**May 23, 2025**

***Via regulations.gov***

Attorney General Pam Bondi
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Chairman Andrew Ferguson
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: **Anticompetitive Regulations Task Force, Dkt. ATR-2025-0001**

**Request for Public Comment Regarding Reducing Anti-Competitive Regulatory Barriers, Dkt. FTC-2025-0028**

Attorney General Bondi and Chairman Ferguson:

The American Gas Association ("AGA") is pleased to respond to the Requests for Information published by the U.S. Department of Justice and the Federal Trade Commission regarding anticompetitive regulatory barriers related to housing and energy. AGA's comments focus on manipulation of standard-setting organizations ("SSOs") by those seeking to restrict or eliminate popular natural gas appliances.

AGA represents more than 200 local energy companies delivering natural gas to homes and businesses across the United States. There are more than 79 million residential, commercial and industrial natural gas customers in the U.S., of which 94 percent — more than 74 million customers — receive their gas from AGA members.

## I. Introduction and Executive Summary

A common tactic in policy-making is to proceed via subtle changes that yield disproportionate results. Activists have done just that by capturing the organizations that set energy efficiency standards for new buildings. More specifically, they have used concerted action to manipulate energy conservation codes, including by pursuing proposals unrelated to energy efficiency, flooding the code-development process with aligned-but-otherwise-uninvolved voters, and attempting to redefine the scope of the putative "energy conservation" codes to mandate decarbonization, electrification, and renewable energy. Those actions have

real effect because energy conservation codes are widely incorporated into state and local law as a result of federal statutory provisions.

The Supreme Court has made clear that such manipulation of standards-setting organizations is a *per se* violation of the Sherman Act and the Federal Trade Commission Act. *See Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492 (1988); *American Society of Mechanical Engineers v. Hyrdolevel Corp.*, 456 U.S. 556 (1982). And the end-result—building codes that actually or de facto ban gas appliances—is likely preempted by the Energy Policy and Conservation Act. *See California Restaurant Association v. City of Berkeley*, 89 F.4th 1094 (9th Cir. 2024).

The facts are not in doubt. Activists are using codes and standards bodies to limit or restrict use of natural gas. They have documented their anti-competitive conduct in press releases, blog posts, and formal actions at SSOs. AGA respectfully submits that these actions warrant investigation for violations of the Sherman Act and Federal Trade Commission Act. Further, DOJ should also seek judicial relief against municipalities that have adopted energy conservation codes containing preempted provisions. Coordination with state Attorneys General may be helpful.

## II. Anti-energy activists are manipulating code-setting bodies for anti-competitive reasons.

### A. The vehicle: statutorily-mandated compliance with energy efficiency codes.

To understand how the manipulation affects consumers and the market, it's important to understand the role of privately developed energy conservation codes.

Congress first imposed energy efficiency standards as part of the Cranston-Gonzalez National Affordable Housing Act, Pub. L. 101-625, 104 Stat. 4079 (1990). Expressly seeking to "use federal funds to leverage state, local, and private resources," S. Rep. 101-316, reprinted in 1990 U.S.C.C.A.N. 5763, 5772, that act required the Department of Housing & Urban Development to promulgate energy efficiency standards for "new construction of public and assisted housing and single-family and multifamily residential housing … subject to mortgages under the National Housing Act," 104 Stat. at 4093. Because that provision covered widely-used FHA-insured mortgages, it was the seed of a de facto national energy efficiency standard.

The Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776, mandated energy efficiency standards more broadly. But rather than create standards out of whole-cloth, Congress incorporated standards developed by private standard-setting organizations: the Council of American Building Officials ("CABO," the predecessor of the International Code Council ("ICC")) and the American Society of Heating, Refrigerating and Air-Conditioning Engineers ("ASHRAE")[1]. So, as amended, the Energy Policy Act of 1992:

- requires the Secretary of Energy to publish a determination of whether the latest editions of the ICC's International Energy Conservation Code ("IECC") and ASHRAE Standard 90.1 would "improve energy efficiency" in residential or commercial buildings, respectively. 42 U.S.C. § 6833(a)(5)(A), (b)(2)(A).

- requires states, upon an affirmative determination from the Secretary of Energy, to review their building codes and certify compliance with the latest editions of the ICC's International Energy Conservation Code ("IECC") and ASHRAE Standard 90.1, or explain in writing why doing so is not appropriate. 42 U.S.C. § 6833(a)(5)(B), (b)(2)(B)(i).

- requires HUD and USDA-financed new construction to comply with the latest version of the IECC or ASHRAE Standard 90.1, subject to certain determinations by the agencies. 42 U.S.C. § 12709.

- requires new federal buildings to comply with the latest version of the IECC or ASHRAE Standard 90.1. 42 U.S.C. §§ 6834, 6835.

- requires the Secretary of Energy to recommend amendments to energy efficiency codes, "seek adoption of all technologically feasible and economically justified energy efficiency measures," and "participate in any industry process for review and modification of such codes." 42 U.S.C. § 6836.

The practical result is that the IECC and ASHRAE Standard 90.1 have been adopted nationwide, with states and municipalities routinely updating their building codes to track the latest editions. *See* Final Determination, 89 Fed. Reg. 33,112, 33,114 (Apr. 26, 2024).

Those updates have become a vehicle for anticompetitive conduct. When Congress passed the underlying mandates in 1990 and 1992, large improvements in energy efficiency were readily attainable. Indeed, Representative Oakar—one of the authors of 42 U.S.C. § 12709—explained that "adoption of the [1992] CABO-MEC [would reduce] total energy consumption for heating and cooling by an average of 25 percent," such that a new "homeowner on average would pay less than $8 more in mortgage payments and save $15 per month in energy bills." 6 S.Prt. 103-91 at 4568. This amounted to direct and immediate savings to consumers.

Such near term, significant, and cost-effective improvements to energy efficiency have been achieved to date. However, future energy efficiency improvements must be pursued with rigorous analysis of technical feasibility, life cycle cost savings, and economic justification.

Rather than engage in that rigorous analysis, the ICC and ASHRAE continue to issue new energy conservation code editions every three years (meaning new codes are being developed before prior editions

can even be evaluated), with the process having devolved into little-more than an opportunity to mandate favored products and penalize disfavored competitors. Actual energy efficiency improvements have now become subordinate to policy and emissions goals. Of particular concern to AGA is the capture of SSOs by activists seeking to either (a) directly mandate so-called "decarbonization" and "electric ready" requirements, or (b) burden or prohibit competing gas appliances. Those mandates and boycotts are classic examples of concerted anti-competitive action, and they are not protected by the *Noerr-Pennington* doctrine.

**B. The IECC process has been captured and manipulated.**

One need look no further than the 2021 IECC to see an example of anti-competitive misconduct. Prior to and through the 2021 code cycle, the IECC was updated via the same governmental consensus process used for other ICC codes. Anyone could submit a proposed code change, which was then evaluated by committees of technical experts who recommend approval, modification, or disapproval. Following public comment and a series of hearings, eligible voters—all of whom were supposedly code-related government officials—would vote on whether to adopt the proposal, with a 2/3 super-majority required to overrule a disapproval recommendation. Exh. 1. An appellate process was available to resolve any remaining disputes.

In 2015, the ICC made voting more accessible with an online option for IECC-eligible voters. "That development … allow[ed] more people to weigh in, rather than the traditional set of fire and building code officials who comprised the majority of in-person votes in previous code development cycles." Exh. 2. Given the reduced barrier to voting by persons who don't otherwise participate in the code development process, it also threw open the door to a concerted effort to manipulate the code. And that's precisely what happened.

In the 2021 cycle, the technical experts recommended disapproval of 26 code change proposals, including three electric ready or decarbonization proposals:

- RE126 ("electric water heaters"), proposed by the Natural Resources Defense Council ("NRDC"), required heat pump or grid-enable hot water heaters unless the building included renewable energy sources. Exh. 3

- RE147 ("electric ready"), proposed by NRDC, required expensive, high-current circuits to be installed within three feet of each gas or propane cooking appliance, water heater, and clothes dryer, as well as a large space reserved for a tanked hot water heater. Exh. 4.

- CE217 ("electric vehicle ready"), proponents (including, the Sw. Energy Efficiency Project, New Buildings Institute, and Alliance to Save Energy) required an expensive, 40 amp, 240-volt circuit for electric vehicle charging, together with an associated parking space. Exhs. 5, 6.

That disapproval recommendation was unsurprising. The proponents conceded these proposals "focus[ed] on shifting away from fossil fuels and readying residential buildings for electrification" rather than energy efficiency, Exh. 7, *i.e.*, a purpose plainly beyond the limited scope of the IECC. And by requiring the installation of expensive high-current electrical circuits even if the new home would use gas appliances, RE147 and CE217 increased the cost of construction with gas appliances with no present benefit to the homeowner. In short, builders and homeowners would be penalized for opting to install gas appliances.

The activists were nevertheless unhappy with the disapproval recommendation, so they engaged in an extensive campaign to register new voters. Brazenly coordinating their activity under the moniker of the Energy Efficient Codes Coalition, the activists partnered with manufacturers of code-compliant products and provided their new voters with a "voters guide" identifying positions on "the most important energy efficiency and climate proposals," including RE126, RE147, and CE217. Exhs. 8, 9. The National Association of Home Builders summarized the resulting anomalous vote:

> After analyzing the results and voting patterns, it became clear that a couple of organizations joined forces to recruit governmental employees to participate and cast votes in their favor. They provided their recruits a voting guide on how to vote on 108 proposed changes to the IECC. * * * * * Ultimately, 20 of the 23 earlier-rejected proposals received the 2/3 supermajority of votes needed to prevail in the final vote. Overturning one vote would have been ***notable*** and ***unprecedented*** as compared to the results of the previous four code cycles where a twice defeated proposal had never been approved by the on-line vote, but for that to happen twenty times was clearly astonishing. Interestingly, the 108 proposals within this specific voting guide also were the top 108 vote-getting proposals.

Exh. 10 (emphasis added).

A contemporaneous letter to the ICC delved into the details: the Massachusetts jurisdictions contributed around two hundred and sixty, or forty three percent of the new voters. Exh. 11A. By purchasing nine ICC memberships the City of Newton, MA, with an estimated population of eighty-nine thousand, contributed fifty-four of the newly added voters, or nine percent of the total. *Id.* The addition of about six hundred new voters correlated directly with the additional five to six hundred added voters on IECC proposals upon which the Energy Efficient Code Coalition voter guide took a position. *Id.*

A long-time participant in the code development process wrote to the ICC about the "mass 'flip' of votes" "in accordance with recommendations made in the voting guide" issued by the Energy Efficient Codes Coalition. Exh. 11B. His letter noted that the "flip" occurred "after the close of all public debate and the disapproval votes of experts," and it urged that the underlying actions and the extraordinary result

constituted an "irregularity" under the ICC's rules. *Id*. The ICC's staff investigated, concluded "the pattern of voting identified in the letter [was] an irregularity," but then dismissed that irregularity as "not prohibited" by the rules. Exh. 12A at 7. The ICC Board of Directors did, however, ask a board committee to examine the use of voting guides in the code development process. *Id*. at 8.

AGA, NAHB, and other long-term industry participants invoked the appeals process, urging that RE126 was likely preempted by the Energy Policy and Conservation Act, and that RE147 and CE217 were outside the scope of the IECC, which provided:

> This code shall regulate the design and construction of buildings for the effective use and conservation of energy over the useful life of each building. This code is intended to provide flexibility to permit the use of innovative approaches and techniques to achieve this objective.

Exhs. 12B, 13, 14. The ICC's Board of Directors ultimately agreed on each of those points, and RE126, RE147, and CE217 did not appear in the 2021 IECC. *See* Exh. 15.

The ICC changed the process for the 2024 cycle. Instead of giving government officials alone the power to approve proposals, approval power would be vested in consensus committees with representatives of manufacturers, builders, standards promulgators / testing laboratories, users, utilities, consumers, a public segment, government regulators, and insurance, although 1/3 of the seats were reserved for government regulators.

In the 2024 IECC cycle, activists again sought to include numerous decarbonization and electric-ready proposals unrelated to energy efficiency, including requirements for installed electric vehicle infrastructure, electric vehicle ready provisions, electric appliance ready provisions, and an all-electric appendix. Those provisions were—once again—obviously out of the IECC's scope. The ICC's Board of Directors had said as much in connection with the 2021 IECC. So in an unprecedented move, the ICC staff purported to subtly change the rules in the middle of the process to permit greenhouse gas provisions to be included in the body of the IECC. Exh. 16. AGA again sought recourse to the appeal process, urging that the scope clearly required "greenhouse gas reduction resources" be included in non-mandatory appendices, and that the ICC's attempt to change the stated scope via a mid-process memorandum violated the organization's own Due Process rules. Exh. 17. The ICC Board of Directors ultimately agreed the challenged provisions—like electric ready, electric vehicle ready, and all electric—had to be moved to non-mandatory appendices or resources as being beyond the IECC's scope, but the board was criticized by activists for breaking its own rules to do so. Exhs. 18, 19, 20, 21.

The 2027 IECC code cycle is moving down the same dangerous path. The scope and intent once again contemplate appendices for "greenhouse gas" reductions and "zero energy" buildings, without defining those terms. And pursuing those goals *at the building level* does not necessarily mean that systemic energy efficiency has increased, or even that those non-energy efficiency goals themselves have been realized – consider an electric stove powered by electricity derived from coal versus a gas fueled stove. To say the answer isn't straight-forward is an understatement. Activists nevertheless continue trying to use the IECC to penalize or outright ban gas appliances. So the gas industry faces yet another code cycle where activists and the electric industry are nakedly seeking code provisions that exclude or penalize a vast swath of competing gas products.

**C. ASHRAE has made purely political commitments regarding GHG and decarbonization, which are being incorporated into ASHRAE Standard 90.1 despite not being connected to building energy efficiency.**

The other major standard-setting organization—ASHRAE—is following much the same dangerous path, albeit slightly delayed but with greater organizational endorsement.

Indeed, in 2022, ASHRAE's Board of Directors issued a formal position statement declaring that "[e]liminating GHG emissions from the built environment is essential;" by 2030, "all new buildings must be net zero GHG emissions in operation;" "[i]ncreasing stringency and enforcement of energy codes are critical for decarbonization;" and "[b]uilding performance standards (BPS) should be considered as a policy tool for existing building decarbonization." Exh. 22 at 3. The board accordingly committed ASHRAE to "[s]trengthen[ing] the decarbonization components of ASHRAE standards every three to five years, consistent with achieving a fully decarbonized built environment by 2050," "[d]evelop[ing] and revis[ing] guidelines and standards to reduce building GHG emissions," and "[c]ollaborat[ing] with other organizations to promote and advance global building decarbonization." *Id.* at 4-5. Later that year, ASHRAE announced a memorandum with DOE to work cooperatively to "advance decarbonization of the building sector." Exh. 23. And ASHRAE issued a joint statement with the ICC and activists like NBI decreeing that "technical tools and related strategies to decarbonize" should be "pursued relentlessly." Exh. 24. These commitments inappropriately reflect a political judgment and particular social views, not any technical judgment regarding energy efficiency. Suffice it to say that ASHRAE's political commitments are not achievable without banning or heavily penalizing the use of gas appliances.

Consistent with those political commitments, ASHRAE has proposed addendums to ASHRAE Standard 90.1 targeting GHG emissions, mandating electric heat pumps as the primary system for all buildings, and requiring electric vehicle service equipment. These proposed addendums are known as Addendum aa, Addendum bk, and Addendum ap, respectively. Exhs. 25, 26, 27. Of course, greenhouse gas reduction,

decarbonization, and boycotting natural gas are not within the purpose or scope of ASHRAE Standard 90.1. Rather, as set forth in the 2022 edition, the purpose of ASHRAE Standard 90.1 is:

> To establish the minimum energy efficiency requirements of buildings other than low-rise residential buildings, and sites for design, construction, and a plan for operation and maintenance; and utilization of on-site renewable energy resources.

The corresponding scope is to provide:

> a. minimum *energy*-efficient requirements for the design and *construction*, and a plan for operation and maintenance of new *buildings* and their *systems*, [etc.] and
> b. criteria for determining compliance with these requirements.

AGA has noted that ASHRAE's advocacy and public political positions are inconsistent with the requirement that it be an unbiased administrator, are inconsistent with the stated purpose of an energy efficiency code, raise serious anticompetitive and group boycott concerns, and would likely be preempted. Exhs. 28, 29, 30. ASHRAE has nevertheless proceeded apace.

Approval of proposals to change ASHRAE standards follows a process similar to the proposals to change ICC codes, with proposals being subject to public comment, then approval by a project committee (typically consisting of industry, code officials, and public interest members) and ASHRAE's Board of Directors. But unlike the ICC, the ASHRAE Board of Directors is likely to endorse boycotts of natural gas rather than halt anticompetitive agreements.

## III. Legal Analysis

### A. Antitrust

The facts above amply illustrate why the law carefully scrutinizes standards setting organizations for anticompetitive conduct.

To trace the underlying legal analysis, start with the basics. Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. § 1. That bar on concerted action "reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *Nat'l Soc'y. Prof'l Eng'rs v. United States*, 435 U.S. 679, (1978). "The assumption that competition is the best method of allocating resources … recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Id.* The resulting rule is strict. Absent a special exemption by Congress, pleas based on "social justifications" and "special characteristics" are not a defense to liability. *NCAA v. Alston*, 594 U.S. 69, 95-96 (2021).

The Supreme Court has accordingly applied a *per se* rule and found Sherman Act liability where there was concerted activity to manipulate standards. Take *American Society of Mechanical Engineers v. Hyrdolevel Corp.*, 456 U.S. 556 (1982). Participants in the standard-setting process for boilers manipulated an unofficial opinion to discourage customers from using one type of safety cut-off. *Id.* at 560-564. The Court noted that the supposed safety rationale obviously didn't justify the conclusion in the informal opinion. *Id.* at 562. And the Court looked to the pragmatic effect of that informal opinion: ASME's codes, "while only advisory, have a powerful influence: federal regulations have incorporated many of them by reference, as have the laws of most States, [and] the ordinances of major cities…." *Id.* at 559. "[A] standard-setting organization like ASME can [thus] be rife with opportunities for anticompetitive activity." *Id.* at 571. The Court then affirmed "a rule that imposes liability on the standard-setting organization -- which is best situated to prevent antitrust violations through the abuse of its reputation," in addition to imposing liability on the individuals involved. *Id.* at 572-573.

The same result followed in *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492 (1988). As the Supreme Court explained in affirming Sherman Act Section 1 liability for manipulating votes in a standard setting organization to exclude a competing product:

> The activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process. The validity of conduct within that process has long been defined and circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law. Indeed, because private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits, see *ibid.*, the standards of conduct in this context are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena or in the adversarial process of adjudication.

486 U.S. at 506-507. That the activity literally complied with the SSO's rules was not enough to shield it from antitrust liability, especially in the absence of "safeguards sufficient to prevent the standard-setting

process from being biased by members with economic interests in restraining competition." *Id.* at 509. The requirement for sufficient safeguards *i.e.*, standards for transparency, scoping, rationality, regularity of proceedings, and the like has colloquially been termed "due process". *See Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938, 946 (2d Cir. 1987) (referencing *Hydrolevel*).

*Hydrolevel* and *Allied Tube* remain good law. In each of these cases, the Court found an antitrust violation because an established industry-wide standard-setting process was abused or manipulated to exclude a competing product. And that's precisely what is happening in connection with the IECC and ASHRAE Standard 90.1 for natural gas appliances.

1. The recruitment and vote-packing campaign in the 2021 IECC is squarely analogous to what the Supreme Court held impermissible in *Allied Tube*. Otherwise uninvolved persons were recruited and armed with a vote-list to facilitate an activist- and industry-led boycott or handicapping of gas appliances. The evidence suggests those new recruits voted on little else, further illustrating their lack of meaningful involvement in the code development process. That the anticompetitive conduct may have been laundered through the actions of local government functionaries doesn't change the result. *See N.C. State Bd. of Dental Examiners*, 574 U.S. 494 (2015). There was no clear state policy that would insulate the action of those functionaries from antitrust liability. *See id.* at 506. Indeed, more than half of the states have adopted fuel-choice laws making clear that the state's policy is the *opposite* of the IECC provisions almost adopted as a result of the vote-packing. And there certainly wasn't clear supervision of that voting by the States. *See id*. That the conceded irregularity resulted despite compliance with the ICC's rules doesn't change the result either. *See* 486 U.S. at 497 & n.1. That the ICC allegedly had to break its own rules to prevent a similar hijacking in the 2024 IECC makes clear the organization has not imposed "safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition," 486 U.S. at 509.

2. Both the ICC and ASHRAE have engaged in conduct to facilitate the anticompetitive conduct. Both have sought to redefine the purpose and intent of their energy efficiency codes, and both have sought to include boycott provisions in appendices of provisions that don't meet the standard for inclusion in the body of the code. The recourse to such conduct only reinforces that a naked restraint of trade—unrelated to legitimate energy efficiency concerns—is at issue. Provisions enforcing decarbonization, electric-ready, electric vehicle ready, and electric-only reflect partisan political choices, and they are nakedly anticompetitive. Such provisions simply seek to freeze out an entire category of popular products from the market for political or economic reasons. Of course, that standards-setting "is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits…." 486 U.S. at 506-507. Perhaps most damningly, in contrast to ICC's Board of Directors acting as a final check to prevent such anticompetitive conduct in the 2021 IECC and 2024 IECC, ASHRAE has adopted that anticompetitive conduct as a top-down policy of the organization.

### B. Unfair Competition / Consumer Protection / Deceptive Trade Practices

Most states have unfair competition laws that track or are analogous to the Sherman Act. Many also have very broad consumer protection laws targeting misleading or deceptive trade practices. Including provisions in an "energy efficiency code" that are political and unrelated to the energy efficiency concerns implied in the title and stated in the scope may raise issues under state law.

### C. Preemption

Setting aside the competition and consumer protection issues, electric-only and electric-ready requirements are preempted by the federal Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6201 *et seq*. That act broadly preempts non-federal regulation of natural gas appliances. Indeed, EPCA provides that once a federal energy conservation standard becomes effective for a covered product, "no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product," unless the regulation meets one of several categories not relevant here. 42 U.S.C. § 6297(c). And, lest there be any doubt, gas water heaters, stoves, and furnaces are "covered products" under EPCA.

The Ninth Circuit's decision in *California Restaurant Association v. City of Berkeley*, 89 F.4th 1094 (9th Cir. 2024), explains the broad scope of preemption under EPCA. That case involved a local ordinance intended to indirectly ban gas appliances by prohibiting new construction with "natural gas infrastructure," *i.e.*, "fuel gas piping, other than service pipe, in or in connection with a building, structure or within the property lines of premises, extending from the point of delivery at the gas meter." *Id.* at 1099. The Ninth Circuit held the ordinance was preempted, explaining that "EPCA preemption extends to regulations that address the products themselves *and* building codes that concern their *use* of natural gas." *Id.* at 1052.

As the court explained, EPCA expansively preempts regulations that "concern[] … energy use" of covered products. Indeed, Congress made clear that local building codes are preempted by including a narrow set of carveouts for such codes vis-a-vis new construction. *Id.* at 1101 (discussing 42 U.S.C. § 6297(f)). The broad scope of preemption is further confirmed by EPCA authorizing waivers of preemption, but not if the "regulation will significantly burden manufacturing, marketing, distribution, *sale*, or *servicing* of the covered product." *Id.* at 1103-04 (emphasis added, discussing 42 U.S.C. § 6297(d)(3)). Implicit in that bar is that EPCA preempts regulations that do burden the sale or servicing of covered products. That's precisely what electric-only and many electric-ready requirements do for gas appliances. For the extreme "all electric" provisions, the ICC's own Board conceded that there was a "significant risk of preemption." Exh. 31 at 2, 5. The electric-ready provisions, while not as blatant, are also preempted.

A list of jurisdictions with potentially preempted building codes is attached as Exhibit 32.

### D. Advocacy by DOE and PNNL

DOE has statutory authority for involvement in the code-development process, both as a participant and as an evaluator. 42 U.S.C. §§ 6836, 6833. The participation authority appears to be exercised through Pacific Northwest National Laboratory ("PNNL"), which participates in code development, votes in SSOs, and then performs statutorily-required cost-benefit analyses of the resulting code.

DOE and PNNL have proposed or publicly supported proposals related to greenhouse gas limitations and electric-readiness which are designed to limit and/or ban the use of fossil fuels. *See, e.g.*, Exhs. 33, 34.

These DOE and PNNL proposed or supported proposals DOE are not only inappropriate but outside the scope of either the IECC and ASHRAE energy codes and standards. Adoption either in the bodies of those codes or as non-mandatory Appendix would result in promoting all-electric homes and buildings or add unnecessary costs to builders and home owners who plan to use natural gas – the added electrical provisions may never be used during the lifetime of the structure.

Additionally, several statutory provisions task DOE with ensuring the energy efficiency standards are cost-effective before they become mandatory for government programs, thereby acting as a limited check on excesses in the IECC or ASHRAE Standard 90.1. *See, e.g.*, 42 U.S.C. § 12709. Yet after electric-ready concepts were rejected by the ICC's Board of Directors in connection with the 2021 IECC, PNNL declared that "[e]xpanding codes to further support decarbonization through strategic electrification is a pivotal step towards reducing regional and national carbon emissions," notwithstanding decarbonization being unrelated to energy efficiency. Exh. 35 at 3.0. So PNNL published a technical brief "to reinstate the electric-readiness concept such that it can be considered by states and local governments for direct incorporation into their codes." *Id*. PNNL then continued to publish reports with code provisions for "net zero operational energy emissions," Exh. 36 at 3.2, *i.e.*, an outcome that is not tied to efficiency, is not practical without banning gas appliances, and is inconsistent with EPCA.

Perhaps most disturbingly, PNNL hired an activist who appears to have been heavily-involved in the concerted anticompetitive effort in connection with the 2021 IECC. The decarbonization and greenhouse gas emissions reduction advocacy and activist hire suggest PNNL has become focused on activism rather than providing neutral technical support related to energy efficiency.

In short, DOE's role as the evaluator of the IECC and ASHRAE Standard 90.1 has become little more than a rubber stamp. Congress directed the agency to make determinations as to whether each new edition of the codes would "improve energy efficiency." 42 U.S.C. § 6833(a)(5)(A), (b)(2)(A). Recent editions' code-over-code energy efficiency improvements are a far cry from the 25 percent reductions seen in the codes of the early 1990s. Yet, DOE continues (most recently in December 2024) to issue affirmative determinations to

codes that focus more on decarbonization, electrification, and renewable energy mandates, rather than improving energy efficiency in a fuel neutral manner.

## IV. Potential Actions

Several courses of action are available to DOJ and FTC.

1. Initiate appropriate civil and criminal investigations into anticompetitive conduct in connection with standards setting.

2. Coordinate with state Attorneys General in investigating anticompetitive conduct, unfair trade practices, and deceptive conduct.

3. Seek declaratory judgments and injunctive relief against states or municipalities that are seeking to ban gas appliances. *See, e.g.*, *Moyle v. United States*, 603 U.S. 324, 327 (2024) (Kagan, J., concurring: "The Government's suit contended that EMTALA preempts the Idaho abortion law in a narrow class of cases…."); *Arizona v. United States*, 567 U.S. 387, 392 (2016) ("The United States filed this suit against Arizona, seeking to enjoin S.B. 1070 as pre-empted.").

4. Coordinate with DOE leadership to confine PNNL to DOE's statutory roles, *i.e.*, not advocating for issues beyond energy efficiency.

5. Coordinate with DOE leadership to ensure future affirmative determinations are provided only to codes that do not favor one fuel type over another.

* * * * *

On behalf of AGA, we greatly appreciate DOJ and FTC's consideration of this comment. We would be pleased to speak with you if you have any questions.

**Michael Murray**
General Counsel
American Gas Association
400 N. Capitol Street, NW
Washington, DC 20001
mmurray@aga.org