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RE: Joint Comments of AGA, APGA, and Spire in response to DOE’s 2nd 2021 Process Rule NOPR, Docket Number EERE–2021–BTD–STD–0003, RIN 1904–AF13; *Energy Conservation Program for Appliance Standards: 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. 35668 (July 7, 2021)

Dear Office of Energy Efficiency and Renewable Energy:

Pursuant to the notice of proposed rulemaking and request for comment issued by the Department of Energy (“Department” or “DOE”), *Energy Conservation Program for Appliance Standards: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment*, Docket Number EERE–2021–BTD– STD–0003, RIN 1904–AF13, 86 Fed. Reg. 35668 (July 7, 2021) (“Notice”),¹ the American Gas Association (“AGA”), the American Public Gas Association (“APGA”), and Spire Inc., and Spire Missouri, Inc. (collectively “Spire”) respectfully submit these comments.² AGA, APGA, and Spire (collectively, “Joint Commenters”)

¹ Available at <https://www.federalregister.gov/documents/2021/07/07/2021-14273/energy-conservation-program-for-appliance-standards-procedures-interpretations-and-policies-for>.

² On August 9, 2021, DOE extended the comment date in this proceeding to September 13, 2021. See 86 Fed. Reg. 43429 (Aug. 9, 2021).

provide comments on DOE’s proposed additional revisions to the current “February 2020 Final Rule.”³

I. Identity and Interest

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. AGA’s members serve residential and commercial customers, the majority of which use natural gas furnaces, boilers and/or water heaters, and therefore have a direct and vital interest in both the minimum efficiency standards for these products and the procedures used by DOE to adopt these standards. The February 2020 Final Rule and any proposed revisions to DOE’s “Process Rule” are integral procedures in DOE’s rulemaking process, therefore reforms to DOE’s processes can and will have meaningful impacts on DOE’s rulemakings to establish new minimum efficiency standards. AGA is concerned that 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 minimum standards do not distort consumer choices away from natural gas to other less efficient and more costly fuel sources.

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. owns and operates Spire Missouri, Inc., the largest natural gas distribution company in the state of Missouri, Spire Alabama, Inc., the largest natural gas distribution company in the state of Alabama, Spire Gulf, Inc. and Spire Mississippi, Inc., operating in the Gulf Coast region of Alabama and in Mississippi, respectively. Spire’s utility companies have been distributing gas in one form or another in their respective service areas for more than a century and a half. Today, they collectively provide natural gas distribution service to more than 1.7 million residential, commercial and industrial customers.

II. Comments

Since the National Academy of Sciences (“NAS”) project, “Review of Methods for Setting Building and Equipment Performance Standards,” has not been finalized, the Joint Commenters

³ *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,*” 85 Fed. Reg. 8626 (Feb. 14, 2020).

believe that DOE should not proceed with any final action on revising the February 2020 Final Rule's provisions pending the release of the final report and recommendations from the NAS. The NAS project, targeted to review DOE analytical procedures for developing new and revised minimum efficiency standards, is authorized under DOE's February 2020 Final Rule and calls for peer review of DOE's procedures and methodologies (10 CFR Parts 430 and 431). DOE and several stakeholders have been directly involved with the NAS project, and the recommendations that are issued by the NAS need to be considered for inclusion in any potential revisions to the February 2020 Final Rule. It would be prudent that the NAS final report and recommendations be given high priority and consideration before DOE includes any modifications to the current February 2020 Final Rule. With that in mind, Joint Commenters offer the following comments and recommendations on the DOE proposed changes to the current February 2020 Final Rule. The proposals, discussed herein and in the Joint Commenters' prior filings on DOE's "Process Rule," are intended to ensure that appliance minimum efficiency requirements are developed in an open and transparent process,⁴ and which are technically feasible and economically justified.

A. DOE should address the problems that resulted in the February 2020 Final Rule and prior revisions to DOE's processes

The February 2020 Final Rule revisions that DOE proposes to unwind were adopted in response to substantial problems with DOE's standards development process. If DOE now has concerns about some of the "fixes" adopted, it should modify those fixes as appropriate instead of reverting to the problematic *status quo ante*.

B. DOE should not have a "Process Rule" that is mere guidance

One of the problems with the "Process Rule" as it existed in 2016 was that DOE's casual disregard of its provisions was widely viewed as an unreasonable and potentially unlawful unwillingness to play by the rules. Suggestions that the so-called "Process Rule" was not really a "rule" and legal fine print intended to make the "rule" unenforceable were not sufficient to dispel the impression that DOE was – at best – acting unfairly. This problem can be expected to recur (despite a new preamble explanation) if DOE has a so-called "Process Rule" set forth in the Code of Federal Regulations that it treats as guidance it is free to ignore. If DOE is unwilling to commit to anything more than guidance, it should limit potential confusion (and temper expectations appropriately) by issuing its guidance in the form of a guidance document rather than as a so-called "Process Rule" appearing in the Code of Federal Regulations.

⁴ All DOE processes and rulemakings should comply with the Administrative Procedure Act ("APA"). *See e.g.*, 5 U.S.C §§ 551, *et seq.* The APA embodies the concepts of transparency, procedural regularity, and judicial review as related to the agency rulemaking process. Stealth rulemaking would undermine transparency and upset the settled expectations of regulated parties and stakeholders. *See Exelon Generation Co., LLC v. Local 15, IBEW*, 676 F.3d 566, 578 (7th Cir. 2012). Regarding transparency, an agency must reveal the reasoning that underlies its conclusion. *See Transcon. Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995). An agency cannot merely insist that its conclusions are rational and supported by the record. *See San Luis Obispo Mothers for Peace v. U.S. Nuclear Reg. Comm'n*, 789 F.2d 26, 48 (D.C. Cir. 1986).

C. DOE’s proposal to reduce the “Process Rule” to unenforceable guidance makes many of the newly proposed revisions unwarranted

DOE has proposed a number of changes that are premised on assertions that there are some circumstances under which various existing provisions of the “rule” might not be appropriate. Such changes will be completely unnecessary if DOE proceeds with its proposal to reduce the “Process Rule” to unenforceable guidance, because – in that case – there will be no “one size fits all” requirements to which DOE will be bound. In short, if there are cases in which a provision of the non-rule “rule” might not be appropriate, DOE would be completely free to depart from it. As a result, concerns that there may be circumstances in which a “rule” might not be appropriate would not even create a need for DOE to specify an exception to the rule, much less a need to eliminate the “rule” completely as it has generally proposed. Instead, a “rule” should be eliminated only if it is not a good *general rule*, a question the proposed rule does not even appear to have considered.

The need to address potential exceptions to a sound general rule only becomes necessary to the extent that there is an actual *rule* in place. Again, however, the potential need for exceptions to a rule provides no justification for having no rule at all, because the need for exceptions to – or deviations from – a general rule can be addressed in a variety of ways.

D. The minimum opportunities for public comment specified above are absolute minimums that should not be treated as optimal norms

In view of the complexity of the issues involved, the minimum statutorily specified opportunities for public input in standards rulemaking are generally inadequate to permit robust stakeholder input. Similarly, the specified minimum comment periods for such rulemaking proceedings are manifestly insufficient to permit adequate review of notices and background documents that routinely run into hundreds of pages. DOE’s practice of specifying the shortest permissible deadlines for comment and considering extension requests “as necessary” needlessly imposes the burden of submitting requests for extension and the difficulties imposed by uncertainty as to what the comment period will ultimately be. To facilitate public comment, it would be better to have longer comment periods specified as the norm.

The “Process Rule” was amended to provide additional opportunities for comment and additional time for submission of public comment. Concerns that these improvements may not always be necessary – or that they would unduly interfere with DOE’s ability to satisfy statutory deadlines are both overblown and easy to address.

DOE should recognize that early opportunities for public comment and robust stakeholder input have the potential to narrow or clarify the relevant issues in ways that reduce the overall time and level of effort required to complete a rulemaking proceeding. In fact, the concept of a formal “early assessment” process was expressly advanced as a means to increase the efficiency of DOE’s rulemaking process and use prompt early decision making to promote more productive use of rulemaking resources. Similarly, better opportunity for stakeholder input does not necessarily lengthen the overall rulemaking process. Moreover, it would be wrong for DOE to prioritize the need to act quickly over the need to act on the basis of adequate information and analysis, because

DOE has a legal obligation to do both. Where both are impossible, the public would be better served by a good regulation that takes a little too long than a bad regulation that is hurried. DOE should therefore be prepared to take additional time as necessary to get its job done right, just as it should be prepared to eliminate *unnecessary* delays in order to achieve statutory deadlines.

The asserted conflict between the desire for more robust stakeholder input and the need to meet statutory deadlines is easy to address, and – as already discussed – does not need to be addressed at all if the “Process Rule” is reduced to mere guidance that DOE can freely ignore. There would be no need to eliminate the provisions providing additional time or opportunity for stakeholder input even if the “Process Rule” were an actual *rule*, because several alternative approaches are available. For example, the text could either be modified to state the requirements at issue in non-mandatory form (*e.g.*, DOE “shall generally provide a minimum of XX days for public comment”) or to provide for exceptions in appropriate circumstances (*e.g.*, a procedural step will be provided “unless DOE determines that [the step] would unnecessarily delay” DOE’s decision making).

E. Specific recommendations on the DOE analytical methods

As part of the NAS project, AGA offered comments to the NAS Project Committee that focused upon analytical methods used for accounting for consumer costs and benefits from minimum efficiency standards, analytical errors in rulemakings covering gas-fired appliances and equipment, and recommendations for corrective actions. Four general issues and recommendations were covered as follows and should be considered in this proceeding:

- DOE’s use of Monte Carlo modeling methods fails to consider correlated variables and, consequently, produces infeasible modeling outcomes. AGA recommended that before any modeling is performed, the Monte Carlo variables and their functional relationships should be reviewed with stakeholders in a workshop format to address correlation issues, and DOE staff should demonstrate knowledge and credentials in using the Monte Carlo modeling platform to avoid infeasible modeling alternatives produced by variable correlations.
- Because stakeholders historically only see Monte Carlo modeling designs after results are presented, the approaches used are unnecessarily opaque and in conflict with DOE guidance for “robust and transparent” modeling methods. AGA again recommended a workshop approach for reviewing model design, selection of distributional variable characteristics and use of data, presentation of model design using standard tools such as precedence graphics, and presentation of intermediate calculation results to help improve model validity, all of which are basic elements of good modeling practices.
- In designing models for gas-fired appliances and equipment, DOE has historically used overly simplistic characterizations of the markets and installation configurations for the “covered products,” thereby introducing biases in the results that do not represent overall potential market impacts and unintended consequences. AGA recommended that development of the affected markets and installation environments should be

undertaken before any calculations are performed, again using a workshop format to engage stakeholders.

- DOE mixes efforts to represent current market distributions for covered products (for which it admits are not based purely upon rational consumer behavior) in its “base cases” with rational consumer decision making in choosing among higher minimum efficiency proposals. This causes inconsistency and distorted benefit calculations for consumers since forcing modeling of uneconomic “decisions” for an individual consumer in the base case and then presenting economically justified alternatives among the proposed standards levels invariably produces positive economic outcomes for all higher levels of efficiency. AGA recommended that DOE abandon efforts to represent actual markets in its base cases and use rational economic decision making across its Monte Carlo models in simulating consumer decision making. Along with other stakeholders, AGA staff understands that it is not within DOE’s role of assessing “technical justification and economic feasibility” to attempt to reproduce markets or predict future markets. Current non-economic consumer behavior and “market failures” can be addressed by DOE through other efforts and policy options.

III. Conclusion

AGA, APGA, and Spire appreciate the opportunity to provide comments on this matter and look forward to working with DOE to provide a reasonable and enforceable “Process Rule” that will result in the appliance minimum efficiency requirements being developed in an open and transparent process that are technically feasible and economically justified.

Respectfully submitted,

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