UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY
OFFICE OF ENERGY EFFICIENCY
AND RENEWABLE ENERGY

Energy Conservation Program: Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products	))))	EERE-2014-BT-STD-0049

COMMENTS OF THE AMERICAN PUBLIC GAS ASSOCIATION

Pursuant to the Request for Information ("RFI") of the Department of Energy, Office of Energy Efficiency and Renewable Energy ("DOE") published on October 31, 2014, 79 Federal Register ("FR") 64,705, the American Public Gas Association ("APGA") comments as follows:

I. COMMUNICATIONS

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II. BACKGROUND

APGA is the national, non-profit association of publicly-owned natural gas distribution systems, with over 700 members in 36 states. Overall, there are some 950 publicly-owned systems in the United States. Publicly-owned gas systems are not-for-profit retail distribution entities that are 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 have natural gas distribution facilities. APGA members serve primarily residential and commercial loads, which rely heavily on gas-fired furnaces and hot water heaters, and hence have a direct and vital interest in both the efficiency standards for such appliances and the procedures used by DOE to adopt new efficiency standards for gas-fired products. APGA is especially concerned that such efficiency standards be adopted only after consideration of all relevant points of view, including the distributors of natural gas, whose desire for the efficient use of natural gas is matched only by their opposition to the adoption of standards that encourage fuel switching from equipment that relies on the cleanest of fossil fuels, natural gas, to equipment that, on a full fuel cycle basis, is both energy inefficient and environmentally unsound.

Because of this concern, APGA was an active participant in DOE's 2011 Furnace Direct Final Rule ("DFR") proceeding in which DOE relied upon a direct final rule, over the objections of many, including APGA, to issue a 90% AFUE standard for non-weatherized gas furnaces in

the northern region.[1] APGA appealed the DFR rulings to the Court of Appeals for the D.C. Circuit in part because of DOE's use of a direct final rule, rather than notice-and-comment rulemaking, to set the 90% furnace standard despite the lack of a consensus in the industry to support that outcome and despite substantive opposition to the standard.[2] The appeal was resolved by a settlement among all parties to the proceeding (transmitted to the Court via Joint Motion) that, among other things, vacated the DFR as it related to the furnace standard, provided for further proceedings pursuant to notice-and-comment rulemaking, and provided that DOE would "initiate a notice and comment rulemaking proceeding to clarify its process related to the promulgation of DFRs."[3]

III. COMMENTS

In accordance with the above-referenced DFR settlement, DOE has invited comments in three areas: "(1) When a joint statement with recommendations related to an energy or water conservation standard would be deemed to have been submitted by 'interested persons that are fairly representative of relevant points of view,' thereby permitting use of the DFR mechanism; (2) the nature and extent of 'adverse comments' that may provide the Secretary a reasonable basis for withdrawing the DFR, leading to further rulemaking under the accompanying NOPR; and (3) what constitutes the 'recommended standard contained in the statement,' and the scope

[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); and *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).

[2] *American Pubic Gas Ass'n v. United States Department of Energy*, No. 11-1485.

[3] The settlement was approved by the Court in a *per curiam* order issued April 24, 2014, in CADC No. 11-1485. The background regarding the DFR and the appeal is also summarized in the RFI (79 FR 64,706).

of any resulting DFR."[4] APGA supports the comments on these issues that are attached to the RFI as Appendix A, and will simply supplement those comments as appropriate below.

A The "Fairly Representative of Relevant Points of View" Requirement

The Energy Policy and Conservation Act of 1975 ("EPCA") was amended to authorize, under limited circumstances, issuance of new appliance standards by way of a direct final rule (versus the historic, more time-consuming notice-and-comment rulemaking).[5] As the legislative history of the EPCA amendment to allow direct final rules makes clear, the idea was to encourage more expedited rulemaking in those instances where there was a true consensus among interested stakeholders representing relevant points of view.[6]

The first criterion for issuing a DFR is that DOE receive "a statement that is submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary, …."[7] Two points seem clear. First, the consensus statement must reflect the "relevant points of view," several of which are named in the statute for illustrative purposes (namely, manufacturers of covered products, States, and efficiency advocates). This suggests that upon receipt of a statement that purports to be a consensus agreement of stakeholders, the DOE has a duty to make a good faith attempt to make sure that there are not relevant points of view that are not represented. Unfortunately, that is not what DOE did in the 2011 furnace rule proceeding; there, despite knowing that there were several relevant interests not included in the statement (*e.g.*, contractors, distributors, gas utilities), it proceeded to issue

[4] 79 FR 64,706.

[5] 42 U.S.C § 6295(p)(4).

[6] *See* 79 FR 64,708.

[7] 42 U.S.C. § 6295(p)(4)(A).

the DFR along the lines suggested in the statement (which it mischaracterized as a "consensus agreement") and then defended it as "fairly representative of relevant points of view."[8]

This necessarily raises the question of what is meant by the phrase "fairly representative." Clearly, what it does not mean is "somewhat representative," which seems to be how DOE construed it in the DFR since DOE was willing to proceed while knowing not only that relevant points of view were not included in the "consensus agreement" but also that there was opposition to the "consensus agreement" from interested persons representing relevant points of view.[9] Instead, given the legislative history of the DFR amendment, it seems clear that the "fairly representative" qualifier was intended to mean "representative in a fair way" of the relevant points of view. This was to ensure that no single entity had a veto over a consensus agreement. For example, assume that a consensus agreement as to a standard that was supported by appliance manufacturers generally (as perhaps evidenced by the support of the manufacturers' trade association) is opposed by a single manufacturer or by several manufacturers. In that situation, the DOE Secretary would have the discretion to determine that the proposal was (or was not) fairly representative of relevant points of view. Contrariwise, if the proposal was supported by some manufacturers but opposed by the vast majority of manufacturers, the DOE Secretary would likewise have the discretion to determine that the proposal was (or was not) fairly representative of relevant points of view.

What Congress did not do was to give the DOE Secretary the discretion to determine that a proposal that was not representative of all relevant points of view, i.e., that omitted significant

[8] DFR, 76 FR 37,422 ("[T]he Secretary has determined that this 'consensus agreement' has been submitted by interested persons who are fairly representative of relevant points of view on this matter"); DOE repeated that finding in its Notice of Effective Date, despite receiving the comments of numerous parties representing other relevant points of view objecting to the "consensus agreement" as not representing an industry consensus; 76 FR 67,040; *see also* RFI, 79 FR 64,706.

[9] Notice of Effective Date, 76 FR 67,040.

points of view, was "fairly representative of relevant points of view," as happened in the DFR proceeding. DOE characterizes its DFR position as follows in the RFI (79 FR 64,706):

> DOE did not read EPCA as requiring absolute agreement by all interested parties, since the Secretary has discretionary authority to determine if a joint agreement meets the requirement for representativeness. *Id.* DOE also reasoned that no single party should be deemed to have a veto power over the use of the DFR mechanism. *Id.* Consequently, DOE considers consensus agreements on a case-by-case basis to determine if they meet the statutory requirements.

This statement, while it contains some accurate observations when viewed in the abstract (*e.g.*, "absolute agreement by all interested parties" not necessarily required; "no single party should be deemed to have a veto power"; view proceedings "on a case-by-case basis"), perfectly illustrates the errors underlying the 2011 DFR. First, DOE does not have the discretion to ignore whether "relevant points of view" are "fairly represented." The statute does not say "some" relevant points of view – it says "relevant points of view," which can only be interpreted in this context to mean "all" known relevant points of view.[10] If a relevant point of view is not represented, DOE should know that before proceeding and should seek to determine whether that relevant point of view supports or does not oppose the "consensus agreement"; if it opposes, then there is no consensus agreement. If there are varying views among the representatives of a particular relevant point of view, then the Secretary should exercise his discretion to determine whether the relevant point of view is "fairly represented," and in this context a dissident does not have a veto power. But the suggestion by DOE that it can accept as a "consensus agreement" a proposal supported by certain relevant points of view and opposed by other relevant points of view defies the statutory language and the clear legislative history of this amendment. The idea

[10] Significantly, DOE's own internal regulations provide in relevant part as follows: "…a consensus agreement on a updated efficiency level submitted by a group that represents *all interested parties* will be proposed by the Department if it is determined to meet the statutory criteria." 10 C.F.R. Part 430, Subpart C, Appendix A, section 5(E)(2) (emphasis added).

is not to allow the Secretary to skirt notice-and-comment rulemaking by exercising discretion that was not given to him to adopt a proposal that he may like but which is not supported by interested persons that are fairly representative of all relevant points of view. That is precisely what happened in the 2011 DFR and what must not be permitted to occur again.

B The "Withdrawal" Standard

Assuming a true consensus agreement is presented to the Secretary, and he determines that the recommended standard is otherwise in accordance with the criteria for prescribing a new or amended standard, he may issue a direct final rule reflecting the recommended standard and must solicit public comment for a period of 110 days. Within the ensuing 10 days following the end of the comment period, the Secretary shall withdraw the direct final rule if (i) DOE receives "1 or more adverse public comments relating to the direct final rule" and (ii) "the Secretary determines that such adverse public comments or alternative joint recommendation may provide a reasonable basis for withdrawing the direct final rule under subsection (o), section 6313(a)(6)(B) of this title, or any other applicable law."[11]

This standard is easiest to understand and apply if the "fairly representative of relevant points of view" standard is correctly applied. If all relevant points of view are fairly represented in the consensus agreement that prompts the issuance of the direct final rule, the chances of substantive adverse comments being filed are minimized; that standard was not followed in the 2011 DFR, and hence the adverse comments were substantial and substantive.

It is presumably not normally difficult to determine if 1 or more adverse public comments have been filed; the harder task is applying the second part of the test, which provides for the Secretary to determine whether "such adverse public comments or alternative joint

[11] 42 U.S.C. § 6295(p)(4)(C)(i).

recommendation may provide a reasonable basis for withdrawing the direct final rule…." Clearly, what this standard does not mean is whether the Secretary agrees with the adverse public comments, which is essentially how it was applied in the 2011 DFR proceeding. There, the Secretary indicated his disagreement with the many substantive technical arguments and then concluded that, even if these arguments were deemed correct, he would still issue the DFR because the LCC savings, while only a fraction of what was postulated in the DFR, were still positive.[12] Congress did not provide for a very limited 10-day review period of adverse public comments so that the Secretary could try during that timeframe to reinforce the justifications underlying the DFR; rather, Congress must have assumed that in the face of serious substantive objections, the Secretary, whether or not he agreed with the objections, would withdraw the DFR and proceed to notice-and-comment rulemaking.

While the facts in the 2011 DFR proceeding did not represent a close call, and thus the Secretary's refusal to withdraw was clear error under the statute, we can easily imagine that there could be situations where the adverse comments, while perhaps reflecting dearly held beliefs, do not represent valid observations under the statutory criteria by which the adverse comments are to be assessed, namely "subsection (o), section 6313(a)(6)(B) of this title or any other applicable law." In that situation, as in the case of clearly frivolous comments, the Secretary is justified in exercising his discretion to decline to withdraw the DFR because the objections "do not provide a reasonable basis" for withdrawal.

DOE states as follows in the RFI (79 FR 64,706):

> To meet this [withdrawal] standard in the 2011 DFR, DOE created a balancing test. DOE considered the substance of all adverse comments received (rather than quantity) and weighed them against the anticipated benefits of the

[12] Notice of Effective Date, 76 FR 67,047-048.

Consensus Agreement and the likelihood that further consideration of the comments would change the results of the rulemaking.

The short response is that Congress did not set up a "balancing test" and for good reason: the DOE, having convinced itself that a direct final rule meets the statutory criteria, will always resolve that balancing test in its own favor. The 2011 DFR proceeding is the perfect example: DOE wanted to publish a new furnace standard in the shortest time frame possible, and to do that it jumped on a "consensus agreement" that did not represent a consensus of all relevant points of view, and then went to great lengths in the limited 10-day review period to try to bolster its case through extra-record LCC calculations on which the public had had no opportunity to comment.[13] In other words, the Secretary was vested in a desired outcome, and the "balancing test" simply amounted to *post hoc* justification and rationalization for that desired outcome.

Given the statutory prescriptions regarding the use of the direct final rule procedure and the legislative history accompanying its enactment, there should be a presumption against the use of this procedure unless it is crystal clear that all of the criteria are met. APGA believes the direct final rule procedure can be a useful tool if used properly, which means, among other things, that the Secretary follows scrupulously each of the statutory requirements and gives the benefit of any doubt to those who comment adversely. That was not done in the 2011 DFR proceeding, and it resulted in an appeal and a vacatur, and thus rather than saving time and resources, had the opposite outcome. Hopefully, this proceeding will produce constructive changes to the Process Improvement Rule, with criteria established to reinforce the statutory limitations regarding the use of the direct final rule procedure.

[13] Notice of Effective Date, 76 FR 67,047 at note 21.

IV. CONCLUSION

APGA appreciates that DOE is proceeding with this Request for Information and respectfully requests that it consider the above comments, along with those comments in RFI Appendix A, in amending its Process Improvement Rule to address the parameters for issuance of direct final rules.

Respectfully submitted,

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