

ORAL ARGUMENT NOT 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 RESPONSE IN SUPPORT OF
MOTION FOR RECONSIDERATION OR CLARIFICATION**

Petitioner American Public Gas Association (APGA) on May 13, 2013, moved for reconsideration or clarification of this Court's order dated May 1, 2013. As set forth below, the following parties concur in the relief requested by APGA: Respondent Department of Energy (DOE); Intervenors in support of Respondent Air-Conditioning, Heating, and Refrigeration Institute (AHRI); Natural Resources Defense Council (NRDC); Alliance to Save Energy; American Council for an Energy-Efficient Economy; Consumer Federation of America; Massachusetts Union

of Public Housing Tenants; and City of New York; and Intervenor in support of Petitioner Air Conditioning Contractors of America (ACCA).

As APGA's motion explains, there is no need for further briefing of the merits in this case. The parties' positions are fully explained in their respective briefs on the merits, and in connection with the subsequent motions. As explained below, the parties jointly filing this response respectfully ask the Court to address those pending motions and (if necessary) the merits based on the materials already before the Court. If any additional briefing is needed, it should be limited to addressing the parties' positions on the post-briefing motions, how the issues presented in those motions affect the case, and how they should be decided.

The captioned case is a challenge to energy conservation standards for non-weatherized gas furnaces. Those standards were established by a direct final rule issued by DOE nearly two years ago. 76 Fed. Reg. 37408 (June 27, 2011), codified in 10 C.F.R. § 430.32. That direct final rule became effective following a final order issued by DOE some four months later. 76 Fed. Reg. 67037 (Oct. 31, 2011). The petition for review was filed by APGA

on December 23, 2011. ACCA and HARDI moved to intervene in support of petitioner on January 20, 2012.

The case has been fully briefed on the merits by all parties. Following merits briefing, the principal parties to this litigation, APGA and DOE, entered into settlement discussions and reached agreement for disposition of the petition for review by partial vacatur and remand for further rulemaking. APGA and DOE jointly moved for that relief. Intervenors City of New York, NRDC, Alliance to Save Energy, American Council for an Energy-Efficient Economy, Consumer Federation of America, and Massachusetts Union of Public Housing Tenants (New York City Intervenor Group) opposed the motion, requesting that if the Court were to grant the motion that it require that DOE complete a new rulemaking within two years. Intervenor HARDI, while supporting the joint motion, also moved for additional relief, seeking to substitute itself as petitioner in the event the Court were to grant the joint motion for partial vacatur and remand. Both post-briefing motions – APGA’s and DOE’s joint motion for

partial vacatur and remand, and HARDI's cross-motion to substitute as petitioner – have been fully briefed.

There are thus three questions before the Court. The most recent motion – HARDI's motion seeking to substitute as petitioner – should be addressed first. As explained in DOE's opposition to that motion, if the Court were inclined to grant HARDI's motion, DOE would withdraw its support for the joint motion. Thus, the settling parties' position on the joint motion depends on whether the Court would grant HARDI's motion to continue the litigation despite the settlement. If this Court were inclined to grant HARDI's motion, the government's withdrawal of support should warrant denial of the joint motion (and would thus moot HARDI's cross-motion). In that event, the merits of the case would be properly presented, and the Court could and should resolve those merits based on the full briefing already filed.

If the Court were to deny HARDI's cross-motion to substitute as petitioner, the Court should next consider the joint motion of APGA and DOE, seeking partial vacatur and remand for further rulemaking. If the

Court grants that motion, it will dispose of the litigation and there would be no need to consider the merits of the case.

Only if the Court were to deny the joint motion for partial vacatur and remand would there be any need to consider the merits of the claims concerning the direct final rule. In that event, there would be no need for further briefing, as the positions of the parties on the merits are unchanged.

As explained above, the parties jointly filing this response thus agree that the three issues before the Court should be decided in the following order, and with the specified consequences:

First, the Court should decide whether it is inclined to grant HARDI's cross-motion to substitute as petitioner. (HARDI supports this motion; DOE and the intervenors supporting respondent have opposed it; APGA and ACCA took no position.)

- If the Court is inclined to grant HARDI's motion, the government would withdraw its support for the joint motion, and the Court should address the merits based on the briefs filed by the parties in October 2012.
- If the Court denies the HARDI motion, it should proceed to decide the joint motion filed by APGA and DOE.

Second, the Court should resolve the joint motion of APGA and DOE, seeking partial vacatur and remand for further rulemaking. (APGA, DOE, and HARDI support this motion;

the New York City Intervenor Group opposed the motion, requesting that if the Court were to grant the motion the Court require that DOE complete a final rule within two years; ACCA and AHRI took no position.)

- If the Court were to grant the joint motion, it would dispose of the case, and there would be no need to consider the merits.
- If the Court denies the joint motion, the merits of the case would be properly presented.

Third, if necessary, the Court should resolve the merits based on the briefing before the Court. (APGA, HARDI, and ACCA seek vacatur of parts of the direct final rule on various grounds; DOE, along with AHRI and the New York City Intervenor Group, urge denial of the petition for review.)

- No further briefing is necessary, as the positions of the parties on the merits have not changed (in the absence of the agreed relief reflecting the settlement of APGA and DOE).

If any additional briefing were required, it should be limited to the pending post-briefing motions, and need not address the merits, which are fully briefed. As APGA's motion for reconsideration explains, any effort by the parties to file joint briefs addressing the merits as well as the pending motions would likely result in greater confusion, in light of the differing views and alignment of the parties on each of the three questions before the Court (as explained above).

CONCLUSION

The undersigned parties concur that additional briefing should not be necessary in this case, and that if any additional briefing is needed, it should be limited to the effect of the two pending post-briefing motions: HARDI's cross-motion to substitute as a petitioner, and the joint motion of APGA and DOE for partial vacatur and remand.

Respectfully submitted,

/s/ H. Thomas Byron III

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MAY 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2013, I electronically filed the foregoing Joint Response In Support Of Motion For Reconsideration Or Clarification 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

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