercise Its Rule 42(b) Discretion and Deny in Part the APGA-DOE Settlement Motion.

If this Court determines that HARDI cannot substitute, it should exercise its FRAP 42(b) authority and deny the APGA-DOE Settlement Motion insofar as it disposes of HARDI's remaining claims. *See Lawyer*, 521 U.S. at 578-80.

Rule 42(b) does not obligate this Court to grant the APGA-DOE Settlement Motion simply because those parties agreed to it. *See Khouzam v. Ashcroft*, 361 F.3d 161, 167 (2d Cir. 2004). Dismissal is at the Court's discretion, *see, e.g.*, *Walker v. Mones*, 2004 U.S. App. LEXIS 26618, *1-2 (D.C. Cir. 2004)(per curiam)(denying motion for voluntary dismissal), particularly where, as here, all

parties do not agree to settlement terms, *see Albers v. Eli Lilly*, 354 F.3d 644, 646 (7th Cir. 2004).

Under Rule 42(b), this Court may fix the terms of dismissal and, when in the interest of justice, prevent the parties from voluntarily dismissing the case. *See AAMA v. Comm'r, Mass. DEP*, 31 F.3d 18, 22 (1st Cir. 1994)(voluntary motions to dismiss "may be denied in…interest of justice or fairness"). Here, the interests of justice and fairness tip sharply in favor of HARDI.

First, granting the APGA-DOE Settlement Motion imposes costs, duties, and obligations on HARDI's members based on a settlement agreement HARDI did not agree to. This would be an unjust and unfair result.

Second, the APGA-DOE Settlement Motion blocks this Court from reviewing the merits of important issues of first impression this case presents. Disposing of this case without reaching the merits will have long-term strategic benefits for DOE. Only judicial review can effectively check DOE's abuse of the DFR process.

A "good reason to exercise discretion against dismissal is to curtail strategic behavior." *Albers*, 354 F.3d at 646; *see United States v. Wash., Dep't of Fisheries*, 573 F.2d 1117, 1118 (9th Cir. 1978)(exercise of Rule 42(b) discretion appropriate if "dismissal [sought] for…purpose of evading…[judicial] determination of certain questions"), *vacated on other grounds*. "[C]ourts must be particularly wary of

abetting 'strategic behavior'…[by] institutional litigants [like DOE] whose…[long-term interests]…may transcend their…interest in the outcome of a particular case." *Suntharalinkam v. Keisler*, 506 F.3d 822, 828 (9th Cir. 2007)(en banc)(Kozinski, J., dissenting).

For this reason, courts have reached the merits even where the government stipulated to an order vacating the challenged agency action. For example, in *Khouzam v. Ashcroft*, the Second Circuit refused to issue an order dismissing a case pursuant to a voluntary stipulation of dismissal even though, unlike here, all parties agreed to this. *See* 361 F.3d at 168. Instead, the court reached the merits of Khouzam's petition, reasoning that the government only agreed to vacatur to prevent the court from ruling on an issue of public importance. *See id.*

Like *Khouzam*, this case presents an issue of first impression of immense public importance. The APGA-DOE Settlement Motion rewards DOE's abuse of its limited DFR authority and will enable DOE to do this again. Because EPCA requires DOE to promulgate rules establishing energy-conservation standards for HVAC equipment at regular intervals, this concern is not speculative.[60] DOE should not be permitted to use the Settlement Motion to evade judicial review.

[60] *See* 77 Fed. Reg. 32,308 (May 31, 2012)(major DOE DFR for dishwashers); 77 Fed. Reg. 59,712, 59,712-14 (Oct. 1, 2012)(same DOE legal rationale for not withdrawing dishwasher DFR after adverse comment).

CONCLUSION

For the foregoing reasons, this Court should vacate and remand the DFR and Notice.

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RULE 32(a) CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. 32(a)(7)(B) and Circuit Rule 32(a)(2)(B), as modified by this Court's December 13, 2013 Per Curiam Order permitting Intervenors HARDI and ACCA to file a Joint Brief of Intervenors in Support of Petitioner not to exceed 11,000 words, because this brief contains 10,848 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and this Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that, on this 28th day of January 2014, I have caused to be served the foregoing Joint Final Brief for Intervenors Heating, Air-Conditioning & Refrigeration Distributors International and Air Conditioning Contractors of America in Support of Petitioner upon the counsel listed in the Service Preference Report through this Court's CM/ECF system, as indicated below.

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ADDENDUM I

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

ADDENDUM II

Table of Contents

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

NOTARIAL SEAL STATE OF 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.

NOTARY PUBLIC STATE OF OHIO

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

AFFIDAVIT OF JAMES SPENELLO
ON BEHALF OF MINGLEDORFF'S, INC.

I, James Spenello, under oath, do hereby state and aver as follows:

1. I am over eighteen (18) 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 were called as a witness.

2. I am a Vice President of Mingledorff's, Inc. I have worked in the HVAC industry for twenty-eight years. Between 1984 and 1985, I travelled the country as an employee for Carrier, a manufacturer of HVAC equipment. I have been employed by Mingledorff's, Inc., since 1985. As a result, I have substantial personal knowledge of the HVAC distribution industry.

3. Mingledorff's, Inc., distributes residential central air conditioners, heat pumps, and furnaces.

4. Mingledorff's, Inc., is a family-owned company that was founded in 1939. Over the years, we have expanded our business, and we currently have thirty-four (34) locations in six (6) states: Georgia, Alabama, Florida, Mississippi, Tennessee, and South Carolina. We almost exclusively serve residential and commercial customers located in the southeastern United States.

5. At this time, Mingledorff's has approximately 415 full-time employees.

6. My company is an individual member of Heating, Air-Conditioning & Refrigeration Distributors International (HARDI).

7. My understanding is that in addition to base national energy-conservation standards, the direct final rule (DFR) established two additional regional standards for central air conditioners that are different from the national base standard, as well as one additional regional standard for furnaces. This means that central air conditioners and furnaces that are legal in one part of the country are illegal in another part of the country.

8. 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).

9. My understanding is that, unlike compliance with national base standards, compliance with the applicable regional standard is determined at the installation location of the covered product. This means that, as a practical matter, compliance with regional standards is determined at the point of sale. This directly affects HVAC distributors like Mingledorff's that sell central air conditioners in several ways.

10. Mingledorff's thirty-four locations are all in the "Southern Region" for central air conditioners that was established by the DFR. Central air conditioners that are installed in the Southern Region after January 1, 2015, must

meet energy-efficiency requirements that are different from and more stringent than the base national standard for those products. As a result, the impact of regional energy-conservation standards will be particularly severe for Mingledorff's, as well as its employees and customers.

11. My understanding is that the base national efficiency standard for air conditioners will be a 13 Seasonal Energy Efficiency Ratio ("SEER"). (SEER is a metric that is used, among other things, to evaluate the energy efficiency of air conditioners.) In the Southern Region, however, the minimum efficiency standard for air conditioners will be 14 SEER.

12. Generally, 14 SEER air conditioners are more expensive than 13 SEER air conditioners. At the consumer point of sale, this difference in price is roughly $1,400.00 to $1,600.00 more for the 14 SEER system.

13. Even after the DFR's regional energy-conservation standards for air conditioners take effect, HVAC distributors in the northern United States will still be able to sell central air conditioners that only comply with the base national energy-conservation standards (with a 13 SEER efficiency level). In contrast, because all of Mingledorff's locations are in the Southern Region established by the DFR, we will no longer be able to sell 13 SEER air conditioners after the effective date for the DFR's regional air conditioning standards, which will ban all sales and installation of 13 SEER air conditioners in the Southern Region. Instead,

we will only be able to sell central air conditioners that meet the more stringent 14 SEER efficiency requirements for the Southern Region to customers who plan to install our central air conditioners in states that are part of the Southern Region.

14. Because the 14 SEER models of central air conditioners that meet the DFR's regional standards are more expensive than those that meet the DFR's 13 SEER national base standard, Mingledorff's—which almost exclusively serves customers in the Southern Region—will be required to purchase a greater quantity of more expensive central air conditioners than we otherwise would. This will increase our inventory costs. Homeowners who purchase an air conditioner from us will have to pay a higher price for the 14 SEER model, we will have to sell 14 SEER models at a 13 SEER price, or some combination thereof. In other words, if the DFR's regional energy-conservation standards for air conditioners take effect, it will likely increase prices for our customers, decrease Mingledorff's profit margin, or a combination of the two.

15. My understanding of the June 28, 2012, final guidance document issued by the U.S. Department of Energy ("DOE") regarding the compliance dates for the DFR's regional standards is that the agency's definitive view is that the compliance date for regional energy-conservation standards is tied to the product's date of installation—not the date on which it was manufactured.

16. As a result, the DFR's accelerated compliance dates for regional standards will harm Mingledorff's by creating a stranded-inventory problem: Mingledorff's will not be allowed to sell our customers in the Southern Region any 13 SEER central air conditioners that we purchased from manufacturers and suppliers before the regional standards take effect, even though those products were in full compliance with all applicable energy-conservation standards when they were purchased.

17. Mingledorff's purchasing department manages many units of inventory for its thirty-four locations. Predicting the future sales of specific products is very time consuming, especially during times of change in industry regulations. When purchasing mistakes are made or industry standards change, it takes a considerable amount of time to sell our outdated inventory. Based on my experience, as soon a new product is available, the older product is considered "unsellable" in the eyes of most consumers. At best, when products are still considered "viable, new, and unused," it usually takes months and heavy price reductions to sell these products to our customers. If the products are still unsold after two years, as an operating rule, we typically write them off and scrap them.

18. The DFR's accelerated compliance dates for its regional energy-efficiency standards, when coupled with the ban on installation of products that do not meet those standards after their effective date, has the potential to severely

devalue our product inventory overnight. If the DFR's regional energy-conservation standards take effect, many of our products will become "illegal" to sell in the Southern Region. Because all of Mingledorff's locations are in the Southern Region, we will be unable to sell to our local customer base any central air conditioners (and supporting products for those air conditioners) in our inventory that do not meet the DFR's more stringent regional energy-efficiency standards for air conditioners after the accelerated compliance date for those standards.

19. Our options for this "stranded inventory" are as follows: We can try to sell these products to customers in locations that are only subject to the DFR's base national standard for central air conditioners, which will, at minimum, cause us to incur substantial shipping costs. (For example, on September 19, 2012, a freight broker quoted a cost of $600.00 per piece of equipment to transport a new and unused air conditioner to Boston.) We can try to sell these products back to the supplier, but there are no assurances that any supplier will buy back our inventory, and, even if they do, there will surely be a restocking fee. Or we can take a total loss. In the alternative, we could sell these products at an artificially low cost as the accelerated compliance date approaches in an effort to increase demand, but this fire-sale approach would likely also cause us to lose money. Based on my past experience, trying to time our inventory level to reach exactly zero upon the

accelerated compliance date would mean we would run out of equipment prior to this date. If we are out of equipment prior to this date, we will likely lose all future sales to competitive distribution.

20. To the best of my knowledge and based on my experience in the HVAC distribution industry, it is likely that the stranded inventory problem associated with the DFR's 90% regional furnace standard for the Northern Region will have an even more profound effect on HVAC distributors located in areas of the country that are subject to that standard for two reasons.

21. First, the effective date of the 90% furnace standard is May 1, 2013, which gives northern HVAC distributors far less time to sell their remaining 80% furnaces than we have to sell our remaining 13 SEER air conditioners.

22. Second, it is my understanding that HVAC distributors in the Northern Region that are unable to liquidate all of their 80% furnaces by May 1, 2013, will have trouble selling their remaining 80% furnaces in the southern United States. This is because the 80% furnaces that are typically sold in the northern United States are different from those that are sold in the southern United States. Generally, the 80% furnaces that are sold in the northern United States do not have air conditioning capable blowers. (80% furnaces with air conditioning capable blowers are generally more expensive than those that do not have air conditioning capable blowers. In the northern United States, where many people

do not have central air conditioning, there is no need for more expensive 80% furnaces with air conditioning capable blowers. Thus, there is a market for 80% furnaces that do not have air conditioning capable blowers in the northern United States.) Conversely, the 80% furnaces that are sold in the southern United States, where central air conditioning is much more common, usually have air conditioning capable blowers.

23. As all of Mingledorff's locations are in the southern United States, Mingledorff's generally will only sell 80% furnaces that have air conditioning capable blowers.

24. The DFR's regional standards will also harm HVAC distributors like Mingledorff's by increasing our other operating costs. After choosing to establish regional energy-efficiency standards in the DFR, the DOE released a Regional Standards Enforcement Framework Document ("Framework Document") outlining three contemplated approaches to enforcing and ensuring compliance with those standards. My understanding is that all three approaches outlined in that document will compel HVAC distributors, like Mingledorff's, to comply with some form of recordkeeping requirements, reporting requirements, and/or unit tracking requirements.

25. My understanding of the Framework Document is that DOE intends to enforce and attempt to ensure compliance with regional energy-conservation

standards through imposing some form of additional recordkeeping, reporting, and/or unit tracking requirements on HVAC distributors, such as Mingledorff's. This will increase our compliance- and enforcement-related costs if the regional energy-conservation standards take effect. We do not yet know how much our costs will increase as a result of the DFR's regional standards only because DOE has not yet finalized an enforcement plan.

26. Based on my experience with the HVAC distribution and contracting industry, I believe that any of DOE's proposed methods for enforcing and ensuring compliance with regional standards will prove to be difficult and expensive to comply with for HVAC distributors like Mingledorff's. For example, recording and reporting the location of equipment once it has left our possession would be next to impossible. There is virtually no way to stop a contractor/dealer from purchasing 13 SEER equipment in the Northern Region, transporting it to the Southern Region, and installing it in the Southern Region. Because equipment will easily flow across the borders, Mingledorff's will potentially lose future 14 SEER sales every time a 13 SEER air conditioner is illegally transported into our territory. The same would hold true for the northern distributors, who will lose sales to southern distributors.

27. If DOE requires distributors to track the sale and installation of their products, Mingledorff's will, at the very least, have to hire additional personnel to

track the sale and installation location of all our air conditioning units. This in itself will be a difficult task due to the proprietary nature of the dealer/home owner relationship. Most residential dealers consider their customer information their intellectual property and choose not to reveal it to others. And, in my experience, many residential dealers believe that anyone and everyone in the industry, distributors and manufacturers alike, cannot be trusted with the name, address, and contact information of their client base. This will create an additional level of tension between dealers and distributors and may create a perverse incentive for dealers to purchase their products from distributors that, unlike Mingledorff's, might not follow the letter of the law and record this data accurately. This will further reduce Mingledorff's sales opportunities.

I, James Spenello, 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.

September 20th 2012
Date

James Spenello
Vice President
Mingledorff's, Inc.

Norcross, Georgia

BEFORE ME, the undersigned notary, _____, on this 20 day of September, 2012, personally appeared James Spenello, known to me to be a credible person of lawful age who was duly sworn by me, and on his oath declared to be true, the above matters set forth in this Affidavit.

ANGELA PARHAM
ROCKDALE COUNTY, GEORGIA
MY COMMISSION EXPIRES APRIL 7, 2013

AFFIDAVIT OF Lawrence R. Trimbach
ON BEHALF OF 2-J Supply Co.

I, Lawrence R. Trimbach, under oath, do hereby state and aver as follows:

1. I am 56 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 VP of Sales and Marketing and Owner for 2-J Supply Co. My business address is **872** Valley Street, Dayton OH 45404.
3. 2-J Supply Co. distributes residential central air conditioners, heat pumps, and furnaces. We serve customers in Ohio, Kentucky and West Virginia.
4. 2-J Supply is a Wholesale Distributor of heating and air conditioning products in Ohio, Kentucky & West Virginia. Our mission is to help HVAC contractors increase their sales and profitability by partnering with them. We offer jobsite delivery and high quality HVAC products.
5. My company is an individual member of Heating, Air-Conditioning & Refrigeration Distributors International (HARDI).
6. The HVAC Distribution business is already very competitive with lower margins and higher costs being absorbed every year.
7. 2-J Supply Co. is a small business with 85 employees and sales of $38 million.

8. In addition to base national energy-conservation standards, the direct final rule (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. 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.

9. 2-J Supply Co. is located near a border between two regions with energy-conservation standards for air conditioners, heat pumps, 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 2-J Supply Co.

10. Because of the location of 2-J Supply Co. and the geographic area that we serve, regional energy-efficiency standards will require us to carry a larger inventory and manage our inventory in a different way to adequately assist our customers in each region. Being on the border as we are in a number of

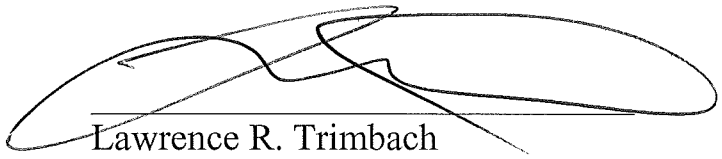
our locations creates more work for us and will cause us to "question" our valued customers about where HVAC equipment is being installed. Consequently, regional energy-conservation standards will increase our company's operating costs and reduce our profit margin.

11. 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 on HVAC distributors, such as 2-J Supply Co., 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.

12. If the standards remain in place, it will mean more work, lower margins, and the potential for customers to purchase their HVAC equipment elsewhere.

I, Lawrence R. Trimbach 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.

5/29/12
Date



Lawrence R. Trimbach

872 Valley Street, Dayton OH 45404

BEFORE ME, the undersigned notary, Izora M. Dill, on this 29 day of May, 2012, personally appeared Lawrence R. Trimbach, 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.

IZORA M. DILL, Notary Public
In and for the State of Ohio
My Commission Expires 3/17/2017

ADDENDUM III

Regional Standards Enforcement Framework Document

I. Background

The Energy Independence and Security Act (EISA) of 2007 modified the Energy Policy and Conservation Act (EPCA) to authorize the Department of Energy (DOE or the Department) to consider regional standards for certain products if such standards can save significantly more energy and are economically justified. Specifically, in addition to a base national standard, DOE was authorized to establish up to two additional regional standards for central air conditioners and heat pumps (CACHP) and one additional regional standard for furnaces. 42 U.S.C. § 6295(o)(6)(B)(ii).

The Department recognizes that regional standards present new certification, compliance, and enforcement issues. Congress ostensibly anticipated these issues and explicitly required DOE to initiate rulemaking for enforcement of regional standards no later than 90 days after issuance of the final rule establishing regional standards. DOE is required to complete this enforcement rulemaking no later than 15 months from issuance of the final rule. (42 U.S.C. § 6295(o)(6)(G)(ii)(I), (III))

Adoption of regional standards by DOE also triggers requirements for the Federal Trade Commission (FTC). EPCA directs the FTC to initiate rulemaking within 90 days after the publication of a final rule establishing regional standards in order to determine the "appropriate 1 or more methods for disclosing information so that consumers, distributors, contractors, and installers can easily determine whether a specific piece of equipment that is installed in a specific building is in conformance with the regional standard that applies to the building." The FTC is required to complete this rulemaking no later than 15 months of publication of the final rule establishing regional standards. (42 U.S.C. § 6295(o)(6)(H)(i), (iii))

On June 27, 2011, DOE promulgated a direct final rule establishing regional standards for residential furnaces and residential air conditioners and heat pumps. 76 Fed. Reg. 37408. In addition to a base national standard for each product, DOE established one regional standard for furnaces and two regional standards for central air conditioners and heat pumps. Compliance dates for these standards are May 1, 2013, for non-weatherized furnaces and January 1, 2015, for weatherized furnaces and central air conditioners and heat pumps.

The tables below provide the amended regional energy conservation standards, as set forth in the June 2011 direct final rule. Table 1 displays the amended standards for furnaces; Table 2 displays the amended standards for central air conditioners and heat pumps.

Table 1 Amended Energy Conservation Standards for Furnaces

Residential Furnaces		
Product Class	**National Standard Levels**	**Northern Region** Standard Levels**
Non-weatherized gas	AFUE* = 80%	AFUE = 90%
Mobile home gas	AFUE = 80%	AFUE = 90%
Non-weatherized oil-fired	AFUE = 83%	AFUE = 83%
Weatherized gas	AFUE = 81%	AFUE = 81%
Mobile home oil-fired‡‡	AFUE = 75%	AFUE = 75%
Weatherized oil-fired‡‡	AFUE = 78%	AFUE = 78%
Electric‡‡	AFUE = 78%	AFUE = 78%

* AFUE is annual fuel utilization efficiency.

** The following States comprise the Northern region for furnaces: Alaska, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

‡‡ The direct final rule does not amend energy conservation standards for this product class.

Table 2 Amended Energy Conservation Standards for Central Air Conditioners and Heat Pumps

Central Air Conditioners and Heat Pumps			
Product Class	**National Standard Levels**	**Southeastern Region†† Standard Levels**	**Southwestern Region‡ Standard Levels**
Split-system air conditioners	SEER† = 13	SEER = 14	SEER = 14 EER† = 12.2 (for units with a rated cooling capacity less than 45,000 Btu/h) EER = 11.7 (for units with a rated cooling capacity equal to or greater than 45,000 Btu/h†)
Split-system heat pumps	SEER = 14 HSPF† = 8.2	SEER = 14 HSPF = 8.2	SEER = 14 HSPF = 8.2
Single-package air conditioners	SEER = 14	SEER = 14	SEER = 14 EER = 11.0
Single-package heat pumps	SEER = 14 HSPF = 8.0	SEER = 14 HSPF = 8.0	SEER = 14 HSPF = 8.0
Small-duct, high-velocity systems	SEER = 13 HSPF = 7.7	SEER = 13 HSPF = 7.7	SEER = 13 HSPF = 7.7
Space-constrained products – air conditioners‡‡	SEER = 12	SEER = 12	SEER = 12
Space-constrained products – heat pumps‡‡	SEER = 12 HSPF = 7.4	SEER = 12 HSPF = 7.4	SEER = 12 HSPF = 7.4

† SEER is Seasonal Energy Efficiency Ratio; EER is Energy Efficiency Ratio; HSPF is Heating Seasonal Performance Factor; and Btu/h is British thermal units per hour.
†† The following States comprise the Southeastern region for central air conditioners and heat pumps: Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia, and the District of Columbia.
‡ The States of Arizona, California, Nevada, and New Mexico comprise the Southwestern region for central air conditioners and heat pumps.
‡‡ The direct final rule does not amend energy conservation standards for this product class.

II. Base and Regional Standards

In adopting amendments to EISA authorizing establishment of regional standards, Congress recognized that an entirely new enforcement framework would be needed. Under the amended energy conservation standards framework, the base national standard applies to the manufacturer (including importers). Compliance with the base national standard is entirely determined by whether the covered product complies with the standard for that covered product applicable at the time of manufacture (or importation). Under regional standards, the applicable standard is determined by the installation location of the covered product.

Regional standards also differ from a base national standard with respect to the compliance date of the standard for a particular product. The current base national standard applies to products "manufactured or imported" on or after the effective date of the standard. (42 U.S.C. § 6295(o)(6)(E)(i)(II)) Regional standards apply to products "installed" on or after the compliance date of the standard. (42 U.S.C. § 6295(o)(6)(E)(ii)) This requirement places a burden for compliance with a regional standard at the point of installation.[1]

As part of its regional standards enforcement rulemaking, the Department is considering three potential approaches to enforcement of regional standards for base national and regional standards. In the three approaches, outlined below, DOE attempted to recognize and consider the fundamental differences inherent in moving from a base national standard system to a regional standards system. DOE attempted to incorporate these differences into each approach to begin the discussions of a potential regional standards enforcement scheme.

III. Impacted Parties

When promulgating rules regarding enforcement of a regional standard, DOE must clearly specify which entities are responsible for ensuring compliance with applicable energy conservation standards. (42 U.S.C. § 6295(o)(6)(G)(ii)(II)) All three potential approaches for enforcing regional standards for residential furnace and residential central air conditioner and heat pump products presented by DOE impose compliance burdens on the manufacturers that

[1] The Department notes that the current regulations, as amended by the direct final rule, inadvertently states that regional standards are applied to the products based on "manufactured" date rather than the "installed" date.

have been regulated by DOE historically. DOE is considering how a regional standards enforcement program should address different types of manufacturers, such as independent coil manufacturers.DOE is also considering the appropriate roles and responsibilities of other parties, such as distributors and contractors, that might be involved in compliance with regional standards.

IV. Alternative Enforcement Approaches

An effective regional standards enforcement program will include participation by manufacturers, distributors, and contractors. The program should not overburden any one participant, nor should it overtax DOE with an impractical enforcement mandate.

DOE has developed three potential approaches to enforcement of regional energy conservation standards for central air conditioners, heat pumps, and furnaces to facilitate discussion regarding the elements of an effective enforcement program. The three potential approaches are intended to present a variety of enforcement mechanisms with different possible distributions of burdens. The Department seeks stakeholder comment on the various aspects of each approach, as well as whether, in the commenter's view, aspects of the different approaches can be combined to form a more efficient and effective enforcement program. DOE welcomes other ideas and suggestions for elements of an enforcement program, and commenters should not limit their comments to discussion of these three approaches.

Each of these three possible approaches builds upon the current compliance requirements, including the requirement for manufacturers to certify the efficiency of each basic model of a covered product to the Department. In the following discussion, the tracking and recordkeeping requirements would only apply to units that are required to meet the regional standard; no tracking or recordkeeping would be required of units that could be sold legally in any region of the United States. These approaches also assume various notification and information requirements would be imposed by the FTC as part of a coordinated enforcement program.

Approach 1 would require only that manufacturers track the serial numbers of units shipped to each distributor location and that distributors maintain records demonstrating that purchasers acknowledged the regional limits applicable to each unit.

Another possibility (Approach 2) would provide stronger enforcement capabilities to DOE and would divide the burden for tracking shipments. Under Approach 2, DOE would require manufacturers and distributors to maintain records of the distributor/contractor to whom each unit of a covered product was distributed. Contractors would be required to maintain a record for each unit installed, including the unit's serial number and installation address. This approach would allow for a record keeping system that the Department could track by requesting the information from each party in the distribution chain. The only information reported to the Department would be the certification reports filed by the manufacturer; however, the

Department could request the records that were required to be maintained under this scheme if it became necessary to do so. No information would be reported to another party.

A different approach (Approach 3) would be to develop a complete tracking system for each individual unit by serial number starting with the manufacturer all the way through the distribution chain until the actual installation. This approach would place a heavier burden on manufacturers, distributors, and contractors but would provide a very comprehensive and effective enforcement program. . This approach would require contractors to maintain records of each serial number and installation address for installed units and to provide that information to the distributor. The distributor would be required to compile the information from multiple contractors and submit basic model number, efficiency, serial number of the unit, and zip code of the installation to DOE for review. Distributors would be responsible for ensuring the distributors or contractors to whom it provides units are installing the units in appropriate regions and that all units are properly reported to the Department.

Summary of 3 Possible Approaches

	Approach 1	Approach 2	Approach 3
Manufacturer	**Required to certify product efficiencies to DOE (including applicable region)** **Required to inform distributors about appropriate regions** **Required to track shipments to distributors by serial number and be able to lookup distributor by serial number of installed units**	**Required to certify product efficiencies to DOE (including applicable region)** **Required to inform distributors about appropriate regions** **Required to track shipments to distributors by serial number and be able to lookup distributor by serial number of installed units**	**Required to certify product efficiencies to DOE (including applicable region)** **Required to inform distributors about appropriate regions** **Required to track shipments to distributors by serial number and be able to lookup distributor by serial number of installed units**
Distributor	**Required to inform installers about appropriate regions** **Required to maintain record of purchasers' signed acknowledgements of regional standard requirements**	**Required to inform installers about appropriate regions** **Required to track unit sales to contractor**	**Required to inform installers about appropriate regions** **Required to track unit sales to contractor** **Required to collect from installers and then submit compiled list of basic model number, efficiency, serial number of unit, and zip code of installation to DOE**
Contractor	**Required to install units in the appropriate region**	**Required to install units in the appropriate region** **Required to maintain records and paperwork about installation location, including serial numbers and address of installation**	**Required to install units in the appropriate region** **Required to maintain records and paperwork about installation location** **Required to provide distributor with serial numbers and installation address for installed units**

1. Approach 1:

Manufacturer	• **Certify products to DOE** • **Required to inform distributors about appropriate regions** • **Required to track shipments to distributors by serial number and be able to lookup distributor by serial number of installed units**
Distributor	• **Required to inform installers about appropriate regions and collect and maintain a record of signatures from customers acknowledging regional standard requirements.**
Contractor	• **Required to install units in the appropriate region**

DOE envisions this approach focusing on ensuring all parties along the distribution chain are informed about regional standards requirements and relying on self-policing to ensure regional compliance. Approach 1 would impose a very low burden on all parties involved but may not provide for effective enforcement of a regional standards enforcement program.

Under this approach, manufacturers would inform distributors about regional restrictions when selling and/or shipping units to the distributor. Manufacturers would track serial numbers of units shipped to distributors and maintain records of this information.

Distributors would maintain a record of signatures acknowledging regional standard requirements from customers (i.e., distributors or contractors). Distributors would inform customers (contractors or other distributors) about regional restrictions when selling and/or delivering units to customers.

Contractors would be required to ensure that products are installed in the appropriate region.

2. Approach 2:

Manufacturer	• **Certify products to DOE** • **Required to inform distributors about appropriate regions** • **Required to track shipments to distributors by serial number and be able to lookup distributor by serial number of installed units**

Distributor	• **Required to inform installers about appropriate regions** • **Required to track unit (serial number) sales by distributor/contractor. This information is not required to be submitted to the Department on a regular basis, but must be provided to DOE if requested.**
Contractor	• **Required to install units in the appropriate region** • **Required to maintain records and paperwork about installation**

Approach 2 presents a potential "middle ground," balancing obligations amongst various parties. This approach would impose additional tracking mechanisms on distributors and contractors. Distributors would be required to track which models are sold to which distributor or contractor. Contractors would be required to track serial numbers and installation location information for every unit installed. DOE believes contractors may already retain this information for warranty and repair purposes. Though this information is not regularly submitted to DOE, it would enable DOE to audit distributors and contractors for compliance if DOE requests the records. This approach would not require a unit-specific certification requirement regarding the installation location, but it would allow DOE to obtain this information if needed. This approach attempts to provide DOE with a systematic way to enforce its regional standards, but limit the burden on affected parties.

3. Approach 3:

Manufacturer	• **Certify products to DOE** • **Required to inform distributors about appropriate regions** • **Required to track shipments to distributors by serial number and be able to lookup distributor by serial number of installed units**
Distributor	• **Required to inform installers about appropriate regions** • **Required to track serial number, installer, and installation location information for units sold and to submit the information to DOE on a regular basis**
Contractor	• **Required to install units in the appropriate region** • **Required to maintain records and paperwork about installation** • **Required to provide distributor with serial numbers and**

	installation location information (i.e., address) for installed units.

Approach 3 represents a potential enforcement program with robust verification mechanisms. This approach would provide for a full tracking system of each individual unit by serial number from the point of manufacturer (or importation) to the point of installation. All of this information would be submitted to the Department on a regular basis. This approach would provide for a comprehensive enforcement scheme, but it would also be very burdensome for affected parties and the Department.

Approach 3 would require distributors to track the serial number of distributed products, the customer (contractor or distributor) receiving the unit, and the installation location information for the unit (obtained from the contractor). DOE believes that approach 3 could represent a significant deviation from current practices for a subset of distributors. Currently, distributors typically do not receive information regarding where units it distributes will be installed. One issue with this approach might be that contractors may not have a specific client in mind when purchasing units—contractors may hold small inventories of their most popular units. This approach would require distributors either to limit sales to only installers that can provide information at the time of the sale regarding where the unit will be installed or to follow-up with contractors after the sale to obtain this information.

Additionally, contractors would maintain their own records on serial numbers and installation location information. This information would allow a unit that is installed in a non-compliant region to be traced back through the distribution chain. Additionally, manufacturers would maintain their own records on the serial numbers, tracking the sales to the distributors. Under this approach, DOE would be able to obtain the identity of the distributor of a unit from a manufacturer based on the serial number of a non-compliant installation. Likewise, the distributor could verify the contractor that took ownership of the unit and presumably performed the improper installation. This would allow the Department to track and receive at any point in the distribution chain information on a specific serial number.

V. Waivers

The Department is aware of concerns by several interested parties regarding the implementation of regional standards for residential furnaces and the potential for select customers to have "stranded" appliances that share venting with a furnace and possibly higher installation costs. For example, there could be an instance where the furnace installation is concentrically vented in the middle of the residence and alteration of the flue to accommodate a condensing furnace could require significantly altering the location of the existing vent pipe and modifications to the residence.

The Department is sensitive to these types of situations and is open to considering alternatives to mitigate the unintended consequences of a condensing standard for residential furnaces in the Northern region for a select subset of installations that may be severely impacted. One possible approach to prevent any unintended result would be to allow a waiver process, in which a party would request a waiver of the regional standard. This approach could function as a new waiver process or could build upon DOE's existing waiver process, which is administered through DOE's Office of Hearing and Appeals. In this case, a party, such as a contractor, could apply for a waiver on an installation-specific basis, providing detailed information demonstrating the need for a furnace that does not meet the applicable regional standard. Information would likely include details about the existing appliances that may be affected by the new venting requirements, the existing venting location, the new venting requirements, the installation costs, the product(s) being purchased, and about the need for such a waiver for each installation that seeks to install a less-efficient furnace. DOE would review the information and either grant or deny the waiver application to the contractor for a given installation. If DOE approved the waiver, DOE would publish the specific installation information with a waiver number. DOE specifically requests comment on the need for a waiver process and, if necessary, the types of information it should consider collecting, what, if any, of this information should be withheld from public access and whether a waiver should be a "post installation approval" or available for all installation scenarios identical to one for which DOE had previously granted a waiver.

VI. Request for Information

The Department solicits public comment from industry, manufacturers, academia, consumer groups, efficiency advocates, government agencies, and other stakeholders generally on the regional standard enforcement approaches for residential furnaces and residential central air conditioners and heat pumps. In submitting information, DOE specifically welcomes comment on:

1. the appropriateness of the three potential approaches, other approaches and on variations that would improve the effectiveness of enforcement of regional standards;
2. the periodicity/timing of data submissions for regional standard enforcement including how the existing certification requirements on manufacturers may need to be altered to accommodate the regional standards approach;
3. the information that would be necessary (either maintained or submitted) to help the Department determine a basic model is compliant with the Department's standards and whether a given unit has been installed in a proper geographic location;
4. the appropriate level of detail when tracking installation location both for internal records and for the Department to ensure DOE can systematically enforce its regional standards.
5. the benefits and burdens of the three potential enforcement schemes the Department is considering;
6. the existing record keeping schemes currently utilized by manufacturers, distributors, and

installers that the Department could leverage to reduce burden;

7. the consideration of a waiver process to mitigate any unintended consequences of regional standards adopted in the June 2011 direct final rule; and
8. any changes that would need to be made to the existing certification requirements to accommodate regional standards.
9. how the certification requirements may need to be modified to accommodate the new regional standards scheme, particularly with a view towards which parties should certify, and what, if any, additional information should be provided.

Respondents are advised that DOE is under no obligation to acknowledge receipt of the information received or provide feedback to respondents with respect to any information submitted.

ADDENDUM IV

This final document represents the definitive view of the agency on the questions addressed and may be relied upon by the regulated industry and members of the public.

This and other guidance documents are accessible on the U.S. Department of Energy, Energy Efficiency & Renewable Energy web site at: http://www1.eere.energy.gov/guidance/default.aspx?pid=2&spid=1.

Guidance Type: Conservation Standards
Category: Residential Products
Product: Residential furnaces, central air conditioners and heat pumps
Guidance Version: FINAL
Issued: June 28, 2012

Q: Is the compliance date for regional energy conservation standards for residential furnaces, central air conditioners, and heat pumps tied to the product's date of manufacture or date of installation?

A: Although the compliance date for the base national standards for these products is tied to the date of manufacture, the EISA 2007 amendments to the Energy Policy and Conservation Act (EPCA) specifically tied the compliance date for regional standards to the date of installation. The U.S. Department of Energy (DOE) is constrained in this regard by the plain language set forth by Congress in the statute, which provides at 42 U.S.C. 6295(o)(6)(E) that the base national standard shall "apply to all products manufactured or imported into the United States on and after the effective date of the standard," but which also provides in the same section that "[a]ny additional and more restrictive regional standard … shall apply to any such product *installed* on or after the effective date of the standard…" (emphasis added). Clearly, these terms have very distinct and different meanings, and Congress expressly differentiated between the two within the same statutory provision. DOE is not at liberty to adopt a contrary interpretation that would violate the statute.

Background: On June 27, 2011, the Department published a direct final rule (DFR) in the *Federal Register* which set energy conservation standards for residential furnaces, central air conditioners, and heat pumps. 76 FR 37408. These standard levels were subsequently confirmed in a final rule published in the *Federal Register* on October 31, 2012 that recited the compliance dates of these standards. 76 FR 67037. This rulemaking was the first instance of DOE establishing energy conservation standards on a regional basis pursuant to authority provided DOE in 2007. In a May 17, 2012 letter to DOE, the Air-Conditioning, Heating, and Refrigeration Institute (AHRI) sought clarification of the relevant regulatory provisions and urged DOE to tie the compliance date for regional standards to the date of manufacture of the product in question, rather than the installation date of such product.

However, DOE has since recognized the potential for confusion associated with its chosen language. Specifically, in the amendatory language for 10 CFR 430.32(c)(4) and (5) and 10 CFR 430.32(e)(1)(iii), DOE set forth the requirements for products "manufactured on or after [date] … and installed in the States of …." 76 FR 37408, 37547-48 (June 27, 2011). The Department has already taken steps to make clear that the express words of the statute apply. More specifically, in its Regional Standards Enforcement Framework Document, footnote 1 on page 3 states, "The Department notes that the current regulations, as amended by the direct final rule, inadvertently states that regional standards are applied to the products based on 'manufactured' date rather than the 'installed' date." (See: http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/furncac_regstnd_enforceframework.pdf) DOE plans to amend the relevant regulatory provisions to address any imprecision in the language.

ADDENDUM V

ADDENDUM V

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ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN PUBLIC GAS ASSOCIATION, Petitioner, v. UNITED STATES DEPARTMENT OF ENERGY, Respondent.	Case No. 11-1485

MOTION OF NATURAL RESOURCES DEFENSE COUNCIL, ALLIANCE TO SAVE ENERGY, AMERICAN COUNCIL FOR AN ENERGY-EFFICIENT ECONOMY, MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS, AND CONSUMER FEDERATION OF AMERICA FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENT

The Natural Resources Defense Council, Alliance to Save Energy, American Council for an Energy-Efficient Economy, Massachusetts Union of Public Housing Tenants, and Consumer Federation of America (collectively "Movants") respectfully move pursuant to Fed. R. App. P. 15(d) to intervene in support of respondent in the above-captioned proceeding for judicial review of the "Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps: Direct Final Rule," 76 Fed. Reg. 37408 (June 27, 2011) ("Energy Efficiency

Standards").

Counsel for Movants consulted with counsel for the American Public Gas Association ("APGA"), who indicated that APGA would not take a position prior to seeing Movants' motion to intervene. Counsel for Movants also consulted with counsel for the Department of Energy ("DOE"), who indicated that the Agency takes no position on the motion at this point.

INTRODUCTION

This proceeding is a challenge to a Final Rule issued by the Department of Energy establishing strong amended efficiency standards for residential furnaces and residential central air conditioners and heat pumps. The Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6291 *et seq.*, as amended by the Energy Independence and Security Act of 2007 ("EISA"), grants DOE authority to set efficiency standards for covered products and requires that such standards must "achieve the maximum improvement in energy efficiency" that is "technologically feasible and economically justified." 42 U.S.C. § 6295(o)(2)(A). The challenged standards satisfy this statutory requirement and will result in significant energy savings, consumer savings and environmental benefits. Further, the standards are supported by manufacturers, states, consumer advocates, and environmental and efficiency organizations. Movants Natural Resources Defense Council, Alliance to Save Energy, American Council for an Energy-Efficient Economy, Massachusetts Union of Public Housing Tenants, and the Consumer Federation of America strongly

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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 FOR LEAVE TO INTERVENE
BY THE AIR-CONDITIONING, HEATING, AND
REFRIGERATION INSTITUTE

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Rule 15(b) of this Court, the Air-Conditioning, Heating, and Refrigeration Institute (hereinafter "AHRI") respectfully moves for leave to intervene in this case as a matter of right in support of the respondent, U.S. Department of Energy.

AHRI is a not-for-profit, non-stock corporation organized under the laws of the Commonwealth of Virginia, recognized under Section 501(c)(6) of the Internal Revenue Code, and headquartered in Arlington, Virginia. AHRI is a national trade association representing the interests of the manufacturers of over 90 percent of the residential and commercial heating and air conditioning equipment sold in North America.

On December 23, 2011, the American Public Gas Association (hereinafter "APGA") petitioned this Court to review a direct final rule published by the U.S. Department of Energy (hereinafter "DOE") in the Federal Register at 76 Fed. Reg. 37408 (June 27, 2011), and notice of effective date and compliance dates for the direct final rule published by DOE in the Federal Register at 76 Fed. Reg. 67037 (October 31, 2011) in a proceeding entitled "Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps." DOE's direct final rule established amended federal minimum energy efficiency standards and standards effective dates for residential furnaces, central air conditioners and heat pumps pursuant to authority granted DOE by Section 325 of the Energy Policy and Conservation Act (hereinafter "EPCA"), 42 U.S.C. § 6295. AHRI and many of its member companies actively participated in the DOE proceedings culminating in the publication of the final rule. AHRI supports the final rule adopted by DOE.

Section 325(p)(4)(A) of EPCA, 42 U.S.C. § 6295(p)(4)(A), authorizes DOE to adopt via direct final rule standards recommendations "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)" if DOE has determined that such recommended standards are technologically feasible and economically justified under criteria set forth in

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICAN PUBLIC GAS ASSOCIATION,

Petitioner,

-against-

Case No. 11-1485

UNITED STATES DEPARTMENT OF ENERGY,

Respondent.

---------- x

MOTION OF THE CITY OF NEW YORK FOR LEAVE TO INTERVENE AS RESPONDENT

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Corporation Counsel of the City of New York
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Assistant Corporation Counsels
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(212) 788-1235

Attorneys for Proposed Intervenor the City of New York

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Circuit Rule 15(b), the City of New York ("the City") hereby moves for leave to intervene in the above-captioned proceeding, as a respondent in support of the "Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps: Direct and Final Rule", 76 Fed Reg. 37,408 (the Rules or Efficiency Standards). The Rules adopt amended energy conservation standards for residential furnaces, central air conditioners, and heat pumps (Efficiency Standards), promulgated by the United States Department of Energy (DOE) pursuant to the Energy Policy and Conservation Act of 1975 (EPCA or the Act), as amended. *See* EPCA, Pub. L. 94-163 (codified as amended at 42 U.S.C. §§ 6201-6422 (2003)). The City seeks leave to intervene in order to ensure that the City's interests in protecting the health of New Yorkers and reducing air pollution, greenhouse gas (GHG) emissions, and energy consumption in the City.

BACKGROUND

In passing the EPCA in 1975, Congress sought to advance energy efficiency and decrease the country's reliance on fossil fuels in response to the oil embargo imposed by the Organization of Oil Producing and Exporting Countries in 1973. *See* EPCA, Pub. L. 94-163 (codified as amended at 42 U.S.C. §§ 6201-6422 (2003)); *see also Natural Rec. Def. Council v. Abraham*, 355 F.3d 179, 184 (2d

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

MOTION OF THE AIR CONDITIONING CONTRACTORS OF AMERICA FOR LEAVE TO INTERVENE

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure ("FRAP") and Circuit Rule 15(b), the Air Conditioning Contractors of America ("ACCA") hereby move for leave to intervene on behalf of the Petitioner in the above-captioned case.

ACCA is a non-profit association serving more than 60,000 professionals and 4,000 businesses in the indoor environmental and energy services community. For more than forty years, ACCA has served the nationwide educational, policy, and technical interests of the small businesses who design, install, and maintain indoor environmental systems. As an American National Standards Institute-approved standards developing organization, ACCA has written numerous industry-recognized standards on quality design, quality installation, quality commissioning, and quality maintenance of heating, ventilation, and air

conditioning systems. ACCA provides leading-edge education for contractors and their employees, and represents the interests of professional contractors in every state in the country.

The Petitioner in this case seeks review of a direct final rule and a notice of effective date and compliance date for the direct final rule promulgated by the United States Department of Energy in a proceeding entitled "Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Air Conditioners and Heat Pumps," published in the Federal Register at 76 Fed. Reg. 37,408 (June 27, 2011) and 76 Fed. Reg. 67,037 (October 31, 2011), respectively. The June 27, 2011, direct final rule amended energy conservation standards for residential furnaces and for residential central air conditioners and heat pumps. The notice of effective date and compliance dates was published in the Federal Register on October 31, 2011. The American Public Gas Association filed a petition for review of this notice on December 23, 2011.

ACCA has a direct and substantial interest in the petition for review because ACCA members, the contractors who install and service residential furnaces, central air conditioners, and heat pumps, will be newly subject to enforcement proceedings under the new regional energy efficiency standards for these products that are the subject of this litigation. ACCA filed comments on the direct final rule setting forth its concerns with the enforcement implications of the rule on ACCA's

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—

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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