ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, *et al.* *Petitioners,* v. U.S. DEPARTMENT OF ENERGY, *et al.* *Respondents.*	No. 20-71068
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, *Petitioners,* v. U.S. DEPARTMENT OF ENERGY, *et al.* *Respondents.*	No. 20-71071 (Not Consolidated)

MOTION OF THE AMERICAN GAS ASSOCIATION FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS

1. Pursuant to Federal Rules of Appellate Procedure 15(d) and 27, the American Gas Association ("AGA") respectfully moves this Court for leave to intervene in support of Respondents the United States Department of Energy

("Department") and its Administrator in each of the above captioned proceedings. In support of this motion, AGA states as follows:

2. AGA is a trade association that represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 75 million residential, commercial and industrial natural gas customers in the United States, of which 95 percent — more than 71 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 one-fourth of the United States' energy needs. Pursuant to Federal Rule of Appellate Procedure 26.1, a Disclosure Statement is attached to this Motion.

3. Pursuant to Circuit Rule 27-1(2), AGA contacted counsel for all parties in these proceedings, *i.e.*, Petitioners and Respondents. Petitioners in Docket No. 20-71068 stated that they take no position on AGA's potential intervention at this time. Petitioners in Docket No. 20-71071 stated that they take no position on AGA's motion. Respondents in Docket Nos. 20-71068 and 20-71071 stated that the government takes no position on this motion to intervene.

BACKGROUND

4. These companion cases involve review of the Department's final rule entitled, "Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment," published in the *Federal Register* at 85 Fed. Reg. 8,626 (Feb. 14, 2020) ("Final Rule"). The Energy Policy Conservation Act ("EPCA") provides for a comprehensive federal regime regulating energy conservation standards for certain appliances and requires the Department to set minimum energy conservation standards for various covered products and review standards periodically. *See* 42 U.S.C. § 6295, *et seq.* In order to achieve the requirements of EPCA, the Department has a process in place to review new energy conservation standards and to amend current standards, which is codified into the Department's regulations ("Process Rule"). *See* 10 C.F.R. Part 430, subpart C, Appendix A (2020).

5. In December 2017, the Department issued a Request for Inquiry to address potential improvements to the Process Rule, and after receiving feedback from the public, issued a Notice of Proposed Rulemaking in February 2019 proposing, among other things, to make certain rulemaking procedures binding on the Department and revise certain provisions to make the Process Rule consistent

with EPCA.[1] On February 14, 2020, the Department issued the Final Rule, providing various updates to the Process Rule, including clarifying the Department's process for considering new or revised energy conservation standards, making specified rulemaking procedures binding on the Department, and revising certain provisions to bring consistency with existing statutory requirements. *See* Final Rule, 85 Fed. Reg. 8,626, *supra.*

6. On April 14, 2020, the states of California, Connecticut, Illinois, Maine, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York filed a petition for review in Docket No. 20-71068, challenging the Department's Final Rule. The Natural Resources Defense Council, Inc., Sierra Club, Consumer Federation of America, Massachusetts Union of Public Housing Tenants, Environment America, and U.S. Public Interest

[1] *Energy Conservation Program for Appliance Standards: Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment*, 84 Fed. Reg. 3910 (February 13, 2019) ("NOPR"). *See also, Energy Conservation Program for Appliance Standards: Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment*, 84 Fed. Reg. 1257 (April 2, 2019) (extending the end of the comment period for the NOPR from Apr. 15, 2019, to May 6, 2019).

Research Group filed a similar petition in the Docket No. 20-71071 on April 14, 2020, also challenging the Final Rule.

LEGAL STANDARD

7. Federal Rule of Appellate Procedure 15(d) provides that an applicant for intervention in a petition for review must file a motion for leave to intervene within 30 days after the petition is filed, supported by a concise statement of the interests and the grounds for intervention. Although the appellate rules do not specify a standard for intervention, this Court looks to the principles underlying intervention under Rule 24 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001). Under Fed. R. Civ. P. 24(a), a court must grant intervention as of right: (1) upon timely application; (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) when the applicant is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) no existing party adequately represents that interest. Fed. R. Civ. P. 24(a). An applicant that meets these standards does not need to separately establish Article III standing. *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 573 (9th Cir. 2014).

8. In general, this Court follows "practical and equitable considerations" and construes Fed. R. Civ. P. 24(a) liberally in favor of potential intervenors. *Wilderness Soc. v. U.S. Forest Serv.,* 630 F.3d 1173, 1179 (9th Cir. 2011). This Court has such a policy because "[a] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. *Id.* (citing *United States v. Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002)). In keeping with that policy, this Court has held that Fed. R. Civ. P. 24(a)(2) does not require a specific legal or equitable interest, and that the interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process. *Id.* (citing *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)).

9. As discussed in detail below, AGA satisfies these requirements, and this Court should grant this Motion so that it can protect its interest.

10. In the alternative, Fed. R. Civ. P. 24(b)(1) authorizes permissive intervention when, on a timely motion, the applicant's claim or defense, and the main action, have a question of law or a question of fact in common. *Los Angeles,* 288 F.3d at 403. To the extent intervention is not warranted under Fed. R. Civ. P. 24(a), AGA submits that its intervention is permitted pursuant to Fed. R. Civ. P. 24(b)(1), as supported below.

TIMELINESS

11. This motion is timely. Pursuant to Federal Rule of Appellate Procedure 15(d) a motion to intervene is timely if filed within 30 days from the date the petition was filed. Petitioners filed their petitions on April 14, 2020. This motion is timely because AGA filed within the time allotted. *See* Fed. R. App. P. 15(d) (intervention motion due within 30 days of petition); *see also* Petition for Review, *State of California, et al. v. DOE, et al.,* 9th Cir. Docket No. 20-71068 (Apr. 14, 2020); Petition for Review, *NRDC, et al. v. DOE, et al.,* 9th Cir. Docket No. 20-71071 (Apr. 14, 2020).

INTEREST AND GROUNDS FOR INTERVENTION

12. As the national trade association representing natural gas utilities in all fifty states and an active participant in the regulatory process promulgating this rule, AGA has sufficient interest and grounds to intervene. Intervention as of right under Fed. R. Civ. P. Rule 24(a)(2) "does not require a specific legal or equitable interest." *Wilderness Soc.*, 630 F.3d at 1179. This Court has held that an applicant demonstrates sufficient interest if "it will suffer a practical impairment of its interests as a result of the pending litigation." *Wilderness Soc.*, 630 F.3d at 1179. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). The operative inquiry should be whether the interest is protectable under some law and

whether there is a relationship between the legally protected interest and the claims at issue. *Wilderness Soc.*, 630 F.3d at 1180.

13. AGA's natural gas utility members are directly affected by the implementation of the Final Rule and by these review proceedings because AGA's members primarily serve residential and commercial customers, the majority of which use natural gas furnaces, boilers and/or water heaters, and therefore have a vital interest in both the minimum efficiency standards for these products and the procedures used by the Department to adopt these standards. The Department's Process Rule establishes the procedures and methods used to consider new or revised energy conservation standards for consumer products and certain types of industrial equipment, and will have meaningful impacts on the Department's rulemakings to establish new minimum efficiency standards. As such, AGA and its members have a direct and substantial interest that will be affected by these review proceedings, whose interest cannot be adequately represented by any other party.

14. AGA has also demonstrated its direct and substantial interest by participating throughout the Department's proceeding related to the Final Rule that gave rise to the instant review proceedings. *See generally, Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (explaining that groups, in

that case public interest groups, are entitled as a matter of right to intervene in an action challenging the legality of a measure they have supported). In particular, AGA has filed several comments and participated in public meetings held by the Department on the Process Rule.[2] AGA's participation in the rulemaking proceeding demonstrates it has a substantial and direct interest in this Court's review.

15. The resolution of these Petitions may impair or impede AGA and its members' ability to protect their interests. *See* Fed. R. Civ. P. 24(a)(2). As this Court has explained if an applicant can demonstrate that they are "substantially affected in a practical sense by the determination made in an action," then the

[2] *See, e.g.,* Joint Comment response to the published Request for information and notification of public meeting, *available at https://www.regulations.gov/document?D=EERE-2017-BT-STD-0062-0061*; AGA Public Meeting Opening Statement in response to the published Request for information (Jan. 9, 2018), *available at https://www.regulations.gov/document?D=EERE-2017-BT-STD-0062-0013*; AGA Statement for Public Meeting in Response to the Notice of Proposed Rulemaking (March 15, 2019), *available at https://www.regulations.gov/document?D=EERE-2017-BT-STD-0062-0083*; AGA Comment Response to the published Notice of proposed rulemaking (May 6, 2019), *available at https://www.regulations.gov/document?D=EERE-2017-BT-STD-0062-0114*; and AGA Comment response to the published Notice of re-opening of the public comment period (Aug. 30, 2019), *available at https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=125&dct=PS&D=EERE-2017-BT-STD-0062.*

applicant should be able to intervene. *See Sw. Ctr. for Biological Diversity*, 268 F.3d at 822. "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene ...." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting Fed. R. Civ. P. 24 advisory committee's note).

16. As discussed above, AGA's members serve customers that use products with minimum energy efficiency standards and have a vital interest in the procedures used by the Department to adopt these standards. The Process Rule will directly affect new or amended energy conservation standards for consumer products, and any challenges to the Process Rule may change the process and criteria that the Department has established. AGA's participation in this action will allow AGA and its members to protect their interests in the procedures and criteria set forth in the Process Rule.

17. As a representative of investor owned local natural gas distribution companies, AGA has a separate practical and legal perspective from the Respondents and Petitioners regarding the Final Rule. The current parties will not provide adequate representation for the interests of AGA and its members. To determine whether the existing parties adequately represent an applicant's interest, this Court considers: if the present party interest is such that it will undoubtedly

make all the intervenor's arguments; if a present party is capable and willing to make such arguments; and if the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect. *Los Angeles*, 288 F.3d at 397-98 (citing *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996)). Furthermore, to intervene, a prospective intervenor need only show that representation of its interest by existing parties may be inadequate. *See Sw. Ctr. for Biological Diversity*, 268 F.3d at 822-23. In other words, "[t]he burden on proposed intervenors in showing inadequate representation is minimal," requiring only that they "demonstrate that representation of their interests 'may be' inadequate." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *see also Citizens for Balanced Use*, 647 F.3d at 898.

18. AGA's participation as an intervenor can provide the Court, Petitioners, and Respondents with unique knowledge of natural gas local distribution companies, and the practical implementation and effect of the Final Rule. In other words, participation brings the necessary element to these proceedings of private regulated parties that would be impacted by the Final Rule. While Respondents may defend the Final Rule overall, AGA and its members' interests are potentially narrower and more directed to matters related to natural

gas as compared to DOE's broader interests. *See e.g., Californians For Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1186 (9th Cir. 1998) (intervention upheld where a union showed more narrow and parochial interests than the interests of the public at large); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d at 816-17 (intervention entitled where there may be a shared objective, but where the municipality's considerations are broader than those of an intervenor). The Respondents and the Petitioners in these proceedings are not in a position to represent the specific interests of AGA and its members. Furthermore, AGA and the other parties are likely to raise different arguments and AGA may offer information that the other parties may not adequately address.

19. Due to the foregoing reasons and the nature of the entities that filed the petitions for review, no existing party adequately represents AGA and its members' interest. Therefore, intervention is appropriate pursuant to Fed. R. Civ. P. 24(a).

20. In the alternative to intervention pursuant to Fed. R. Civ. P. 24(a), AGA seeks leave for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1). As discussed above, AGA's intervention is timely since it was filed within the allotted time. Additionally, no prejudice or delay would result from AGA's intervention because AGA is seeking to join this case at the earliest possible stage.

Additionally, AGA generally supports the Department's Process Rule, as it aids the Department in pursuing reasonable, fact-based efficiency standards. If allowed to intervene, AGA will address the issues of law and fact that the Petitioners present on the merits and discuss the lawfulness of the Process Rule. Since the Petitioners challenged DOE's Process Rule, which AGA has an interest, there are common questions of law and fact with the main action and AGA would therefore meet the permissive intervention requirements. *See Los Angeles*, 288 F.3d at 391, 403.

Accordingly, the American Gas Association respectfully moves for leave to intervene in the above-captioned proceedings. In the event that this Court acts to transfer and/or consolidate these and any other related cases, AGA also requests that it be included, as appropriate, in any consolidated or transferred proceeding.

Respectfully submitted,

/s/ *Matthew J. Agen*

MATTHEW J. AGEN
MICHAEL L. MURRAY
American Gas Association
400 North Capitol Street, N.W.
Washington, DC 20001
Telephone: (202) 824-7000
MAgen@aga.org
MMurray@aga.org

Counsel for the American Gas Association

Dated: May 14, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, *et al.* *Petitioners,* v. U.S. DEPARTMENT OF ENERGY, *et al.* *Respondents.*	No. 20-71068
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.* *Petitioners,* v. U.S. DEPARTMENT OF ENERGY, *et al.* *Respondents.*	No. 20-71071 (Not Consolidated)

DISCLOSURE STATEMENT
OF THE
AMERICAN GAS ASSOCIATION

Pursuant to Federal Rule of Appellate Procedure 26.1, Movant-Intervenor makes the following Disclosures:

The American Gas Association ("AGA") is a trade association that represents more than 200 local energy companies that deliver clean natural gas throughout the United States. 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. AGA has not issued shares or debt securities to the public, has no parent company, and no publicly held company has a 10 percent or greater ownership interest in AGA.

Respectfully submitted,

/s/ *Matthew J. Agen*

MATTHEW J. AGEN
MICHAEL L. MURRAY
American Gas Association
400 North Capitol Street, N.W.
Washington, DC 20001
Telephone: (202) 824-7000
MAgen@aga.org
MMurray@aga.org

Counsel for the American Gas Association

Dated: May 14, 2020

CERTIFICATE OF COMPLIANCE FOR MOTION TO INTERVENE OF THE AMERICAN GAS ASSOCIATION

The Motion of the American Gas Association for Leave to Intervene ("Motion") complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the Motion contains 2608 words, according to the count of Microsoft Word.

The Motion complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5), and the type-style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(6), because the Motion has been prepared in a proportionally spaced 14-point Times New Roman type.

Respectfully submitted,

/s/ *Matthew J. Agen*

MATTHEW J. AGEN
MICHAEL L. MURRAY
American Gas Association
400 North Capitol Street, N.W.
Washington, DC 20001
Telephone: (202) 824-7000
MAgen@aga.org
MMurray@aga.org

Counsel for the American Gas Association

Dated: May 14, 2020

CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure, I certify that on this May 14, 2020, I caused to be electronically filed the foregoing Motion of the American Gas Association for Leave to Intervene in Support of Respondents and Rule 26.1 Statement with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the Court's CM/ECF system.

/s/ *Matthew J. Agen*

MATTHEW J. AGEN
American Gas Association
400 North Capitol Street, N.W.
Washington, DC 20001
Telephone: (202) 824-7000
MAgen@aga.org