

**UNITED STATES OF AMERICA  
BEFORE THE  
DEPARTMENT OF ENERGY**

Procedures, Interpretations, and Policies for	)	
Consideration of New or Revised Energy	)	EERE-2017-BT-STD-0062-0080
Conservation Standards for Consumer Products	)	
	)	

**COMMENTS OF THE  
AMERICAN PUBLIC GAS ASSOCIATION**

The American Public Gas Association (“APGA”) submits these comments in response to the Notice of Proposed Rulemaking (“NOPR”) of the Department of Energy Office of Energy Efficiency and Renewable Energy (“DOE”) concerning its “Process Rule,”<sup>1</sup> published in the *Federal Register* on February 13, 2019 (84 Fed. Reg. 3910).

**I. SUMMARY**

APGA is the national, non-profit association of publicly owned natural gas distribution systems, with more than 740 members in 37 states.<sup>2</sup> The members of APGA serve primarily residential and commercial customers, which rely heavily on natural gas-fired furnaces and water heaters, and hence they have a direct and vital interest in both the minimum efficiency standards and the procedures used by DOE to adopt new minimum efficiency standards for such products. APGA members are 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 commitment to ensure that

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<sup>1</sup> 10 C.F.R Part 430, Subpart C, Appendix A

<sup>2</sup> Overall, there are approximately 1,000 public gas systems in the United States. Public 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.

minimum standards do not have the consequence of eliminating consumers' fuel choice decisions away from clean and economical natural gas to other less efficient and more costly energy sources.<sup>3</sup> In that vein, following DOE's RFI in December 2017, APGA both participated in the January 2018 Public Meeting and submitted comments, jointly with the American Gas Association, on March 5, 2018.

The NOPR is a monumental effort by the DOE that when finalized will improve in many ways the department's fulfillment of its responsibilities under the Energy Policy and Conservation Act of 1975, as amended ("EPCA"). APGA applauds the efforts of the DOE staff that developed such a comprehensive and transparent proposal. In the main, APGA supports the NOPR and encourages DOE to move swiftly to a final rule.

Originally established during a time of energy scarcity, and intended to encourage energy efficiency, DOE's Appliance and Equipment Standards Program ("Program"), overseen by the Office of Energy Efficiency and Renewable Energy ("EERE"), was created to establish minimum efficiency standards for certain appliances and equipment that are technologically feasible and economically justified. In its early years, the Program effectively advanced the development and availability of higher efficiency product offerings that enabled consumers to consider a range of options and purchase a product that best meets their needs. But the covered appliances and equipment in the Program have a finite efficiency level. Now the point has been reached at which much smaller incremental changes in the minimum standards will reduce customer choice and ultimately result in the use of less efficient, more costly alternatives for customers. This is because the achievement of higher incremental efficiency levels for some

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<sup>3</sup> On March 8, 2019, DOE released its forecast for the representative average unit costs of five residential energy sources for the year 2019, which again shows that natural gas remains the most affordable residential energy source, less than one-third the cost of electricity and half the cost of heating oil and propane.

covered products would require changes to building systems to which the product is connected that are outside of DOE's covered product authority.<sup>4</sup>

Moreover, over the past several years, APGA and other stakeholders have expressed serious concerns regarding the materially flawed analysis DOE has been using to justify various proposed standards under review, which APGA believes has led DOE to overstate the potential benefits associated with the proposed standard and understate the costs. As discussed further below in response to the NOPR, the flawed analysis has resulted in a proposed standard that fails to meet the economic justification requirement under the statute that governs the Program. In some cases, such as the proposal regarding residential gas furnaces, APGA maintains that DOE's flawed proposal will lessen competition by removing the choice that natural gas consumers currently have, and will likely force many consumers to use less efficient, and ultimately more costly, electric alternatives.

## **II. COMMENTS**

### **A. The Process Rule Should Be Binding**

APGA strongly supports DOE's proposal within the NOPR to make the Process Rule mandatory. By making the provisions within Process Rule binding on the agency, there will be a consistent set of procedures in place to hold DOE accountable to its own procedures, and this will increase public confidence in the fairness of the regulatory process. If not made mandatory, then even if there are improvements made to the "voluntary" guidelines, the status quo is unchanged: when the Process Rule is not followed, there are no consequences. If the Process Rule is mandatory, it is much more likely to be followed.

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<sup>4</sup> For example, achieving efficiency levels that exceed 88% Annual Fuel Utilization Efficiency ("AFUE") (fully condensing furnace) for residential natural gas furnaces requires venting systems and condensate removal equipment that furnaces below this level of efficiency do not require, resulting in increased costs in most instances.

## **B. Test Procedures**

APGA supports the proposal to require that test procedures used to evaluate proposed standards be finalized at least 180 days prior to publication of a NOPR proposing new or amended standards. In previous years, it appeared to have been common practice with EERE commencing new minimum efficiency standards before the test procedures for the product were developed and finalized. This had occurred despite the clear prohibition of the practice in the Process Rule. If stakeholders do not know the exact procedure for testing equipment to determine compliance with a proposed efficiency standard, they cannot meaningfully analyze and comment on the impact of the proposed standard.

Finalizing test procedures prior to proceeding with standards is vitally important for many reasons. First and foremost is the fact that if stakeholders do not know the exact procedure for testing equipment to determine compliance with a proposed efficiency standard, they cannot meaningfully analyze and comment on the impact of the proposed standards. Finalizing test procedures prior to issuance of a new proposed minimum standard will help ensure that: (i) the test procedure is technically correct and the results from the final test procedure clearly demonstrate the impact on the current energy efficiency rating of the covered products; (ii) the results from the final test procedure are repeatable and can be performed without any excessive burden on the manufacturer or testing facility that performs the test; and (iii) stakeholders have the opportunity to meaningfully review and comment on the standards proposal when it is made.

## **C. Negotiated Rulemaking: Ensuring Full Participation**

APGA has supported negotiated rulemaking but also sought amendment of the Process Rule to include provisions that promote and require full participation. In response, the NOPR contains a new section on negotiated rulemaking: Section 11: Negotiated Rulemaking Process. This new provision is consistent with APGA's position, and APGA urges its adoption.

In summary, the new section states that DOE will: (a) use negotiated rulemaking on a case-by-case basis and provide notice of such efforts in the *Federal Register*; (b) rely on the Negotiated Rulemaking Act and the Appliance Standards and Rulemaking Federal Advisory Committee (“ASRAC”); (c) use a “neutral independent convener” among other things to assess the “full breadth of interested parties who should be included in any negotiated rulemaking”; and (d) have a neutral and independent facilitator, who is not a DOE employee or consultant, present at all ASRAC working group meetings. APGA applauds DOE for including these critical elements.

#### **D. Direct Final Rulemaking (“DFR”): More Clarity Needed**

APGA made comments to the NOI expressing concern about the misuse of DFR, seeking standards to ensure that DFR is not misused. DOE responded by agreeing that the department has conflated negotiated rulemaking and DFR in the past and will treat them distinctly in the future. Toward that end, DOE offered explanation and clarification.

APGA requested, and the NOPR preamble provides, what it means for a joint statement to be submitted by “interested persons that are fairly representative of relevant points of view.” DOE “agrees that the rulemaking process must be as inclusive as possible,” and that, “at a minimum, ‘fairly representative of relevant points of view’ must include larger concerns and small businesses in the regulated industry/manufacturer community, energy advocates, energy utilities, as appropriate, consumers, and States.” NOPR at 3929. DOE believes the meaning of “fairly representative” should be determined on a case-by-case basis.

APGA believes that DOE either should include this guidance and interpretations in the actual final rule text or at least restate them in the final rule preamble. In response to DOE’s response for further comments on the topic, APGA offers the following.

a. “Fairly Representative of Relevant Points of View”

Under the Energy Policy and Conservation Act (“EPCA”), the DFR process is initiated by the submission of a joint statement 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.”<sup>5</sup> DOE seeks further comment on what it means for a statement to be submitted by interested persons that are “fairly representative of relevant points of view.”

In a vacuum, the phrase “fairly representative” could be interpreted to mean “somewhat representative,” “moderately representative,” or something equally as vague. Similarly, without context, “relevant points of view” could mean *some* relevant points of view, *i.e.*, more than one but not necessarily all relevant points of view, or selective points of view.

Statutory provisions, however, are not to be read in a vacuum. Rather, the statute’s text, legislative history, structure and purpose all must be examined.<sup>6</sup> The legislative history of the DFR amendment indicates that the DFR process was intended to be used only in circumstances in which representatives of *all* relevant interests jointly submit a proposed energy conservation standard for a product – *i.e.*, when there is a *clear consensus*.<sup>7</sup> In other words, all relevant points of view must be represented.

Even without this history, however, basic logic would mandate such a result. Interpreting “relevant points of view” to mean merely “some relevant points of view” would allow the DFR process to proceed if as few as two relevant points of view supported a proposal while all others

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<sup>5</sup> 42 U.S.C. § 6295(p)(4)(A).

<sup>6</sup> *Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

<sup>7</sup> *See Energy Conservation Program: Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products*, 79 Fed. Reg. 64,705, 64,708 (Oct. 31, 2014) (discussing communications from DOE to Congress requesting DFR legislation).

opposed it. That of course would fly in the face of the basic purpose of the DFR to expedite *noncontroversial* proposed standards.

In this context, therefore, it is clear that “fairly representative” means “representative in a fair way.” Given the intent of the DFR process – to avoid a time-consuming notice-and-comment rulemaking when there is already a general consensus – the “fairly representative” qualifier was intended to ensure that no single entity has a veto over the general consensus. For example, assume that a proposal that is 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 the point of view of manufacturers. Similarly, if the proposal were supported by some manufacturers but opposed by the vast majority of manufacturers, the Secretary would likewise have discretion. In other words, if there are varying views among the representatives within a particular point of view (e.g., manufacturers), then the Secretary should exercise discretion to determine whether the statutory standard is met. By contrast, if a relevant point of view is completely omitted from a proposal – or if it unanimously opposes the proposal – then the proposal is *not* fairly representative of relevant points of view.<sup>8</sup>

This approach would ensure that a single dissident or very small minority within a relevant point of view would not have veto power. At the same time, however, consistent with the statutory text and legislative history, it would make clear that DOE will not accept a joint statement that is supported by some relevant points of view but opposed by others.

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<sup>8</sup> If a relevant point of view is not represented, then DOE should know that before proceeding and should seek to determine whether that relevant point of view supports or does not oppose the joint statement. If it opposes, then the joint statement is not fairly representative of relevant points of view.

The guidance offered by DOE in the NOPR preamble appears to be consistent with this approach: “at a minimum, ‘fairly representative of relevant points of view’ must include larger concerns and small businesses in the regulated industry/manufacturer community, energy advocates, energy utilities, as appropriate, consumers, and States.” NOPR at 3929.

As for what are “relevant points of view,” EPCA parenthetically indicates that relevant persons include “representatives of manufacturers of covered products, States, and efficiency advocates.”<sup>9</sup> This, however, leaves DOE with discretion to determine which other points of view, beyond the illustrative examples, are relevant with respect to proposed efficiency standards.<sup>10</sup> DOE should be more explicit: for example, gas distribution utilities and their customers should be deemed to be relevant persons with respect to all proposed standards applicable to appliances that use gas. The NOPR preamble gets to this point but it is only guidance. NOPR at 3929. Solidifying this understanding in the actual Process Rule is preferable.

b. The “Withdrawal” Standard

The NOPR is responsive to APGA’s NOI comments. If the Secretary determines that the recommended minimum efficiency standard is in accordance with the criteria for prescribing a new or amended standard, the Secretary may issue a DFR 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 must withdraw the DFR 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

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<sup>9</sup> 42 U.S.C. § 6295(p)(4)(A).

<sup>10</sup> *See, e.g. Ariz. State Bd. for Charter Sch. v. U.S. Dep’t of Educ.*, 464 F.3d 1003, 1007 (9th Cir. 2006) (“In both legal and common usage, the word ‘including’ is ordinarily defined as a term of illustration, signifying that what follows is an example of the preceding principle.”).



reasonable basis for withdrawing the direct final rule under subsection (o), section 6313(a)(6)(B) of this title, or any other applicable law.”<sup>11</sup>

The bar for withdrawal – “*may provide a reasonable basis*” – is very low, and it is coupled with a very short review period for withdrawing the DFR. Clearly the statute was not intended to give the Secretary just 10 days to make a full, substantive ruling on objections. Nor was it intended to countenance the use of a balancing test to consider the substance of the objections and weigh them against the anticipated benefits of the consensus agreement. There is neither the time nor any statutory basis for such an analysis. Rather, the clear purpose of the 10-day window is to allow the Secretary to make an initial determination as to the facial validity of the objections and whether they provide a reasonable basis to withdraw the DFR and instead proceed to full notice-and-comment rulemaking, during which the comments can be fully analyzed.

Accordingly, APGA commented that any serious and substantive objections to a DFR that are reasonably backed by argument – even if the Secretary disagrees with them – should be deemed to provide a reasonable basis for withdrawing the DFR; and, by contrast, objections that are clearly frivolous should not.<sup>12</sup>

In response, DOE says it will head in a new direction. DOE now states that it “will look not at the quantity of comments received but rather at the substance of the adverse comment.” In contrast to previous policy, if DOE determines that a substantive comment objecting to the final rule provides a sufficient reason to withdraw the DFR, “DOE will do so, and instead proceed

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<sup>11</sup> 42 U.S.C. § 6295(p)(4)(C)(i).

<sup>12</sup> Such facially invalid comments could include, for example, objections that are not grounded in the statutory criteria for prescribing new standards.

with the published NOPR (which could include withdrawal of that NOPR, as appropriate).”  
NOPR at 3930. Amen to that.

### **E. Peer Review**

APGA supports DOE’s commitment to undertake a recurring peer review of DOE’s analytical methods at least once every 10 years. It is only through regular and thorough peer review that stakeholders can have a level of assurance that the energy conservation standards development process and analyses is based on sound scientific and economic data.

The inclusion of a process for a recurring peer review of DOE’s analytical methods is consistent with the regulatory guidelines established by the Office of Management and Budget (“OMB”) that require a peer review of any changes to scientific data and/or methodologies used in the development of rules or regulations. Further, the Final Information Quality Bulletin for Peer Review of OMB (“OMB Bulletin”) requires each federal agency to conduct a peer review of all influential scientific information that the agency intends to disseminate. The term “influential scientific information” means scientific information that the agency reasonably can determine does or will have a clear and substantial impact on important public policies or private sector decisions. In turn, “scientific information” includes “factual inputs, data, models, analyses, technical information, or scientific assessments based on the behavioral and social sciences, public health and medical sciences, life and earth sciences, engineering, or physical sciences.” The information in the Technical Support Documents (“TSDs”), upon which DOE relies in its proposed and final appliance and equipment standards is indisputably “influential scientific information” that DOE has disseminated, as determined by DOE itself.<sup>13</sup>

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<sup>13</sup> See Energy Conservation Standards Rulemaking Peer Review Report (“2007 Peer Review Report”) at 6 (Feb. 2007) (available at <https://energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-reviewreport-0> ).

#### **F. Transparency in the Rulemaking Process: Proprietary Data**

The NOPR states that DOE is “interested in comments regarding the Department’s handling and use of proprietary data.” NOPR at 3937. With regard to the open and transparent rulemaking process, APGA in recent years has voiced strong concerns about the lack of transparency in regard to the manner in which the rulemaking for residential furnace efficiency standards has been handled. Specifically, in the furnace rulemaking initiated in 2015, DOE relied on proprietary data from two privately authored American Home Comfort studies in its life cycle costs calculation. To view this data, APGA was required to purchase the studies at a cost of \$15,000 and retain expert consultants to analyze the data. What this data actually revealed contradicted what DOE asserted it showed.

It is APGA’s position that proprietary data should not be utilized in a DOE rulemaking unless that data is made available to the public at no cost and without limitations as to its use in the rulemaking. The perils of an agency relying on such data have been demonstrated in the furnace rulemaking proceeding where stakeholder analysis of the proprietary data showed that it rebutted, rather than supported, the point DOE was seeking to make. Importantly, APGA is not suggesting that DOE release commercially sensitive, manufacturer specific information, but rather aggregate market data it relies on for establishing minimum efficiency standards.

#### **G. Improvements in DOE Analytical Methodologies and Models**

DOE states in the summary of its NOPR that it “continues to think about potential changes to its analytical methodologies and models for assessing the costs and benefits of appliance standards rulemakings.” NOPR at 3911. *See* NOPR 3936-3940. APGA continues to believe that this focus—including the peer review process (discussed above), proprietary data, and DOE’s analytical methodologies—is extremely important. APGA applauds DOE’s commitment to conducting an expert independent peer review of its assumptions, models, and

methodologies while also rendering a recurring peer review of DOE's analytical methods at least once every 10 years and "in the immediate future." DOE is exactly correct when it observes that although these labors are demanding, there should be a time and resource savings when the review demonstrates clearly that a new standards rulemaking is unlikely to yield significant energy savings.

APGA respects DOE's need for more time given the range of the NOPR, but continues to urge further action soon. APGA believes that EERE's energy efficiency modeling is too complex and burdensome, so we have advocated replacing the current complex life-cycle-cost analysis with a simple payback analysis based on "real numbers".

#### 1. "Walk Down" Approach

Over the past several years, APGA and other stakeholders have expressed serious concerns regarding the materially flawed analysis DOE has been using to justify the proposed standard under review, which APGA believes has led DOE to overstate the potential benefits associated with the proposed standard and understate the costs. The flawed analysis has resulted in a proposed standard that fails to meet the economic justification requirement under the statute that governs the Program.<sup>14</sup> In fact, in many cases, the market is working without a rule and the practical effect of a proposed rule's new minimum standards would be that consumers either are forced by the government to make an uneconomic choice (*i.e.*, they would incur a net cost to purchase a new appliance), or they would switch from natural gas to an alternative that, on a full fuel basis, is less efficient.

DOE's proposal to move away from the "walk down" approach (NOPR at 3938) is responsive to APGA's concerns. APGA agrees that the most logical way to determine if a particular

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<sup>14</sup> In fact, technical analysis has been provided in several proceedings demonstrating that if DOE made reasonable and rationally-based corrections to key methodological and data flaws, the proposed standard would result in an increase in the life-cycle cost on a national basis.

consumer option is “economically justified” is to compare it to the full range of available consumer choices. Accordingly, APGA supports requiring determinations of economic justification to consider comparisons of economically relevant factors across trial standard levels.

## 2. Retrospective Reviews

APGA has advocated routine retrospective reviews. In the past DOE has not interpreted its mandate to require whether the prior standard was efficacious despite that being the common-sense starting point. DOE’s general response in the NOPR is that (a) it has only so many resources available; (b) it will continue to evaluate retrospective reviews; and (c) reforming the Process Rule is an overall retrospective review. DOE states that it “will be seeking input in what effectively amounts to a retrospective review of the impact and effectiveness of its most recent regulatory action for the product at issue.” NOPR at 3940. This is responsive to APGA’s concerns, and it can agree that the proposed Process Rule reform will address the concern as well.

## 3. Specific Modeling Reforms

APGA encourages DOE to make changes to its current modeling processes. Specifically, there is a fundamental flaw in EERE’s Life-Cycle Costing (“LCC”) analyses and Monte Carlo risk assessment that relies upon false assumptions wherein consumers do not make economically rational choices. Instead, DOE’s models randomly “assign” installation or use scenarios without regard to the economic consequences of the installation. This implies that purchasers of a piece of equipment never consider the economics of their purchases (including initial cost, maintenance cost or cost of operation). The result is rules and standards that do not represent the actual market or consumer choice.

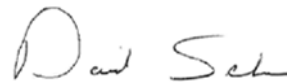
It is our view that an economic decision-making process should be utilized wherein DOE’s model would put the type of appliance that made economic sense in each home. This

appropriate starting point would allow for a more accurate calculation of the benefits and costs associated with a proposed rule. The views of today's and tomorrow's consumers must be taken into account accurately. To do so, for purposes of LCC analysis: (a) DOE should assume that a standard would have no adverse impact on product sales; (b) DOE should use marginal energy prices actually paid by consumers to estimate the savings that energy efficiency improvements would provide; and (c) DOE should collect and consider market data on actual product installation and maintenance costs.

### **III. CONCLUSION**

APGA appreciates the opportunity to submit comments on the NOPR and respectfully request that DOE consider the above comments.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Dave Schryver", is positioned above a horizontal line.

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