

**BEFORE THE  
OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY  
UNITED STATES DEPARTMENT OF ENERGY  
WASHINGTON, D.C.**

**Docket Number EERE-2014-BT-STD-0031/ RIN NO. 1904-AD20**

**SUPPLEMENTAL COMMENTS OF THE  
AMERICAN PUBLIC GAS ASSOCIATION  
ON THE SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING**

**Filed January 6, 2016**

The American Public Gas Association (APGA)<sup>1</sup> submits these comments in response to the December 5, 2016 notice in the Federal Register (DOE Notice), 81 Fed. Reg. 87493, reopening the public comment period in this proceeding regarding the Supplemental Notice of Proposed Rulemaking (SNOPR) published by the Office of Energy Efficiency and Renewable Energy, Department of Energy (DOE) on September 23, 2016 (81 Fed. Reg. 65720). APGA's comments on the significant substantive shortcomings of the SNOPR were filed timely on November 22, 2016, in accordance with the SNOPR. APGA referred extensively to and attached to its comments a report developed by the Gas Technology Institute (GTI). GTI has made a revision to Table 35, so APGA requests that DOE remove the November 21 version of this report (which accompanied APGA's previously comments) from the comments database in favor of the corrected version attached hereto.

In the SNOPR, DOE stated that comments would be due on November 22, 2016. 81 Fed. Reg. at 65720. Both before and immediately after the SNOPR was published, APGA, along with the American Gas Association (AGA, and together with APGA, the Associations), filed requests for extensions of time due to the bulk and complexity of the materials associated with the SNOPR, in both instances requesting a comment period of 90 days.<sup>2</sup> The Associations requested that DOE respond promptly in writing, noting that: "It is very important that DOE avoid the sort

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<sup>1</sup> APGA is the national association for publicly-owned natural gas distribution systems. There are approximately 1000 public gas systems in 37 states, and over 700 of these systems are APGA members.

<sup>2</sup> *E.g.*, <https://www.regulations.gov/document?D=EERE-2014-BT-STD-0031-0220>; <https://www.regulations.gov/document?D=EERE-2014-BT-STD-0031-0232>; <https://www.regulations.gov/document?D=EERE-2014-BT-STD-0031-0242>.

of delay and resulting confusion that was associated with the Associations' joint request for additional time and data responses related to the Notice of Data Availability (NODA).”<sup>3</sup>

To recap briefly, in the 2015 NODA proceeding, DOE had received timely requests for an extension of the comment period from, among others, the Associations, but it declined to respond to those requests prior to the comment due date; hence, parties like APGA and AGA utilized extensive resources to file substantive comments in a timely manner. DOE then issued a notice of extension the *day after* the comment date, which, of course, was of no use to those entities like APGA that were engaged in a critical analysis of the NODA and were required to marshal resources to meet the stated comment due date absent timely notice from DOE of an extension. APGA described these facts and the resulting prejudice to APGA in its Supplemental Comments on the NODA dated November 6, 2015.<sup>4</sup>

APGA filed its SNO PR comments timely, before the close of business on November 22, 2016, as instructed by DOE.<sup>5</sup> Several minutes after 5 pm on November 22, APGA received an email stating that EERE had issued a pre-publication notice that the comment period in the SNO PR proceeding would be extended to January 6, 2017. The hyperlink to that notice did not function. When the notice was posted on line for the public to read, it was several days later, and the notice was dated November 21, 2016.

Once again, DOE completely ignored the Associations' requests for timely action on their extension requests and repeated its abusive practice of issuing a notice of extension after the affected stakeholders had dedicated their time and resources to meeting the deadline stated in the SNO PR, to which those same stakeholders had objected as being unreasonable. Further, in

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<sup>3</sup> See Associations' Sept. 12, 2016 Joint Request in this docket, *supra* at note 2, at page 2 n.4. In addition, at the October 17, 2016 DOE technical conference, APGA's representative observed as follows: "we, along with AGA, have requested that the comment period be extended to 90 days from the date of publication. We have also requested a prompt ruling on that request and reiterate that request today." (Tr. 31; emphasis added.) AGA's representative also noted: "AGA and APGA did, at the end of September, request subsequent extension to get a full 90 day comment period. And we just wanted to get an idea if we're going to actually see a response on that. I mean we need a response one way or the other and timely would be the best." (Tr. 213; emphasis added.)

<sup>4</sup> Available at: <https://www.regulations.gov/document?D=EERE-2014-BT-STD-0031-0193>.

<sup>5</sup> At the October 17, 2016 technical conference held by DOE on the SNO PR, Mr. John Cymbalski, in responding negatively to the many requests on the record for more time to submit comments (e.g., Tr. 213), observed that the "[c]omment period closes well before Thanksgiving dinner. So please get them in close of business or at least by midnight November 22nd." (Tr. 222.)

initially providing for a 30-day comment period in the pre-publication SNO PR, DOE ignored its enabling statute, which provides for a 60-day comment period (42 U.S.C. § 6295(p)(2)), and in setting a 60-day comment period in the published SNO PR, DOE ignored its settlement pledge in the DFR appellate proceeding to grant a 90-day comment period.<sup>6</sup> DOE's effort in the DOE Notice to justify its actions by counting 81 days between the issuance of the pre-publication SNO PR and the November 22 deadline in the published SNO PR ignores that comment periods are uniformly measured from the publication date, as that is when the general public becomes aware of proposed government action. In brief, DOE's unseemly actions in establishing foreshortened comment periods and then responding belatedly to timely requests for adequate time to conduct technical analyses are indicative of an agency bent on keeping those who question its proposals off-balance and disadvantaged.

DOE, of course, is fully aware that the parties adversely impacted by its tardy notice extending the comment period are those parties that oppose the SNO PR. Parties that seek to rebut the enormous technical document generated by EERE must spend vast time and resources to understand, analyze, and test this very complicated document and underlying spreadsheets. Parties in support of DOE do not need to do so. Thus, an extension of time to accomplish these difficult tasks is only meaningful if it is issued well before the comment due date so that the affected parties can use the additional allotted time efficiently to maximize their available resources. It is not feasible to supplement technically complex analytical work as the intellectual inquiry is not a two-step process that starts and stops at the press of a button.

DOE well knows that a tardy extension, such as that granted for the NODA comments and now the extension issued for the SNO PR comments, serves only the interests of the pro-SNO PR advocates, which basically act in the role of cheer leaders for any DOE initiative that shows any putative energy savings. These post-due date extensions provide these advocates the advantage of reviewing the work product of those entities like APGA that place their views on the record after undertaking a critical review and analysis of the DOE technical support documents. This turns administrative rulemaking into a sham. And it is no answer for DOE to argue that some stakeholders critical of the SNO PR did not file by close of business on November 22 and thus also got the benefit of the extension; that is most certainly not the case as those stakeholders, just like those that filed timely, had to plan to meet the November 22

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<sup>6</sup> *American Public Gas Ass'n v. DOE*, CADC No. 11-1485, Joint Motion of All Parties at 7.

deadline, and thus are not able to go back to the drawing board and pretend that they have more time for conducting in-depth and highly complex critical analyses that were done to accommodate the November 22 due date.<sup>7</sup>

DOE obviously knew well before the November 22 comment deadline that it would extend the date, as such decisions are not made on the spur of the moment. The requests for extensions were filed as early as September 12, and repeatedly thereafter (including, as noted, at the October 17 technical conference). The Associations (and others) made very clear the importance of receiving prompt written notice of DOE's decision on the requests. In fact, the prepublication notice is dated November 21, but the email notice was not generated until after COB on November 22. It is no stretch to infer intent here.

Moreover, nothing about this should have been in question given the NODA extension fiasco recited above. APGA is frankly outraged by the DOE's repeated abuse of process, and has indicated as much to the DOE Inspector General in a letter dated November 28, 2016 (attached).

Both because of the significant technical flaws underlying the SNOPR itself (*see* APGA November 22 Comments and accompanying GTI Report) and because of the consistent, biased and prejudicial procedural errors by DOE associated with the NODA and the SNOPR, this proceeding should be aborted.

Respectfully submitted,

AMERICAN PUBLIC GAS ASSOCIATION

By: Bert Kalisch  
APGA President and CEO

January 6, 2017

Attachments (2)

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<sup>7</sup> Because the comment due date was November 22, APGA's and AGA's consultant, the Gas Technology Institute, publically posted its technical report on the SNOPR on November 21.



# AMERICAN PUBLIC GAS ASSOCIATION

November 28, 2016

**Via email and U.S. Mail**

Hon. Rickey R. Hass  
Acting Inspector General  
U.S. Department of Energy  
Office of Inspector General  
1000 Independence Avenue, SW  
Washington, DC 20585

Dear Mr. Hass:

The American Public Gas Association (APGA) filed a complaint with the Inspector General (IG) on November 18, 2015 (attached); in the year since that filing, APGA has made repeated requests with the IG office for a definitive status report regarding its complaint, the last such request being on April 26, 2016, which was responded to by a Ms. Grebasch as follows: "I am in the process of reaching out to our Office of Investigations to ascertain the status of our inquiries. I hope to have an update for you tomorrow, April 26<sup>th</sup>." No such update has been forthcoming in the intervening seven months.

APGA writes today both to request action on its year-old November 2015 complaint and to supplement that complaint with additional facts that underscore the waste, abuse and mismanagement at the Department of Energy's Office of Energy Efficiency and Renewable Energy (EERE), which has occurred in the context of the same rulemaking proceeding referenced in our November 2015 complaint, namely Docket No. EERE-2104-BT-STD-0031, regarding the setting of efficiency standards for non-weatherized gas furnaces.

APGA pointed out in its November 15 complaint the abuse of process by EERE in extending the date for comments on the Notice of Data Availability (NODA) the day *after* comments were due. Why is that significant? It is significant and highly prejudicial because DOE knew that those opposing its proposed rule, such as APGA, would be required to expend significant time and resources to do the technical work to rebut the NODA within a condensed period of time, and that the only parties that would benefit from the belated extension were those parties supporting DOE, which would have time to review and respond to the comments of those (like APGA) which filed timely in opposition to the NODA.

Now, to add insult to injury, DOE has again belatedly issued an extension of a comment date that can only benefit those supporting DOE. As a follow-up to the NODA, DOE published a Supplemental Notice of Proposed Rulemaking (SNOPR) on September 23, 2016,<sup>1</sup> The SNOPR provided for comments to be filed on November 22, 2016. In response to the pre-publication of the SNOPR, APGA and the American Gas Association (AGA) on September 12 filed a request

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<sup>1</sup> Available at: <https://www.regulations.gov/document?D=EERE-2014-BT-STD-0031-0230>.

for an extension of the comment period and asked for a DOE ruling within seven (7) days, noting that: "It is very important that DOE avoid the sort of delay and resulting confusion that was associated with the Associations' joint request for additional time and data responses related to the Notice of Data Availability (NODA)."<sup>2</sup> APGA and AGA filed again on September 26,<sup>3</sup> and again on October 28,<sup>4</sup> for the comment date to be extended and for DOE to provide adequate notice of same. In the meantime, many other requests for extension of the comment date were filed.<sup>5</sup>

Because DOE remained silent regarding the many requests for extension of the November 22 comment date and because of the intense work associated with responding to the SNOPR timely, APGA and its consultant did the work required to file (and did file) APGA's comments on the November 22 deadline. Shortly after 5 pm on November 22, 2016, DOE issued an email notice that the comment date was being extended to January 6, 2017. DOE, which obviously decided well before November 22 to extend the date, nevertheless waited until after 5 pm on the due date to notify the public of the extension. Again, the prejudice of such action to adverse parties like APGA who play by the rules, assuming the regulatory agency that is making the rules will do the same, is self-evident.

EERE is toying with the public, specifically those stakeholders that believe DOE is acting irresponsibly in proposing rules for which the scientific support is seriously flawed. The only question is whether the IG now takes appropriate action or simply look the other way, as it apparently has to date regarding APGA's November 2015 complaint regarding EERE's misfeasance. Due process and fairness should be the hallmarks of regulation by administrative agencies like DOE, and yet it is clear that EERE does not share that view.

APGA has suggested many times that it would like to speak directly and in person with the IG office regarding its complaint, and APGA repeats that offer. APGA, of course, understands that we are in a transition period between administrations, but suggests that that is no excuse for procrastinating regarding abuse-of-process issues that are tainting an ongoing administrative proceeding and that are being committed by bureaucrats that will likely remain at DOE without regard to a change in the administration.

Respectfully submitted,



Dave Schryver  
APGA Executive Vice President

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<sup>2</sup> Available at: <https://www.regulations.gov/document?D=EERE-2014-BT-STD-0031-0220>.

<sup>3</sup> Available at: <https://www.regulations.gov/document?D=EERE-2014-BT-STD-0031-0232>.

<sup>4</sup> Available at: <https://www.regulations.gov/document?D=EERE-2014-BT-STD-0031-0242>.

<sup>5</sup> E.g., by Spire, Inc.; the Air-Conditioning, Heating, and Refrigeration Institute; the Heating, Air-Conditioning & Refrigeration Distributors International; the Air-Conditioning Contractors of America; Lennox International; etc.