



April 29, 2017

The Honorable James R. Perry, Secretary  
U.S. Department of Energy  
1000 Independence Ave., SW  
Washington, DC 20585

Dear Secretary Perry:

We are writing in response to a “sixty-day letter” dated April 3, 2017 in which ten states, the Pennsylvania Department of Environmental Protection, and the City of New York effectively threatened to commence legal action against the Department of Energy (“DOE”) unless it publishes five draft efficiency rules as final rules within sixty days.<sup>1</sup>

The draft rules in question would impose energy conservation standards for various categories of consumer products and industrial equipment under the Energy Policy and Conservation Act of 1975, as amended (“EPCA”). None of the five draft rules are final rules; instead they are draft rules – still expressly subject to potential change – that have been posted on DOE’s web site pursuant to the “error correction” procedure codified at 10 C.F.R. § 430.5.

As representatives of natural gas distribution systems and the customers they serve,<sup>2</sup> we have interests directly at stake in one of the five rulemaking proceedings at issue: that involving efficiency standards for commercial packaged boilers.<sup>3</sup> We submitted a timely error correction

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<sup>1</sup> A copy of the “sixty-day” letter is provided as Attachment A. We note that on April 3, 2017, the Natural Resources Defense Council, Sierra Club, and Consumer Federation of America also sent a similar 60-day letter to DOE indicating their intention to bring legal action as well. ([earthjustice.org/sites/default/files/.../notice-letter-doe-efficiency-standards-20170403.pdf](http://earthjustice.org/sites/default/files/.../notice-letter-doe-efficiency-standards-20170403.pdf))

<sup>2</sup> The American Public Gas Association is the national association for publicly owned natural gas distribution systems, with over 730 members in 36 states. Publicly-owned gas systems are not-for-profit, retail distribution entities owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that own and operate natural gas distribution facilities in their communities. Spire Inc., through its subsidiaries, is the fourth largest investor-owned gas utility in the nation with just under 1.7 million customers and 3,000 employees in Missouri (where our corporate headquarters are based), Alabama and Mississippi.

<sup>3</sup> Docket No. EERE-2013-BT-STD-0030.

request in that proceeding on February 11, 2017, and supplemented that request with a broader request submitted on March 14, 2017.<sup>4</sup> As discussed in both submissions, the standards that the draft commercial boiler rule would impose were selected and justified on the basis of modeling outputs that are completely invalid due to a basic error in DOE’s modeling of the impacts efficiency standards would have. That error involves one discrete function buried in a very elaborate modeling analysis, but its impact is profound: it produces an artificial base case for analysis that causes DOE’s analytical model to substantially overstate the benefits any efficiency standard would provide.<sup>5</sup> Because of this error, DOE’s regulatory analysis does not justify standards as stringent as those the draft rule would impose. To determine what standards – if any – are economically justified as EPCA expressly requires, DOE must correct this error in its modeling and revise its regulatory analysis accordingly. Our submissions requested that DOE issue a solicitation of comment to facilitate the required revision of its regulatory analysis, and those requests remain pending.

In effect, the sixty-day letter demands that DOE ignore our pending requests and impose standards for commercial packaged boilers that are not economically justified as required by law, and that will not actually produce the energy conservation or consumer benefits erroneously attributed to them by DOE’s existing analysis and cited in the sixty-day letter. In particular, the sixty-day letter suggests that our error correction request – as well as those filed by other parties in the same proceeding – do not “appear to have identified” errors as defined by DOE’s error correction rule, *and that DOE therefore has a non-discretionary duty to publish the draft rule as a final rule in the form in which it was posted.* We respectfully disagree on both counts. If DOE determines that the draft standards for commercial packaged boilers have not been economically justified as required by law – and they have not – it may not adopt those standards. 42 U.S.C. § 6313(a)(6)(A)(ii)(II). Nothing in DOE’s procedural rules for “error corrections” alters that result. To the contrary, “the purpose of the error correction rule is to prevent an erroneous energy conservation standards regulation from being published,”<sup>6</sup> not to put DOE in a position in which it would have no choice but to adopt unjustified standards. More specifically, DOE intended to adopt an error correction rule that “promotes” (rather than defeats) “compliance with the statutory mandate that DOE not adopt a standard unless it determines, *inter alia*, that the

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<sup>4</sup> Copies of these submissions are provided as Attachments B and C, respectively.

<sup>5</sup> For a detailed discussion of the impacts of the modeling error, see the comments and supporting documentation filed by the American Public Gas Association on November 22, 2016, and Spire Inc. on January 6, 2017, in the rulemaking addressing standards for residential furnaces. These submissions are available in the docket at the following links:  
<https://www.regulations.gov/document?D=EERE-2014-BT-STD-0031-0292>  
<https://www.regulations.gov/document?D=EERE-2014-BT-STD-0031-0309>

<sup>6</sup> 81 Fed. Reg. 57745 at 57749 (August 24, 2016).

standard is . . . economically justified.”<sup>7</sup> It would be perverse to interpret this rule otherwise; in fact, it is difficult to see how a procedural rule could reasonably be interpreted to require an outcome that would be unlawful on the merits: adoption of standards that are not economically justified as EPCA requires.

In any event, publication of the draft rule as final is not a non-discretionary act that a court could properly compel, because it is plain on the face of the rule that DOE *does have* discretion: at a minimum, DOE may identify errors and make changes to address them even in the absence of any error correction request. 10 C.F.R. § 430.5(f). Accordingly, DOE is not *required* to publish the rule in the form in which it was posted, and courts are empowered “only to compel an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing *how* it shall act.”<sup>8</sup> An order of mandamus compelling agency action is “an extraordinary remedy, reserved only for extraordinary circumstances,”<sup>9</sup> not an exercise of judicial authority appropriately invoked to force the adoption of standards that lack economic justification required by law.

### **The Error Correction Rule**

The “error correction” rule was adopted as a rule of agency procedure and practice<sup>10</sup> to address concern that EPCA’s so-called “anti-backsliding” provisions<sup>11</sup> might leave DOE unable to correct errors in energy conservation standards once they have been published in the Federal Register.<sup>12</sup> The error correction rule was intended to “reduce the possibility of promulgating an incorrect energy conservation standard”<sup>13</sup> by providing an opportunity for interested parties to review a draft final rule and provide input before a final rule is published in the Federal Register.

DOE recognized that the error correction rule “commits [DOE] to considering properly submitted error correction requests before publishing” a rule in the Federal Register,<sup>14</sup> and was careful to limit the extent of its commitment. DOE specifically rejected the suggestion that the error correction rule should provide an opportunity for full administrative reconsideration because such a process “would represent a commitment by DOE to revisiting the entire

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<sup>7</sup> 81 Fed. Reg. 57745 at 57748.

<sup>8</sup> *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (internal quotations omitted).

<sup>9</sup> *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000).

<sup>10</sup> 81 Fed. Reg. 26998 at 27003 (May 5, 2016); 81 Fed. Reg. 57745 at 57752.

<sup>11</sup> 42 U.S.C. §§ 6295(o)(1) and 6313(a)(6)(B)(iii)(I).

<sup>12</sup> 81 Fed. Reg. 26998, 26998-99; *see NRDC v. Abraham*, 355 F.3d 179, 195-97 (2<sup>nd</sup> Cir. 2004).

<sup>13</sup> 81 Fed. Reg. 57745 at 57747.

<sup>14</sup> 81 Fed. Reg. 57745 at 57747.

rulemaking record in order to assess the particulars of any issue a person might raise,” and DOE did not want to create “a mandatory general reconsideration period covering all topics.” 81 Fed. Reg. 57745 at 57753. However, the constraints on the scope of the error correction rule were designed to limit DOE’s enforceable “commitments” under the rule, not to limit DOE’s discretion or legal authority to take other action as appropriate before adopting a final rule. This is clear from the expressly-stated purpose and scope of the error correction rule, which is merely to “describe procedures through which [DOE] accepts and considers submissions regarding possible Errors in its rules.” 10 C.F.R. § 430.5(a).

### **The Error Correction Rule Provides No Basis to Require Adoption of Unjustified Efficiency Standards**

The legal premise of the error correction procedure is straight-forward: DOE has the legal authority to make changes to a draft final rule at least until the day it is published in the Federal Register. More specifically, DOE can “change a standard that it has posted but has not yet published in the Federal Register.” 81 Fed. Reg. 26998 at 27002. That premise is consistent with the proposition that “Congress considered publication as the terminal act effectuating an amendment” of efficiency standards, and that DOE thus “prescribes final rules amending” energy efficiency standards “*by publishing them* in the Federal Register.”<sup>15</sup> Until publication in the Federal Register occurs, DOE clearly retains the discretion to make any appropriate changes.<sup>16</sup>

The sixty-day letter parses provisions of the error correction rule in isolation, asserting that – in the absence of an “error” as defined by the rule – DOE has a non-discretionary obligation to publish posted standards without change, apparently *even if DOE determines that the standards have not been economically justified as required by law*. However, those provisions were not intended to preclude changes pursuant to “the error correction process established under 1 C.F.R. Chapter 1 applicable generally to all documents published in the Federal Register,”<sup>17</sup> let alone to eliminate DOE’s discretion to make substantive changes required to ensure “compliance with the statutory mandate that DOE not adopt a standard unless it determines, *inter alia*, that the

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<sup>15</sup> *NRDC v. Abraham*, 355 F.3d 179, 195-97 (2<sup>nd</sup> Cir. 2004) (emphasis added); *see* 42 U.S.C. § 6313(a)(6)(B)(ii)(II) (DOE can adopt the standards the draft commercial boiler rule would impose only “if the Secretary determines, *by rule published in the Federal Register*,” that such standards are justified) (emphasis added).

<sup>16</sup> DOE expressly declined to address the extent to which it has the authority to reconsider efficiency standards after they have been published in the Federal Register. 81 Fed. Reg. 57745 at 57754.

<sup>17</sup> 81 Fed. Reg. 26998 at 26999 n. 1.

standard is . . . economically justified.”<sup>18</sup> The error correction rule expressly notes that “[u]ntil an energy conservation standard has been published in the Federal Register, the Secretary may correct such standard, consistent with the Administrative Procedure Act,”<sup>19</sup> and the rule does not limit this authority in a way that would eliminate DOE’s authority to change a standard for which it determines proper economic justification is lacking. Again, the error correction rule serves to “describe procedures through which [DOE] accepts and considers submissions regarding possible Errors in its rules,”<sup>20</sup> and its constraints were designed to limit the range of issues DOE could be *required* to consider under that procedure, but not to eliminate DOE’s discretion to consider or reconsider other issues if it concludes that there is a legitimate need for it to do so.

Our error correction request identified a fatal methodological error in the modeling upon which the economic justification of the standards the draft commercial boiler rule would impose. The error is extremely difficult to detect: indeed, it can be discerned only by finding a needle in a haystack (one parameter among many on one of many modeling spreadsheets presented in the record) and examining it with the benefit of a secret decoder ring (a proprietary modeling “plug-in” required to reveal anything beyond the single parameter assignment – out of the ten thousand actually used – that is visible on the face of the spreadsheet). Only then can it be seen that a random distribution function – not evidence of actual market conditions – was used to assign high-efficiency equipment in the base case used in DOE’s modeling analysis. This all-but invisible error amounts to an error in the calculator used to generate the key model outputs upon which DOE’s economic analysis is based, and – as already indicated – its impact is sufficient to invalidate all of those model outputs.

The model is required to provide a reasonable means to assess the economic impacts of efficiency standards, and – because of the use of a random distribution function in the creation of the base case – it does not. The result is exactly the kind of outcome the error correction rule was intended to avoid: one in which erroneous standards are selected on the basis of bad numbers. The numbers were not simply bad because DOE erred in determining the values used as parameter inputs for its modelling; they were bad because of a defect in the base case the model used. Among the examples of “mistakes that give rise to Errors” for purposes of the error correction rule is “a calculation mistake that that causes the numerical value of an energy conservation standard to differ from what the technical support documents would justify.” 10 C.F.R. § 430.5(b). The mistake in question is arguably a species of “calculation mistake,” and it is certainly an error that caused numerical energy conservation standards to differ from those that DOE’s model inputs would actually justify. The fact that substantive analysis will be required to correct the resulting error does not mean that the issue does not involve an “error” for purposes

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<sup>18</sup> 81 Fed. Reg. 57745 at 57748.

<sup>19</sup> 10 C.F.R. § 430.5(g).

<sup>20</sup> 10 C.F.R. § 430.5(a).

of the error correction rule, because DOE clearly anticipated the need for correction of errors of this kind. *See* 81 Fed. Reg. 57745 at 57750 (citing the potential for an “error” relating to “particularly complex engineering analysis”).

### **Conclusion**

As discussed in our pending submissions, a basic error in DOE’s modeling completely invalidates the economic justification for DOE’s draft commercial packaged boiler standards. DOE will therefore need to correct the analysis in the commercial boiler rulemaking proceeding, and we have already requested that DOE issue a request for comment in that proceeding to facilitate that process.

The suggestion in the sixty-day letter that DOE’s error correction rule leaves DOE with no choice but to publish the posted commercial boiler standards as a final rule is in error. The error correction rule was intended to promote “compliance with the statutory mandate that DOE not adopt a standard unless it determines, *inter alia*, that the standard is . . . economically justified,”<sup>21</sup> not to deprive DOE of the opportunity to correct serious errors invalidating the justification for new standards at any time before such standards are published as final rules. There is no reason why the modeling error cannot be addressed as an “error” under DOE’s error correction rule, and – even if it could not – the error correction rule cannot reasonably be interpreted to require DOE to proceed with the publication of standards that are not economically justified as EPCA requires.

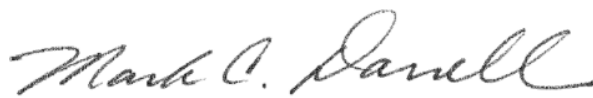
We respectfully request that DOE grant our pending requests by acknowledging the error invalidating the economic justification for its draft standards for commercial boilers and requesting comment to facilitate appropriate correction of its regulatory analysis.

Sincerely,



Bert Kalisch  
President & CEO

American Public Gas Association



Mark Darrell  
Senior VP, General Counsel and Chief Compliance  
Officer  
Spire Inc.

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<sup>21</sup> 81 Fed. Reg. 57745 at 57748.