

**Comments to the Department of Justice
Regarding Competitive Impact of Proposed Rule
in Department of Energy Docket No. EERE-2014-BT-STD-0031**

**Submitted by the
American Public Gas Association
and
American Gas Association**

The American Public Gas Association (APGA) and the American Gas Association (AGA) (jointly, the Associations) submit these comments to the Department of Justice (DOJ) regarding the anti-competitive effects of the Supplemental Notice of Proposed Rulemaking (SNOPR) issued by the Department of Energy (DOE) and published in the *Federal Register* on September 23, 2016 (81 Fed. Reg. 65720), which proposes energy efficiency standards for residential furnaces. In summary, the SNOPR will lessen competition by removing the choice that natural-gas using consumers currently have, and will likely force many consumers to use less efficient, and ultimately more costly, electric alternatives. DOE does not deny that such fuel switching will happen. (81 Fed. Reg. 65730).

APGA is the national trade association of publicly-owned natural gas distribution systems. There are over 730 members of APGA, ranging in size from Philadelphia, PA and Memphis, TN, to scores of much smaller communities in 36 states; collectively, they serve millions of customers, mostly residential, whose primary loads are winter-heating loads. APGA and its members are strong supporters of energy efficiency; however, they do not support energy efficiency measures that cause market failures and lessen competition through fuel switching, which is the case here.

AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 72 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent — just under 69 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.

The Energy Policy and Conservation Act (EPCA) directs the Attorney General to determine the impact, if any, of the lessening of competition likely to result from a proposed standard and to transmit such determination to the DOE Secretary within 60 days of the publication of a proposed rule, along with an analysis of the nature and extent of the impact. 42 U.S.C. § 6295(o)(2)(B)(ii). Based on the *Federal Register* publication date, the DOJ response is due on or before November 23, 2016. The SNO PR further provides for public comments on the competitive impact of the proposed standards to be sent to the DOJ by November 22, 2016 (81 Fed. Reg. 65720). Given this, the DOJ will have little opportunity to review the public comments before submitting its competitive impact determination to the DOE. Consequently, the Associations are submitting these comments well before the November 22 deadline.¹ In addition, the Associations urge DOJ to lodge a placeholder with DOE on the issue of competitive impacts at the 60-day mark, as DOJ cannot properly or fully address the competitive impacts of the proposed rule until after it has had the opportunity to review the comments filed by APGA and AGA, along with the technical report of their consultant, the Gas Technology Institute (GTI).

We note that DOE has provided DOJ with the SNO PR and the accompanying Technical Support Document (TSD) (81 Fed. Reg. 65828), which cannot be adequately assessed by DOJ without also reviewing the technical report of GTI. GTI submitted a technical report regarding the DOE Notice of Proposed Rulemaking (NOPR) issued in this proceeding on March 12, 2015, 80 Fed. Reg. 13120 (2015), pointing out significant and fatal flaws in the underlying science used by DOE to justify the proposed rule (that report is submitted along with these comments). Subsequent to the issuance of the SNO PR, GTI is in the process of updating its technical analysis, which will be delivered to DOJ at the time it is filed with comments submitted to DOE on November 22, or the applicable comment period deadline if pending extension requests are granted. The Associations believe that DOJ must review the critical data provided by the

¹ Note, the Associations as well as other parties have pending requests to DOE to extend the comment period. Most recently, on October 28, 2016, the Associations made a Supplemental Request to Extend the Comment Period on the SNO PR to a total period of 120 days, until January 23, 2017.

Associations and others in their filings in order to assess the competitive impact. Thus, as stated above, it is important that DOJ lodge a placeholder with DOE on the competitive impact issues because DOJ cannot properly or fully address the competitive impacts of the proposed rule until after it has had the opportunity to review and consider the comments and associated technical analyses filed by stakeholders in the proceeding.

The SNOPR and the materials underlying it are immense in volume² and require substantial and detailed analysis by stakeholders, like the Associations. The SNOPR is predicated on the above-referenced March 2015 NOPR, and the subsequent September 2015 Notice of Data Availability (NODA), 80 Fed. Reg. 55038 (2015). To understand and analyze the changes proposed in the SNOPR, the Associations must review, analyze and compare the data provided in the SNOPR with the data provided in the March 2015 NOPR and September 2015 NODA. The Associations are working to complete as much of their analysis of the SNOPR as possible within the limited amount of time afforded by DOE, and they will submit comments to DOE by the November 22, 2016 deadline specified in the SNOPR, or the applicable comment period deadline if pending extension requests are granted, with copies to the Attorney General. However, while the updated analysis to be filed with DOE on the SNOPR is not complete, it is readily apparent at this stage of our SNOPR review that the flaws inherent in the NOPR and the NODA analysis are also present in the SNOPR. DOE has chosen to perpetuate rather than address these flaws in the SNOPR, so the problems inherent in those prior issuances persist, including the adverse effect on competition.

The views of DOE's key consultants on energy efficiency matters at the national laboratories are set forth in numerous studies.³ DOE appears to be following a path to

² The SNOPR itself is almost 500 pages, the TSD regarding the SNOPR is almost 1200 pages, and the spreadsheets supporting the TSD are over 6000 pages.

³ See, e.g., Lawrence Berkeley National Lab (LBNL): "[Aggressive Efficiency and Electrification Needed to Cut California Emissions](#)"; Energy and Environmental Economics, Inc. (E3) and the Deep Decarbonization Pathways Project (DDPP): "[Policy Implications of Deep Decarbonization in the United States](#)" [This report builds on results from an earlier report, Pathways to Deep Decarbonization in the United States (DDPP, 2014), conducted by E3 in collaboration with LBNL and PNNL for the DDPP, an international consortium of research teams studying pathways to deep decarbonization in sixteen of the world's highest-emitting countries]; E3 in collaboration with LBNL and PNNL, "Pathways to Deep Decarbonization." LBNL has

decarbonization via rulemakings that ban non-condensing natural gas appliances, in favor of more costly condensing equipment that cannot replace non-condensing equipment without substantial and costly installation work, including replacement of the existing venting system.⁴ The Associations believe that the record demonstrates that, due to the up-front cost (price and installation) of replacement natural gas condensing equipment (as compared to the non-condensing alternative), many consumers, particularly those in middle and lower income brackets, will be economically forced into selecting less efficient, albeit with potentially lower up-front cost, electric alternatives. Additionally, the impact of such a conversion may go further. It would also likely impact the continued use of natural gas water heaters as they are typically jointly vented with natural gas non-condensing furnaces. In the long run, however, these less efficient non-natural gas alternatives will be more expensive and result in higher energy consumption. In effect, DOE's proposal removes natural gas furnaces from being an alternative choice for energy consumers as well as competitive constraints on the electric sector of the energy industry. The Associations submit that DOE fails to consider the negative impact on consumers that will result from the SNOPR's elimination of natural gas as an alternative heating source for many.

In the subject proceeding, DOE is proposing a new minimum furnace efficiency standard that the Associations believe will act to prohibit most consumers from being able to choose to replace their existing non-condensing natural gas furnace with another non-condensing natural gas furnace. Faced with the potentially significant costs of converting to a condensing natural gas

performed all of the spadework on the various furnace TSDs and the associated spreadsheets, and it is those spreadsheets that contain the underlying and uncorrected scientific flaws. We are attaching hereto, and incorporating by reference, the comments to DOJ of Spire, Inc. (Spire) in the DOE proceeding on proposed energy conservation standards for commercial water heating equipment (Docket No. EERE-2014-BT-STD-0042) in which Spire documented how "DOE is increasingly seeking to limit consumer appliance and energy choices by adopting energy conservation standards for gas heating equipment that can only be achieved through the use of condensing technology." (Spire Comments at 1.)

⁴ The companion rulemakings to this one include Energy Conservation Standards for Commercial Packaged Boilers, Docket No. EERE-2013-BT-STD-0030; and Energy Conservation Standards for Commercial Water Heating Equipment, Docket No. EERE-2014-BT-STD-0042.

furnace,⁵ many such affected customers will choose to switch to electricity. DOE has accomplished this outcome by proposing to adopt a large furnace minimum Annual Fuel Utilization Efficiency (AFUE) standard of 92%, which can only be met by condensing natural gas furnaces. DOE has proposed an exception to this standard for consumers whose furnace input capacity is at or below 55,000 Btu/hour; however, this only accounts for about 10% of existing furnace owners.⁶

There are serious technical flaws in the SNOPR analysis that render its rationale for the proposed 92% standard and small furnace exception unacceptable, *i.e.*, correction of the technical flaws noted below turns positive life-cycle cost (LCC) savings to negative savings. The two key technical flaws the Associations have identified in the SNOPR were also present in the NOPR and NODA analysis, and include: (i) the reliance on random assignment rather than economic decision-making to establish the homes that would be impacted by the SNOPR, which results in greatly overstated LCC savings, and (ii) the reliance on a flawed fuel switching analysis that inappropriately ignores more granular data showing that tolerable payback periods are a function of income and are dominated by large numbers of very low tolerable payback periods with small numbers of much larger payback periods, the effect of which is to undermine DOE's fuel switching conclusions (and also further undermine the putative LCC savings in the NOPR, NODA, and SNOPR).

These flaws are discussed in detail in APGA and AGA's NOPR comments (and the accompanying technical report of GTI), which, as noted, are submitted with this letter. Among the GTI Report's findings, it demonstrates that if these critical flaws are addressed, the putative LCC savings of a 92% AFUE standard of \$277 in the North and \$336 in the South are really **negative** LCC savings of \$131 and \$237, respectively, with more consumers in the North and South experiencing a net cost than a net benefit.⁷ The updated GTI Report on the SNOPR,

⁵ The Associations believe that many homeowners living in apartments, town homes, and row-houses likely will face structural barriers to installing condensing furnaces that will force them into options that will be economically burdensome, and less energy efficient, in the longer term.

⁶ SNOPR, Table IV.12, 81 Fed. Reg. 65771.

⁷ GTI NOPR Report at Tables 5 and 6, pages xv and xvi. This GTI Report is attached for the convenience of the DOJ.

which will be provided to DOJ by the SNOPI comment deadline, will also demonstrate that the negative LCC savings of the 92% AFUE standard do not change appreciably with the proposed small furnace exception, as so few consumers qualify for that exception.

The refusal of DOE in the SNOPI to address prior comments in this proceeding to correct its analysis to reflect economic decision making and more granular fuel switching data, or to even submit its flawed scientific approaches to peer review, is deeply concerning. The failure to review or even consider making corrections to the significant flaws that the Associations have extensively discussed in their comments on the NOPR will result in a rule that is not economically justified and will impose significant economic burdens on far too many American consumers. The correction of these basic flaws render the SNOPI proposal uneconomic and hence unacceptable under the economic feasibility standards of the EPCA (42 U.S.C. § 6295(o)(2)(B)(i)(I)).⁸ The Attorney General must not base a finding regarding the SNOPI's impact on competition without reviewing the comments demonstrating the flawed science on which the SNOPI proposals rely, or this review exercise to determine competitive impacts becomes meaningless.

The Attorney General also needs to understand that the record shows that the furnace market is working *without a rule*. Hence, the practical effect of the proposed rule's new minimum standards will be that consumers either are forced by the government to make an uneconomic choice (*i.e.*, they will incur a net cost to purchase a condensing furnace), or they will switch from natural gas to a less efficient electric alternative. The extent to which the market is working *without a rule* is demonstrated by the data in the SNOPI TSD. It shows that in 2022, the year the furnace rule would become effective, approximately 74% of all replacement furnaces and 70% of all new furnaces in the North will be condensing furnaces – a number that (on a combined basis) will reach 90% by 2050;⁹ and in the South replacement market,

⁸ DOJ should also be mindful of the fact that the results of the flawed DOE economic model on life-cycle costs transfer directly to DOE's national impact analysis, which renders the putative energy savings and national benefit numbers shown in the SNOPI without factual basis.

⁹ TSD Appendix 8I, Table 8I.4.7 (page 8I-11) and Figure 8I.5.1 (page 8I-12). Table 8I.4.1 (page 8I-6) shows that in 2022 in the northern replacement market, without any rule there will be 95% saturation of condensing furnaces in States like CT, ME, NH, RI, VT, PA, WI, IA, MN, ND, SD, and WV.

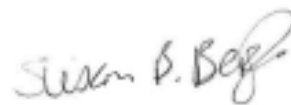
approximately 86% of the replacement furnaces and 87% of new home furnaces in 2022 will be of the non-condensing variety, with that number (on a combined basis) to drop to approximately 40% in 2050.¹⁰ In other words, in the North where it makes economic sense to purchase a condensing furnace, and to incur the related installation costs, due to the heating load and resulting operating cost savings, consumers are making rational economic decisions and doing just that in huge numbers. In the South, on the other hand, where operating cost savings are more marginal, consumers are making the choice to do what economically works for them, which may not be to purchase a condensing furnace – the result mandated by the SNO PR (except as to the small fraction of consumers that find a very small furnace adequate). In short, consumers will make the economically rational choice when given alternatives. The residential heating (and associated water heating) markets should be allowed to work through the continued existence of competition and consumer choice.

DOE is proposing a rule in the SNO PR that is not needed, as the furnace market is functioning efficiently because of the presence of competition, and not economically supportable. The Associations believe that the SNO PR proposal unnecessarily restricts competition and reduces consumer choice by forcing a significant number of consumers to forego their natural gas furnace for a less efficient electric product, thereby mandating market failures. The Associations request that the Attorney General inform DOE that the SNO PR does not meet the EPCA standards set forth in 42 U.S.C. § 6295(o)(2)(B)(ii).

Respectfully submitted,



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¹⁰ *Id.*