Before the

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

COMMENTS OF THE AMERICAN GAS ASSOCIATION, THE AMERICAN PUBLIC GAS ASSOCIATION, SPIRE INC., AND SPIRE MISSOURI INC.

In response to the Request for Comment Entitled
Energy Conservation Program: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment

86 Fed. Reg. 18901 (April 12, 2021)
Docket No. EERE-2021-BT-STD-0003
RIN 1904-AF13

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I. Introduction

The American Gas Association (AGA), the American Public Gas Association (APGA), and Spire Inc. (Spire), collectively referred to as "Commenters," appreciate the opportunity to comment on the above-captioned notice of proposed rulemaking (NOPR) concerning revisions of its "Process Rule."[1]

AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 76 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent — more than 72 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than thirty percent of the United States' energy needs.

APGA is the trade association for approximately 1,000 communities across the U.S. that own and operate their retail natural gas distribution entities. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies, all locally accountable to the citizens they serve. Public gas systems provide safe, reliable, and affordable energy to their customers and support their communities by delivering fuel to be used for cooking, clothes drying, and space and water heating, as well as for various commercial and industrial applications.

Spire Inc. and Spire Missouri Inc. (collectively "Spire") are in the natural gas utility business. Spire Inc. owns and operates natural gas utilities that distribute natural gas to over 1.7 million residential, commercial, and institutional customers across Missouri, Alabama, and Mississippi, and Spire Missouri Inc. is the largest natural gas utility serving residential, commercial, and institutional customers in Missouri.

Natural gas utilities are critical stakeholders in rulemakings concerning standards for products that use natural gas, including the procedures used by DOE to adopt these standards, and support energy efficiency, including cost effective efficiency improvements, for natural gas products. Overall, as a recent study found, natural gas utilities invested $3,800,000 per day in energy efficiency programs in 2018.[2] The study found that, in 2018, natural gas utilities funded 132 natural gas efficiency programs in the U.S. and Canada for a total of $1.47 billion—an eight percent jump from 2016 and a 20 percent rise since 2012.[3] These programs help customers install tighter-fitting windows and doors, better insulation and purchase increasingly more efficient natural gas appliances.[4] Natural gas utilities spent one-quarter of their budget ($365.34 million) on low-income efficiency programs, assisting over 214,581 participants in 2018.[5] Additionally,

[1] *See* 10 C.F.R Part 430, Subpart C, Appendix A.
[2] Natural Gas Efficiency Programs (2018 Program Year), available at https://www.aga.org/research/reports/natural-gas-efficiency-programs-2018-program-year/.
[3] *Id*.
[4] *Id*.
[5] *Id*.

more than 66,000 commercial customers, and upwards of 72,000 industrial program customers were enrolled in natural gas efficiency programs in 2018.[6]

Commenters 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 minimum standards do not have the consequence of eliminating consumers' choice to use clean and economical natural gas by imposing unjustified costs on consumers or depriving them of gas-fired products that are suitable for their needs. Such standards are not authorized by statute and would be harmful both to natural gas utilities' interests and those of the consumers they serve. Commenters have a direct and vital interest in both the minimum efficiency standards and the procedures used by DOE to adopt new minimum efficiency standards and have consistently engaged in efforts to revise the Process Rule, including through its recently finalized changes in 2020. Accordingly, we offer these comments in response to the newly proposed revisions.

II. Comments

Over the last several years, there were substantial efforts to revise DOE's Process Rule to address serious stakeholder concerns about DOE's standards development process. There was strong stakeholder support for these efforts and generally for the results they achieved.

Now, DOE effectively proposes to wipe the slate clean, suggesting that some of the solutions might be excessive or that there may be circumstances in which they could be problematic. The result would be to restore the *status quo ante* that had been the source of so much stakeholder dissatisfaction. Commenters respectfully submit that a more tailored approach to concerns about the Process Rule would be more constructive. At a minimum, DOE should ensure that it does not address concerns about recent Process Rule revisions in a way that ignores the underlying problems that animated them.

A. The Process Rule Should Be Binding

Commenters strongly oppose DOE's proposal to make the Process Rule non-binding. Rules are a means to provide the consistency and transparency needed to ensure public confidence in the fairness and integrity of the regulatory process. To serve that purpose, however, rules must be followed.

It is an important tenet of administrative law that a federal agency must adhere to its own policies, rules, and regulations. Failures to do so disrupt the orderly processes and harm the predictability that are the hallmarks of lawful administrative action.[7]

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[6] *Id*.

[7] *See, e.g.*, *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) ("[I]t is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned . . . for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life."); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796

In 2016, the Process Rule was of little value to anyone. DOE frequently ignored it, to the frustration of stakeholders bewildered to see the text of a "rule" appearing in the C.F.R. being dismissed so lightly.

In 2017, there was an impetus to turn the Process Rule into something useful: a vehicle to resolve systemic concerns about DOE's standards rulemaking process. For the Process Rule to serve that purpose, however, it had to provide rules that DOE would be obliged to follow; in short, it had to become *enforceable*. Amendments followed, resulting in the Process Rule as it now exists: a rule that – however imperfect – is at least an actual rule that could be usefully revised going forward.

Now there is an impetus to neuter the Process Rule by reversing the changes that made it enforceable. This would be a serious mistake.

Everyone actively involved in efficiency regulation knows what happens when the Process Rule is unenforceable: it becomes a dead letter that need not even be acknowledged in the breach. That is exactly what the Process Rule had become by 2016. That outcome was not necessary to ensure that the requirements of the Rule would not be overly restrictive because, at that time, Section 14(a) of the Rule expressly allowed deviations from the Rule's requirements if DOE explained why such deviations were "necessary or appropriate in a particular situation." That approach should have provided both the flexibility DOE needed and at least some measure of transparency and accountability. Unfortunately, that provision of the rule failed in its purpose beacuse the Process Rule had a fatal flaw: a provision (then Section 14(c)) designed to make the Process Rule completely unenforceable. The practical result was that the Process Rule provided no rules at all.

It should go without saying that it is a bad idea for agencies to have "rules" that they can casually flout. At best, any failure to "play by the rules" looks bad and erodes trust even when there is fine print effectively depriving the "rules" of any legal force. A "Process Rule" published in the C.F.R. should not be something that can be dismissed as (to quote Captain Barbossa) "more what you'd call 'guidelines' than actual rules." Moreover, the "optics" involved are not the only issue: "actual rules" can be counted on to resolve issues; by contrast, "guidelines" cannot be relied upon at all.

Concerns that an enforceable Process Rule would be unduly rigid can easily be addressed without resorting to a provision that would ensure the Rule can require nothing at all. After all, it is only the requirements of a rule that are enforceable, and what a rule requires is defined – and can be limited as appropriate – by the language and structure of its substantive provisions. There are surely some things that should be required, others that should be required in the absence of some specific reason why they should not be, and others that should not be stated as requirements at all. Distinctions of this kind can be drawn if the Process Rule is enforceable, but *only if the Rule is enforceable*. Such distinctions are meaningless in a "rule" that – because it is unenforceable – cannot require anything at all. If there are to be any rules, the Process Rule must be enforceable. If it is not, DOE should stop calling the Process Rule a "rule."

F.2d 533, 536 (D.C. Cir. 1986) ("It is axiomatic that an agency must adhere to its own regulations."); *Mine Reclamation Corp. v. FERC*, 30 F.3d 1519, 1524 (D.C. Cir. 1994) (an agency must follow its own regulations).

Commenters urge DOE to retain the Process Rule as an enforceable rule. If there are particular requirements of the Rule that are overly rigid – and that does appear to be the case – the appropriate solution is to revise those requirements (an approach DOE has proposed to take in a number of cases) or provide exceptions in appropriate circumstances. What DOE should *not* do is recreate the fatal flaw that previously caused the Process Rule to be treated as a nullity.

B. Test Procedures

Commenters opposes the proposal to revoke the requirement that test procedures used to evaluate proposed standards be finalized prior to publication of a NOPR proposing new or amended standards. 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. In previous years, it appeared to have been common practice for DOE to commence new minimum efficiency standards rulemakings before the test procedures for the product were developed and finalized. Disappointingly, this practice had occurred despite the clear prohibition of it by the Process Rule.

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 with sufficient time 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. Significant Savings of Energy

Commenters urge DOE to maintain a threshold that clearly delineates what constitutes a "significant savings of energy." As other public commenters noted during DOE's public webinar discussing this NOPR,[8] DOE never utilized the recently updated Process Rule for any appliance efficiency rulemaking. Yet the agency is now proposing to remove the untested new significant savings of energy threshold in the current NOPR. Utilizing a clear threshold will ensure consistency and transparency in rulemakings and will provide an aspect of certainty for those who are preparing to ultimately comply with new appliance efficiency rulemakings. Before any changes are made to this threshold, including its potential revocation, Commenters ask that DOE analyze previous appliance efficiency rulemakings to provide context and a transparent rationale for the threshold value (or lack thereof) it ultimately applies to future rulemakings.

[8] Transcript of DOE Public Webinar re: Process Rule – Part 1, Notice of Proposed Rulemaking (Apr. 23, 2021) available at https://www.regulations.gov/document/EERE-2021-BT-STD-0003-0009.

D. Negotiated Rulemaking: Ensuring Full Participation

Commenters have supported negotiated rulemaking but also sought prior amendment of the Process Rule to include provisions that promote and require full participation. The current Process Rule contains a section on negotiated rulemaking: Section 11: Negotiated Rulemaking Process, which is consistent with Commenters' position. Unfortunately, the current NOPR proposes to remove this section; accordingly, Commenters urge DOE not to adopt this proposed change.

In summary, the current 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. These are critical elements that Commenters believe must be maintained in the Process Rule.

E. Direct Final Rules

In the NOPR, DOE also proposes to walk back clarifications and requirements provided to the direct final rule ("DFR") process in the 2020 Process Rule final revisions. These clarifications and requirements are appropriate and necessary, as DOE has previously acknowledged that it has conflated negotiated rulemaking and DFR in the past and must treat them distinctly in the future,[9] which the 2020 revisions would aid in. The NOPR explains that some of these clarifications and requirements may not be applicable to all rulemakings. Instead of introducing unsuitable levels of deference, which will reduce consistency and transparency of these rulemakings, DOE could instead permit divergence from the requirements when appropriately substantiated by the agency. Any DFR and DFR process should be consistent with the Energy Policy and Conservation Act and the Administrative Procedure Act. Since a DFR is done without prior notice and comment, it is essential that such a rulemaking process only be used when an agency deems a rule to be routine or noncontroversial in accordance with the relevant statutory requirements.

F. Other Comments

As noted above, Commenters have consistently engaged in DOE's efforts to revise the Process Rule and have submitted comments requesting changes addressing a number of issues.[10] While these issues are not addressed in DOE's current proposal, Commenters encourage DOE to consider certain additional matters as it further revises the Process Rule. For example, Commenters believe that the Process Rule should specify 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

[9] 84 Fed. Reg. 3910 (Feb. 13, 2019).

[10] Comments from APGA in response to DOE's February 13, 2019 Notice of Proposed Rulemaking (84 Fed. Reg. 3910) to revise the Process Rule (May 6, 2019) ("APGA May 2019 Comments") available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0062-0106. *See also* Comments of the American Gas Association in response to DOE's February 13, 2019 Notice of Proposed Rulemaking (84 Fed. Reg. 3910) filed on May 6, 2019 ("AGA May 2019 Comments") available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0062-0114.

its use in the rulemaking[11] and address a number of other previously stated concerns regarding DOE's analytical methodologies and models used in appliance efficiency rulemakings.[12]

To ensure transparency with all stakeholders, the Process Rule should also include a requirement for DOE to hold public workshops that would clearly define the consumer categories that will be impacted by the rulemaking (*i.e.,* homeowner, renter, building owner, manufactured homeowner, *etc.*) and to establish and make publicly available the economic criteria that will be used in the minimum efficiency rulemaking decision-making for these various consumer categories. Additionally, the Process Rule should require DOE to identify the specific modeling approach that it has used (or will use) in its modeling method and that the model be made publicly available so that all stakeholders can have the ability to conduct the analysis and confirm the results that DOE issues.

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Commenters appreciate the opportunity to submit comments on the NOPR and respectfully request that DOE consider the above comments. If you have any questions regarding this submission, please do not hesitate to contact us.

[11] APGA May 2019 Comments at Section F. *See also* AGA May 2019 Comments at Section VI.L.1. ("AGA supports making all analysis and models utilized in the standard setting process available to the public, to the extent permitted by law.").

[12] APGA May 2019 Comments at Section G. *See also* AGA May 2019 Comments at Sections VI.L. and M, and Comments of the American Gas Association in response to DOE's *Notice of Data Availability*, 84 Fed. Reg. 36037 (July 26, 2019) filed on August 30, 2019, available at https://www.regulations.gov/comment/EERE-2017-BT-STD-0062-0157.

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