

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN PUBLIC GAS ASS'N,
Petitioner,

v.

UNITED STATES DEPARTMENT OF
ENERGY, et al.,
Respondent.

No. 11-1485

**JOINT MOTION OF PETITIONER AND RESPONDENT
TO VACATE IN PART AND
REMAND FOR FURTHER RULEMAKING**

Pursuant to FRAP 27 and this Court's Circuit Rule 27, petitioner American Public Gas Association (APGA) and respondent Department of Energy (DOE) hereby jointly move this Court to enter an order implementing a settlement agreement that resolves the dispute between the parties. APGA and DOE agree that this Court should vacate in part the rule under review in this case and remand to DOE for notice-and-comment

rulemaking concerning the vacated portion of the rule. The reasons for this motion, and the details of the parties' request, are set forth below.

APGA and DOE have engaged in settlement negotiations, which have led the parties to reach agreement on the terms of a settlement described herein. The key, and dispositive, term of settlement calls for the parties jointly to move this Court for an order vacating in part the rule under review (including the subsequent notice of effective date), and remanding for further rulemaking by DOE. Specifically, APGA and DOE hereby request that the Court enter an order that:

(1) vacates the direct final rule, 76 Fed. Reg. 37408 (June 27, 2011), and notice of effective date, 76 Fed. Reg. 67037 (Oct. 31, 2011), as they relate to energy conservation standards for non-weatherized gas furnaces, including but not limited to DOE's determination that such furnaces constitute a single class of products for purposes of 42 U.S.C. §§ 6295(q)(1)(B), 6295(o)(4); and (2) remands to DOE for notice and comment rulemaking in accordance with the Energy Policy and Conservation Act (EPCA).

STATEMENT

This petition for review challenges a direct final rule issued by DOE on June 6, 2011, 76 Fed. Reg. 37408 (June 27, 2011), codified in 10 C.F.R.

§ 430.32, which became effective following a final order – the notice of effective date – issued by DOE on October 24, 2011, 76 Fed. Reg. 67037 (Oct. 31, 2011). APGA filed its petition for review on December 23, 2011. The parties have completed briefing; oral argument has not been scheduled. This Court has held proceedings in abeyance pending mediation.

APGA and DOE have agreed on final terms of a settlement of this case. In the parties' agreement, and in this motion, the term "non-weatherized gas furnaces" includes mobile home gas furnaces (other than weatherized furnaces). See 42 U.S.C. §§ 6291(20), (22), (23), (28), 6295(f). Energy conservation standards include the standards governing electrical power consumption in standby and off modes, as well as the Annual Fuel Utilization Efficiency (AFUE) standards. See 42 U.S.C. §§ 6291(20), 6295(gg).

ARGUMENT

APGA has challenged the energy conservation standards for non-weatherized gas furnaces set forth in the direct final rule under review. APGA has raised arguments concerning the substance of the standards, as

well as the procedure that led to their adoption by DOE. In light of those arguments, DOE has concluded that it is appropriate to undertake new rulemaking proceedings to consider the appropriate standards and provide an opportunity for APGA and others to offer additional comments concerning any proposed standards.

DOE has agreed to proceed with notice-and-comment rulemaking to consider energy conservation standards for non-weatherized gas furnaces. Such a rulemaking proceeding requires first that the relevant portion of the rule under review – the direct final rule itself, as well as the notice of effective date – must first be vacated in relevant part.¹ The dispute between APGA and DOE concerns the standards for non-weatherized gas furnaces, and the agency’s analysis and conclusions leading to the adoption of those standards. But the direct final rule also established energy

¹ EPCA does not permit DOE to set energy conservation standards that “increase the maximum allowable energy use *** of a covered product.” 42 U.S.C. § 6295(o)(1). Thus, unless the Court vacates the standards for non-weatherized gas furnaces set forth in the rule under review, the agency would be prohibited from adopting any new energy conservation standards unless they were more stringent than those in the direct final rule.

conservation standards for other furnaces, central air conditioners, and heat pumps. APGA and DOE have agreed that any vacatur should be limited to the portions of the direct final rule and the notice of effective date that relate to energy conservation standards for non-weatherized gas furnaces.²

The contemplated rulemaking on remand would provide a forum for DOE to consider the concerns of all interested parties, including APGA. In the course of that rulemaking proceeding, DOE and any commenters (including APGA) would not be limited by the direct final rule procedure set forth in 42 U.S.C. § 6295(p)(4)(A). DOE will proceed as expeditiously as possible on remand, consistent with building a full and fair record on all relevant issues, and it anticipates being able to issue a notice of proposed

² Among the considerations that relate to energy conservation standards for non-weatherized gas furnaces, the agreement between APGA and DOE specifically indicates that an order of vacatur by this Court would encompass DOE's determination that such furnaces constitute a single class of products for purposes of 42 U.S.C. §§ 6295(q)(1)(B), 6295(o)(4), an issue that APGA raised in the proceedings below, as well as in its briefing before this Court.

rulemaking within one year of the remand by this Court and a final rule within one year thereafter.

In the rulemaking on remand, DOE will make available to the public the data gathered and analyzed by the agency prior to publication of a proposed rule. DOE will endeavor to post such data as it becomes available during the agency's development of a proposed rule. At a minimum, the agency will make such data available to the public within 30 days after the Office of Management and Budget receives a draft proposed rule from DOE. Following the issuance of the proposed rule, DOE will provide a comment period of at least 90 days, and DOE will follow its normal practice in notice and comment rulemaking proceedings with regard to any request for extension of the comment period.

As DOE develops the administrative record on remand for the rulemaking to set energy conservation standards for non-weatherized gas furnaces, the agency agrees at a minimum to include in that record the data gathered for the direct final rule under review in this case (in DOE Docket EERE-2011-BT-STD-0011) concerning the impact on consumers resulting

from the trial standard levels considered in the Technical Support Document for that proceeding for non-weatherized gas furnaces.

Nothing in the settlement of this litigation shall be construed to limit APGA's rights to make any arguments it deems appropriate in the rulemaking proceeding on remand. The making of the settlement agreement and its acceptance or approval by this Court shall not in any respect constitute an admission by either settling party that any allegation or contention in the proceeding below (including this appeal) is true or valid. It is further understood and agreed that the settlement agreement constitutes a negotiated agreement and, except as explicitly set forth therein, no settling party shall be deemed to have approved, accepted, agreed on or consented to any principle or position in this proceeding. The settlement agreement shall not be the basis for assessing fees, expenses, or costs pursuant to any applicable federal statute. The settlement negotiations culminating in the settlement agreement are privileged and confidential and may not be used as or received in evidence in any proceeding.

CONCLUSION

For the foregoing reasons, this Court should enter a dispositive order that:

(1) vacates the direct final rule, 76 Fed. Reg. 37408 (June 27, 2011), and notice of effective date, 76 Fed. Reg. 67037 (Oct. 31, 2011), as they relate to energy conservation standards for non-weatherized gas furnaces, including but not limited to DOE's determination that such furnaces constitute a single class of products for purposes of 42 U.S.C. §§ 6295(q)(1)(B), 6295(o)(4); and (2) remands to DOE for notice and comment rulemaking in accordance with the Energy Policy and Conservation Act (EPCA).

Respectfully submitted,

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JANUARY 2013

CERTIFICATE OF SERVICE

I hereby certify that on January __, 2013, I electronically filed the foregoing Joint Motion Of Petitioner And Respondent To Vacate In Part And Remand For Further Rulemaking by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ H. Thomas Byron III

H. THOMAS BYRON III