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June 6, 2016

Mr. John Cymbalsky
U.S. Department of Energy
Office of Energy Efficiency and Renewable Energy, Building Technologies Program
Mailstop EE-5B
1000 Independence Avenue SW
Washington, DC 20585-0121

PETITION TO AMEND THE ERROR CORRECTION RULE

Re: Energy Conservation Program: **(1)** Establishment of Procedures for Requests for Correction of Errors in Rules RIN 1904-AD63 and **(2)** Notice of Opportunity to Submit a Petition to Amend the Rule Establishing Procedures for Requests for Correction of Errors in Rules, Docket No. EERE-2016-BT-PET-0016

Dear Mr. Cymbalsky:

This Petition to Amend the Error Correction Rule and associated comments are submitted by the Air-Conditioning, Heating, and Refrigeration Institute (AHRI) in response to the Department of Energy (DOE) final rule regarding the Establishment of Procedures for Requests for Correction of Errors in Rules (Final Rule or Error Correction Rule) and companion Notice of Opportunity to Submit a Petition to Amend the Rule Establishing Procedures for Requests for Correction of Errors in Rules appearing in the *Federal Register* on May 5, 2016.

About AHRI

AHRI is the trade association representing manufacturers of heating, cooling, water heating, and commercial refrigeration equipment. More than 300 members strong, AHRI is an internationally recognized advocate for the industry and develops standards for and certifies the performance of many of the products manufactured by our members. In North America, the annual output of the HVACR industry is worth more than \$20 billion. In the United States alone, our members employ approximately 130,000 people and support some 800,000 dealers, contractors, and technicians.

Overview

AHRI supports certain purposes of the Final Rule and agrees that any error correction process should not simply duplicate the purposes behind an interested party filing initial

comments on a Notice of Proposed Rulemaking (NOPR) or to criticize conclusions that have already been raised and responded to by DOE. AHRI also appreciates the enormous undertaking that both test procedure and efficiency standard rulemakings require in terms of time, effort and cost, both on the part of stakeholders and DOE.

AHRI specifically commends DOE's acknowledgment in the Final Rule that:

If the Department made an error in the regulatory text of a rule, and that error had the effect of increasing a standard beyond what the Department had concluded—after reasoned deliberations—was appropriate, the error-correction process set forth in this document would permit the Department to correct it. For section 325(o) to prohibit that result would undermine the multiple goals of EPCA. Were an erroneous standard to remain in place, its economic costs might be higher than what DOE had concluded could be justified, at that time, by the resulting energy savings or the standard might be technologically infeasible.

81 Fed. Reg. 26,998, 27,003 (May 5, 2016).

At the outset, it is important to understand that the Final Rule is a direct response to and outgrowth of two separate and interrelated settlements of litigation brought by AHRI and other petitioners or petitioner-intervenors against DOE. See *Lennox Int'l v. DOE*, No. 14-60535 (5th Cir.). In those settlements, AHRI bargained for and secured an agreement for DOE to consider the adoption of a full-fledged reconsideration process of the type that, if available, would have rendered it unnecessary for AHRI to have advanced the arguments contained in Argument Section I of its brief in the *Lennox* litigation. See AHRI Opening Br. at 23-43, 5th Cir. Doc. # 00512992378 (Apr. 2, 2015) (attached as Exhibit 1 herein) [hereafter "*AHRI Lennox Litigation Opening Brief*"]. Therefore, the relevant text of that brief, specifically Roman numeral I and its supporting provisions, should be deemed to be fully incorporated into this Petition to Amend the Error Correction Rule.

Additionally, the *AHRI Lennox Litigation Opening Brief* was itself an outgrowth of DOE's response, in the context of the walk in cooler/freezer litigation, to AHRI's petition for reconsideration¹ and also to the Second Circuit's decision in *NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004). More detail on these points is given below, but in sum, DOE has misconstrued its legal authority as it relates to the anti-backsliding provision in EPCA and in the wake of the *Abraham* decision. Additionally, DOE has acted inconsistently with other reconsideration decisions by the agency.

AHRI believes that many of the main purposes articulated in the Final Rule can best be met by allowing for a 60-day pre-publication period in which Petitions for Reconsideration, as provided for under the Administrative Procedure Act (APA), will be considered and

¹ 42 U.S.C. § 6295(o)(1). See also 79 Fed. Reg. 59,090, 59,091 (Oct. 1, 2014) (Energy Conservation Program for Certain Commercial and Industrial Equipment: Energy Conservation Standards for Walk-in Coolers and Freezers; Air-Conditioning, Heating & Refrigeration Institute Petition for Reconsideration).

publicly addressed by DOE. This would offer a simple mechanism that both (a) avoids triggering the anti-backsliding provision as DOE now reads it (*i.e.*, that this provision is not triggered by changes made to energy efficiency standards that predate *Federal Register* publication); and (b) allows for the full range of reconsideration petitions that the APA contemplates, without artificially restricting that range to allow the correction only of errors defined extremely narrowly as typographical errors, mathematical errors, cross-reference errors or even as DOE putting something in a final rule that it did not intend to include. AHRI's proposal for how DOE should proceed here would also treat DOE rulemakings consistently across test procedures and other agency rulemakings, and benefit operating in harmony with the existing body of law addressing reconsideration petitions under the APA.

Therefore, AHRI petitions DOE to amend the Final Rule to provide for the posting of a pre-publication version of final rules under 42 U.S.C. §§ 6293 and 6295 (and the corresponding provisions applicable to commercial equipment, §§ 6313 and 6314) for a period of 60 days and allow petitions for reconsideration under the APA during that pre-publication period. DOE does not need to define what is meant by an "error" if it adopts this far-simpler proposal. DOE's concern that parties would file reconsideration petitions that are duplicative of their rulemaking comments is not a serious administrative problem for DOE. If the arguments advanced in petitions for reconsideration are duplicative of points already made in comments and adequately responded to by the agency, then as to any such arguments all DOE needs to do in response is to note that such arguments were already addressed in the preamble or other documents accompanying a final energy standards or test procedures rule and DOE stands by the reasons it gave for rejecting such comments.

Alternatively, if DOE does not accept AHRI's Petition to Amend the Rule as described above, AHRI petitions DOE to make the following amendments to the Final Rule as stated below.

The Error Correction Rule Is Too Narrow—It Should Allow for the Full Range of Reconsideration Petitions, an Option DOE Is Committed to Address Under Two Litigation Settlements

In Paragraph 2.b. in the discussion section of the first settlement in the *Lennox* litigation, DOE agreed as follows:

Following an order by this Court granting this motion, DOE has agreed to address these parties' concerns by engaging in a process for establishing the manner in which DOE will address error correction in future rulemakings consistent with EPCA and the APA. Specifically, DOE will use its best efforts to issue, within six months of an order by this Court granting this motion, a public document initiating a process for establishing the manner in which DOE will address error correction in future rulemakings. In addition, DOE will use its best efforts to issue, within twelve months of an order by this Court granting this motion, a final document setting forth the manner in which DOE will address error correction in future

rulemakings. ***DOE's evaluation of options will include, but may not be limited to, a procedure for reconsideration of energy conservation standard rulemakings consistent with EPCA and the APA.***

Joint Motion Embodying Settlement Agreement of All Parties for Partial Vacatur and Remand and to Hold These Cases in Abeyance, 5th Cir. Doc. # 00513134775, at 6-7 (July 29, 2015) (emphasis added).

DOE's Final Rule does not comport with this settlement obligation. The Final Rule did not consider the option of a full-fledged "procedure for reconsideration;" instead, DOE only considered and immediately adopted (without intervening public comment) a Final Rule that defined the term "error" as it applied to "error correction in future rulemakings" extremely narrowly.

DOE's narrow definition of "error" and its lack of considering the option of full-fledged reconsideration petitions necessitated the second settlement. That second settlement provides in relevant part as follows:

If one or more petitions submitted within the 30-day period described in section 2(d) request that DOE consider establishing ***a process for full reconsideration (to any degree, of any aspect) of an energy conservation standard, as contrasted with the limited scope of the error correction rule***, the public document referred to in section 2(d) will address that request, regardless of whether or not DOE chooses to establish ***such a process for full reconsideration***.

Joint Motion Embodying Further Settlement Agreement of All Parties for Dismissal Without Prejudice, 5th Cir. Doc. # 00513484693, at 3 (Apr. 28, 2016) (emphasis added).

This timely Petition to Amend the Error Correction Rule triggers DOE's obligations in the block quotation immediately before this paragraph (contained in paragraph 2.e) of the second sentence.

AHRI reminds DOE that paragraph 2.b. of the first settlement remains fully operative and thus, first and foremost, DOE is obligated to consider the option of "a process for full reconsideration (to any degree, of any aspect of an energy conservation standard.*)" Failing to adhere to this settlement obligation could also subject DOE to challenge if DOE does not correct its failure to comply with paragraph 2.b. in the first settlement by complying with paragraph 2.e of the second settlement.²

² AHRI recognizes that DOE's settlement obligations require it to consider the full-fledged reconsideration obligation only as to substantive energy efficiency standards and not as to test procedures as well. But the other reasons AHRI sets out below equally apply to test procedure rulemakings. There is no rational basis for allowing an error-correction process only for energy efficiency standards and not for test procedure rules. Test procedure rules in many regulatory regimes are part and parcel of substantive rulemaking. Test procedure rules are not ministerial but extremely complex undertakings in their own right. Since compliance with substantive standards are measured by the applicable test procedures, in important ways test

Additionally, the reasons DOE gave in the Final Rule for artificially constraining that rule to considering errors only as narrowly defined are not valid. *First*, the APA, 5 U.S.C. § 553(e) does not limit the grounds on which reconsideration can be pursued. There is no specific provision of EPCA that indicates that Congress intended for APA reconsideration processes to be limited to “error” correction as DOE has sought to narrowly define it in 10 C.F.R. § 430.5(b). Hence, there is no basis for DOE to conclude that reconsideration petitions in the EPCA context were intended to be narrower than under the APA. Indeed, in EPCA there is every indication that the background procedures of the APA were intended to be followed and incorporated into EPCA, not departed from. *See, e.g.*, 42 U.S.C. § 6306(b)(2). *See also AHRI Lennox Litigation Opening Brief* at 30-31 & 32; *see also id.* (when major rules are involved a 60-day period to allow reconsideration also harmonizes with the Congressional Review Act).

Second, DOE expressed the view in denying the walk in cooler/freezer rule that it lacked the power to grant reconsideration petitions. As noted, AHRI hereby incorporates by referenced the arguments it made in its brief to the Fifth Circuit (Exhibit 1) as to why DOE was incorrect and expects DOE to respond to these arguments consistent with its obligations under the two *Lennox* litigation settlements and applicable administrative law principles.

Third, as AHRI’s brief in the *Lennox* litigation also explained, DOE also acted inconsistently with its own action on prior reconsideration petitions filed with the agency in its new assertion in the walk-in cooler/freezer litigation. *See AHRI Lennox Litigation Opening Brief*, 27-28, 39-40.³ DOE must address this inconsistency if it denies this Petition to Amend the Error Correction Rule and either leaves the Final Rule unchanged or modifies it in a way that leaves its narrow-definition of “error” largely in place.

Fourth, DOE has now conceded that the anti-backsliding provision in EPCA is ambiguous within the meaning of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984):

The Department interprets section 325(o)(1) (and its analogs applicable to certain types of equipment) to permit this approach. These provisions prohibit DOE from “increas[ing] the maximum allowable energy use” or “decreas[ing] the minimum required energy efficiency.” However, ***they do not indicate unambiguously what are the relevant maximum “allowable” use and minimum “required” efficiency against which an amended standard should be compared.*** Applying these terms to refer only to rules published in the Federal Register is consistent with the Act and will further its purposes.

procedure rules and substantive energy efficiency standards are logically inseparable. Both codetermine the requirements for covered products and appliances under EPCA. *See also* section below entitled “Include Test Procedure Rules in the Error Correction Process,” which provides additional analysis in this same vein.

³ *See, e.g.*, Energy Conservation Program for Consumer Products: Landmark Legal Foundation; Pet. for Recons., 78 Fed. Reg. 49,975 (Aug. 16, 2013); Energy Conservation Program for Consumer Products: Landmark Legal Foundation; Pet. for Recons., 78 Fed. Reg. 79,643, 79,644 (Dec. 31, 2013).

Final Rule, 81 Fed. Reg. at 27,002. Two points to note there: (1) based upon this DOE logic, it would just as consistent with DOE's construction of EPCA Section 325(o)(1) here for DOE to allow for "a process for full reconsideration (to any degree, of any aspect) of an energy conservation standard, as contrasted with the limited scope of the error correction rule"; and (2) because DOE now acknowledges that the terms "allowable" use and minimum "required" efficiency are ambiguous, this admits the validity of AHRI's argument in the alternative on page 29 of the *AHRI Lennox Litigation Opening Brief*.⁴

Fifth, as noted in the *AHRI Lennox Litigation Opening Brief*, DOE must address itself to the important part of the administrative law problem it faces after the *Abraham* decision of the Second Circuit by setting out its current position as to what that case says about DOE's EPCA reconsideration powers. See *id.* at 32-38 (all each of the prior sub-arguments set out in that brief).

Sixth, to avoid uncertainty and put its new rulemaking on firm ground, DOE must reject the 42 U.S.C. § 6295(n) rationale it adopted in the walk-in cooler/freezer litigation. See *id.* at 39-41. For the reasons given in the *AHRI Lennox Litigation Opening Brief*, that position is legally invalid. And it would be unwise for DOE not to address itself to that issue because the Final Rule here is silent on that provision and DOE would thus be leaving itself open to claims that its denial of reconsideration in the walk-in cooler/freezer situation (published in the *Federal Register* as well) and its Final Rule are inconsistent. DOE's rulemaking here should aim to create a consistent and stable error correction/reconsideration position that will stand the test of time, not one that will foment more uncertainty.

Seventh, DOE's assertion that the process it contemplates should "not include new evidence," 81 Fed. Reg. at 27,002 does not seem well-considered. The heart of any reconsideration process, as it has historically been considered, has always considered the submission of new evidence (especially evidence that could not have been submitted during the comment period) because it is newly arising as a ground for reconsideration. DOE cites no precedent supporting its newfangled view that new evidence should always be off-limits.

* * *

The remainder of this Petition to Amend the Error Correction Rule addresses problem with the Final Rule even on the assumption that DOE basic conception of the scope for

⁴ AHRI continues to request DOE to address AHRI's primary argument on page 28 of the *AHRI Lennox Litigation Opening Brief* that words "allowable" and "required" are sufficiently unambiguous in *Chevron* step one terms to render invalid DOE's rationale for denying AHRI's walk-in cooler freezer reconsideration petition. Indeed, if DOE does not adopt AHRI's request for relief in this Petition to Amend the Error Correction Rule of adopting a 60-day pre-publication period for receiving unfettered reconsideration petitions, administrative law requires DOE to respond to this *Chevron* one argument. The new *Chevron* step two argument DOE advanced in the Final Rule is an improvement over its original flat repudiation of reconsideration authority in the Final Rule here, but it is still not entirely correct as a matter of law.

the rule will remain largely unchanged, though AHRI's proceeding in this fashion should not be deemed to recede, in any way, from the various points made above.

Include Test Procedure Rules in the Error Correction Process

The Final Rule limits the applicability of the error correction procedure to energy conservation standards. However, there is no logical basis to exclude test procedure rules from this process, and contrary to DOE's conclusion in the Final Rule, the combination of features that make the procedure beneficial is not unique to energy conservation standards. *See also supra* n.2.

First, the overall goal of transparency and correcting errors without going through an expensive, uncertain and lengthy litigation process applies to both test procedures and efficiency standards.

Second, test procedure changes may impact efficiency standards if the changes in the test procedure affect efficiency test results. This is specifically recognized within the statutory framework of EPCA at 42 U.S.C. § 6293(e), through the requirement that the Secretary determine to what extent a proposed test procedure would alter the measured energy efficiency of a covered product, and if so make adjustments in the applicable efficiency standard via the test procedure rulemaking. The interconnectivity of test procedures and efficiency standards is also recognized in DOE's own Process Rule,⁵ which requires that final, modified test procedures be issued prior to the Notice of Proposed Rulemaking (NOPR) on the proposed efficiency standards.

Third, the process of developing a test procedure also ordinarily involves extensive technical analysis and voluminous amounts of data. For example, the recent pre-publication version of the test procedure revisions applicable to central air conditioners and heat pumps is 432 pages long, and the recent NOPR on commercial water heaters is seventy pages long. Given the complexity of testing for HVACR and water heating equipment (particularly commercial products), such complicated test procedure rules are not uncommon.

Fourth, despite the provisions of the Process Rule referenced above, DOE has habitually violated that rule in recent years by issuing test procedures after or simultaneously with efficiency standards.⁶ As a result, the analysis and comment periods for test procedures and efficiency standards are frequently intertwined, and stakeholders are left to guess at what the final test procedure will be when evaluating the impact of an efficiency standard.

⁵ 10 C.F.R. 430, Subpart C, Appendix A (paragraph 7).

⁶ *See, e.g.*, "Energy Conservation Program: Energy Conservation Standards for Commercial Package Boilers; Proposed Rule" (81 Fed. Reg. 15,836) (March 24, 2016) and "Energy Conservation Program for Certain Commercial and Industrial Equipment: Test Procedures for Commercial Packaged Boilers; Proposed Rule" (81 Fed. Reg. 14,642) (March 17, 2016). *See also* "Energy Conservation Program: Energy Conservation Standards for Commercial Water Heating Equipment; Proposed Rule" (81 Fed. Reg. 34,440) (May 31, 2016); and "Energy Conservation Program for Certain Commercial and Industrial Equipment: Test Procedure for Commercial Water Heating Equipment; Proposed Rule" (81 Fed. Reg. 28,588) (May 9, 2016).

When DOE chooses to proceed in such a manner, over the objections of the regulated industry, it is fundamentally unfair for DOE to confine the error correction process to only efficiency standards – especially when the comment period for those standards may close *before* comment period of the related test procedure.

Fifth, the real world effect of test procedure and efficiency standard errors is the same, since just as DOE notes that “the relevant industries would face uncertainty about the standard, as well as some difficult choices—whether to comply with it, hope that the error is addressed sometime later, or challenge it in court,” 81 Fed. Reg. at 26,999—this is true for test procedures as well as efficiency standards. Perhaps more so, given that test procedures generally must be complied with no later than 180 days after their effective dates – much earlier than the compliance date for efficiency standards.

Overall, AHRI fully supports DOE’s goal of establishing a process meant to avoid undesirable outcomes, but those outcomes are undesirable and avoidable for efficiency standards and test procedures alike—and DOE’s goals can easily be achieved by applying the error correction process to both test procedures and efficiency standards in a consistent manner, instead of reaching to assert the existence of differences that do not really exist. Therefore, AHRI petitions DOE to amend the Final Rule to allow requests for error corrections for both test procedure and efficiency standard final rules.

Timing of Requests

Thirty days is not a sufficient amount of time to adequately analyze a final rule to determine if an error has occurred. This is recognized in EPCA, which provides 60 days for parties to bring a challenge to a final action by the Secretary.⁷ Efficiency rules can be 50-70 pages long, and the supporting TSD analysis can be over 500 pages. For some rulemakings, DOE has also added a significant amount of text (200 pages)⁸ to TSD documents between the NOPR and Final Rule stage. DOE does not provide redlined versions of these documents, so the only way to identify changes or new material that may contain an error is to painstakingly review the entirety of the final documentation, which realistically takes much more than 30 days.

AHRI notes that DOE could accommodate a much more reasonable timeframe for review by simply following the proposed 30-day pre-publication period and also allowing error correction requests up until the effective date of the rule – 30 days after its publication in the *Federal Register*. This is a reasonable compromise – it does not further delay the effective date of the rule and addresses DOE’s concerns about “delaying” the energy savings from a rule (although the “savings” accrued over one or two months for a rule analyzed over 30 years is clearly miniscule) while allowing a more reasonable time for stakeholders to review. Balancing such a minimal delay against the relatively long-lived, if not permanent nature of the energy standards (given the 42 U.S.C. § 6295(o)(1) provisions on anti-backsliding) makes eminent sense.

⁷ 42 U.S.C. § 6306(b).

⁸ 79 Fed. Reg. 32,050 (June 3, 2014).

This approach is also consistent with the APA power to postpone effective dates, see *AHRI Lennox Litigation Opening Brief* at 10, 30-31, 32-33, 35. It is also consistent with DOE's prior view of the terms "effective" as illustrated in the *Abraham* litigation and with *Abraham* itself. See *id.* at 28-38 (which again should be deemed incorporated by reference for all purposes of this Petition to Amend the Error Correction Rule). As DOE notes on page 27,001 of the Final Rule "as is currently the case, no energy conservation standards rule will be *effective* for some period of time after it has been published in the *Federal Register*, and the start of the lead-time provided to manufacturers to comply with the standards will begin at publication in the *Federal Register*." (Emphasis added).

"Publication" in the Federal Register is also different than the "effective" date of a rule, which is in turn different from when rules "prescribe" action. 42 U.S.C. § 6295(p)(1); see also *AHRI Lennox Litigation Opening Brief* at 36. While publication in the *Federal Register* is a prerequisite for a rule to be effective, a rule can either be effective upon publication or at a later specified date if the ability for Congressional Review is required. If publication equated to when a rule becomes effective, a separate effective date would not be required.

Accordingly, AHRI petitions DOE in this respect (and without prejudice to its farther reaching petition elements above) to amend the Final Rule to either: (1) provide for a 60-day pre-publication period in which error correction requests are allowed; or (2) provide the proposed 30-day pre-publication period and also allow error correction requests up until the effective date of the rule, which is generally 30-60 days after its publication in the *Federal Register*.

Closure of the Rulemaking Record Upon Publication in the Federal Register

DOE states that "consistent with this approach, the Department considers the record with respect to a rule subject to the error correction process closed upon the posting of the rule." 81 Fed. Reg. at 26,999. *First*, DOE does not have the ability to modify the requirements of the APA to exclude the final rule published in the *Federal Register* from the administrative record, as this statement would appear to suggest. *Second*, in the situation where the final rule contains an error that was not in the NOPR, the stakeholders have had no ability to comment upon that error. The "record" for the review by a court is all the information DOE had before it at the time it issued the final rule—and that is the date the final rule is published in the *Federal Register*. *Third*, closing the "record" for the rulemaking at the date of posting the pre-publication version of the rule means that there is no final action by the agency at all—since the very language of pre-publication documents indicates that the rule is not final and is subject to change upon publication in the *Federal Register*.

Additionally, DOE's approach is erroneous for a further set of reasons. It seems calculated to exclude from the record on the relevant rulemaking: (1) the error correction petitions themselves; (2) materials that might submitted attached to or in support of error correction petitions; and (3) DOE action or inaction on error correction petitions and

related materials. That is also improper under the APA, administrative case law, and illogical. If any party files for error correction (or in AHRI's preferred outcome for amending the Final Rule, for reconsideration broadly defined), then both what that party files seeking error correction (or reconsideration) *and* DOE's response to such a filing clearly form part of the rulemaking record because they are considered materials that predate the finalization of the relevant rule.

For these reasons, AHRI petitions DOE to amend the Final Rule to eliminate all references to the closing of the record prior to publication of a final rule in the *Federal Register*.

The Error Correction Process Should Provide for a DOE Response to Error Correction Requests

AHRI objects to DOE's proposed ability to "effectively reject" an error correction request through silence and non-response. This would result in a complete lack of transparency. There are real costs in time and effort by a stakeholder that will attend review of an otherwise final rule and the submission of an error correction request. The least DOE can do is respond. Assuming that DOE will, in good faith, review the error correction submission, providing a written and public notice of its finding will require limited additional effort by DOE. It also may have the added benefit of leading stakeholders to recognize (through DOE's explanation for action on an error correction submission) that stakeholders may have misunderstood what DOE was doing in its rulemaking. This will further promote the goal of avoiding uncertainty as well as the expense and delay of litigation—a goal which benefits both stakeholders and DOE.

AHRI particularly disagrees with DOE's statement that even if DOE agrees that an error occurred, it may conclude the regulatory text is acceptable because the error is insignificant. If so, in the interests of transparency alone, DOE should provide its analysis or justification as to why it deems the error insignificant. See 81 Fed. Reg. at 27,002. Otherwise, a stakeholder could be of the view that it knows an error has occurred, yet in a situation where DOE did not respond at all to the error correction submission, the stakeholder could naturally interpret that as DOE finding that it had not engaged in error and thus lead to the stakeholder concluding that mounting a protracted legal challenge was its only option.

Accordingly, AHRI petitions to amend the Final Rule to include a requirement that DOE will publicly respond in writing to error correction requests, via publication of a responsive document in the rulemaking docket or in the *Federal Register*, prior to publication of the final rule in the *Federal Register* and revising § 430.5(f) to do so.

Direct Final Rules

AHRI agrees with DOE's conclusion that the error correction process is not necessary for rules issued as direct final rules, assuming that identification of an error would be deemed

an “adverse comment related to the rule” under the applicable provisions of EPCA.⁹ However, currently the determination of how DOE defines an “adverse comment” is unclear, due to DOE’s failure to clarify its process related to direct final rules as directed in the settlement of *American Public Gas Ass’n v. United States Department of Energy*.¹⁰ AHRI thus urges DOE to complete that rulemaking, which will in part clarify “the nature and extent of ‘adverse comments’ that may provide the Secretary a reasonable basis for withdrawing the direct final rule, leading to further rulemaking under the accompanying notice of proposed rulemaking (NOPR).”¹¹ The settlement agreement was approved by the court over two years ago, and comments on the Request for Information were submitted in October of 2014.¹² The delay in completing this guidance prejudices not only this rulemaking, but other ongoing rulemakings in which DOE is using the direct final rule process.¹³

Definitions:

Error – *First*, DOE defines “error” as an aspect of the regulatory text that is inconsistent with what the Secretary intended regarding the rule at the time of posting. This definition is unworkable for several reasons. There is no way for stakeholders to surmise DOE’s subjective “intent” behind any given part of a rule. This definition begs the very question to be answered—was the agency action in question deliberate or was it in error? Furthermore, since DOE proposes that if it finds no error it has no requirement to respond, how will stakeholders ever receive the appropriate clarification? DOE needs to adopt an objective definition of the term “error,” not one that will require stakeholders of any stripe to engage in the equivalent of mind-reading.

Moreover, by defining an error as it has done in the Final Rule, DOE has established a standard that allows identification of an error—or, more likely, refusal to find that an error occurred—with hindsight. This amounts to authorizing *ex post* redefinition of an “error” based on an argument (or unexpressed view whenever DOE chooses to remain silent) that DOE does not agree some aspect of a rule is in error based on its current, post-rulemaking intent, whereas DOE may not actually have had any specific subjective intent about that aspect of the rule when it was originally promulgated. And, of course, such *post hoc* assertions about pre-finalization subjective intent would inherently prove unverifiable as an objective matter. Such an approach would thus seem to improperly invite agencies to engage in *post hoc* rationalization about what they had in mind if litigation arises,

⁹ 42 U.S.C. 6295(p)(4)(C)(I).

¹⁰ No. 11-1485 (D.C. Cir.) (mandate issued Apr. 24, 2014).

¹¹ See Joint Motion of All Parties and Intervenors at 21, D.C. Cir. Doc. # 1483406 (March 11, 2014)

¹² 79 Fed. Reg. 64,705 (October 31, 2014); EERE-2014-BT-STD-0049.

¹³ See, e.g., “Energy Conservation Program for Certain Industrial Equipment: Energy Conservation Standards for Small, Large, and Very Large Air-Cooled Commercial Package Air Conditioning and Heating Equipment and Commercial Warm Air Furnaces” (81 Fed. Reg. 2,420) (January 15, 2016).

which is contrary to federal law. See *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). Instead, objective clarity in all rulemaking documents should be promoted, not subjectivity, and especially not subjectivity coupled with silence about why an error correction submission is denied, which is the doubly flawed approach DOE's Final Rule takes.

Second, the rule provides that if a party identifies an error in the regulatory text, it may submit a request that DOE correct the error. DOE should clarify that the relevant "text" includes an error in the Technical Support Documents. For example, whether the rule is erroneous because the regulatory text does not accurately reflect the findings or conclusions of the TSD, or whether an error in the TSD leads to an error in the regulatory text is irrelevant. Both types of errors are equally harmful and subject to legal challenge, and both should be identified and corrected through the error correction rule process.

Similarly, it may be that a stakeholder can identify an error, but because DOE models may not be fully available or useable (due to values "fixed" by DOE) to stakeholders, there may be some instances where stakeholders cannot fully determine what the corrected version should be. In such situations, the error correction process should still be available to identify the error, with the ability for DOE to revise the rule as necessary to propose a correction addressing it. Limitation of the error correction process to the language to be substituted into the *Code of Federal Regulations* also fails to address the equally likely situation where the preamble language states one thing and the proposed *Code of Federal Regulations* language adopted by DOE for the rule in question states another. For example, if the preamble analysis identifies "TSL 2" as the selected level, but the CFR language sets the standard on the levels of TSL 3, where is the error? In the preamble, which DOE has said is off limits from error correction, or in the *Code of Federal Regulations*, which is available to be "error corrected"? How will a stakeholder ever know DOE's intent in such a situation? Again, how will a stakeholder know whether a legal challenge is warranted if DOE is under no requirement to respond? In reality, if there is an inconsistency between a regulation's preamble and a regulation's text, the error runs in both directions. DOE assumes that it will be obvious to stakeholders which one of the two is the error and which one of the two is correct. But that is another example where stakeholders are required to engage in mind-reading, which is both impossible and irrational.

Especially in situations where DOE presents information in the Final Rule that was not in the NOPR, stakeholders should have the ability to address errors based upon that new information through the error correction process. New information in a Final Rule has, by definition, not been subject to stakeholder review and comment, so it would be fundamentally unfair to say that an error within such information cannot be addressed through this process.

Therefore, AHRI petitions to amend the Final Rule to define "Error" in an objective fashion. AHRI suggests that, even if AHRI's request for the establishment of a full-fledged reconsideration process is rejected, a workable reworking of the more limited error correction approach would be to redefine an "error" as an aspect of the text of the final rule that results in an outcome that is inconsistent with (i) the preamble of the rule, (ii) the regulatory text, (iii) technical support documentation; or (iv) other DOE pronouncements that are part of the rulemaking record.

AHRI appreciates the opportunity to provide these comments. If you have any questions regarding this submission, please do not hesitate to contact me.

Sincerely,



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No. 14 - 60535

United States Court of Appeals for the Fifth Circuit

LENNOX INTERNATIONAL, INCORPORATED & AIR-CONDITIONING,
HEATING AND REFRIGERATION INSTITUTE,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY & ERNEST MONIZ, in his
official capacity as Secretary, United States Department of Energy,

Respondents.

On Petition for Review of an Order of the
Department of Energy

Agency No. EERE-2008-BR-STD-0015 &
Agency No. EERE-2014-BT-PET-0041 (consolidated)

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(No. 14-60535)

The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

For the reasons given in this Brief as to why the consolidated petitions for review should be granted, Petitioners Lennox International Inc. and the Air-Conditioning, Heating and Refrigeration Institute (collectively "Petitioners") respectfully submit that oral argument should be granted in this case to assist the Court in resolving the complex legal and record-based issues presented.

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GLOSSARY

AHRI	Air-Conditioning, Heating and Refrigeration Institute (one of the Petitioners in this case)
APA	Administrative Procedure Act
AWEF	annual walk-in energy factor
CRA	Congressional Review Act
DOE	Department of Energy
EISA	Energy Independence and Security Act of 2007
EPAct 92	Energy Policy Act of 1992
EPAct 2005	Energy Policy Act of 2005
EPCA	Energy Policy Conservation Act of 1975
envelope	structure consisting of the panels and doors of a walk-in cooler/freezer
INPV	industry net present value
IQA	Information Quality Act
LFL	load factor low – ratio of the Total Walk-in System Heat Load to the system Net Refrigeration Capacity during a low-load period
maximum energy consumption	metric in KWh/day used for door standards in this rulemaking
max-tech	maximum technologically feasible level for energy-efficiency standards
NECPA	National Energy Conservation Policy Act
NOPR	notice of proposed rulemaking
NPV	net present value
OPEC	Organization of Oil Producing and Exporting

	Countries
R-value	Metric in h-ft ² -°F/Btu used for panel standards in this rulemaking
RFA	Regulatory Flexibility Act
SBREFA	Small Business Regulatory Enforcement Fairness Act of 1996
SCC	social cost of carbon
TSL	trial standard level – package of standards selected by DOE with different degrees of stringency
WICF	walk-in cooler/freezer

INTRODUCTION

In the American food industry and in many other applications, walk-in coolers and freezers are ubiquitous. This case involves new and onerous energy-efficiency standards the Department of Energy (“DOE”) has imposed on manufacturers of such coolers and freezers in its Walk-In Cooler Freezer Rule (“WICF Rule”). The Air-Conditioning, Heating and Refrigeration Institute (“AHRI”) requested that DOE reconsider the WICF Rule and avert this litigation, but DOE refused, taking the position that it lacked the power to grant reconsideration—contrary to prior agency precedent that DOE did not acknowledge. In the alternative, DOE denied reconsideration on the merits, based on a cursory assertion that AHRI’s petition contained unspecified errors and that additional explanations of the rule would be forthcoming. DOE’s arbitrary grounds for denying reconsideration necessitated this suit.

AHRI is a trade association with members that produce residential, commercial, and industrial equipment including the walk-ins that are the subject of the WICF Rule. Lennox International Inc. (“Lennox”), a leading provider of climate-control solutions for air-conditioning and refrigeration

markets, with a tradition of innovation dating back to 1895, is also a regulated manufacturer.

This challenge focuses on three categories of errors made by DOE in the rulemaking: (1) DOE wrongly considered itself without the power to grant AHRI's petition for reconsideration, violating bedrock principles of administrative law; (2) DOE performed a fundamentally flawed cost-benefit analysis outside its statutory authority and plagued by systematic exaggerations of the benefits claimed for the rule while minimizing or overlooking its costs; and (3) DOE's technical analysis contained multiple errors as a result of unexplained about-faces from its prior positions, including applying technology DOE had rejected in the notice of proposed rulemaking ("NOPR") without warning and adopting energy-efficiency levels it concluded in the proposed rule were unjustified because the burdens outweighed the benefits and would place excessive burdens on manufacturers, including small businesses.

STATEMENT OF JURISDICTION

This Court has original jurisdiction to review the WICF Rule under 42 U.S.C. § 6306(b)(1) because Lennox and AHRI will be adversely affected by

that rule.¹ Additionally, the Court has original jurisdiction to conduct judicial review of DOE's denial of AHRI's petition for reconsideration of the WICF Rule. DOE's denial of reconsideration is final agency action within the meaning of 5 U.S.C. § 704. *See* 42 U.S.C. § 6306(b)(2) (applying chapter 7 of title 5 U.S.C. (which includes Section 704) to judicial review conducted under 42 U.S.C. § 6306(b)(1)). *See also NRDC v. Abraham*, 355 F.3d 179, 191-94 (2d Cir. 2004) (holding that, in addition to "the ultimate question whether the replacement standards were promulgated in violation of" law, *id.* at 191, certain actions taken by DOE in connection with an Energy Policy and Conservation Act of 1975 ("EPCA") final rule were also reviewable under Section 6306(b)(1), including reconsideration issues). Indeed, the denial of reconsideration concerning the WICF Rule is inextricably bound up with review of the standards adopted in the final rule itself and thus it would make no sense for review of DOE's reconsideration denial to occur in district court. *See* 42 U.S.C. § 6306(c) (prescribing irrelevant exceptions for exercise of district court jurisdiction over certain EPCA-related actions).

¹ *See* 42 U.S.C. § 6316(a) (applying Section 6306 to rulemakings setting standards for walk-ins, *see* 42 U.S.C. §§ 6311(1)(G), 6313(f), 6314(a)(9)).

QUESTIONS PRESENTED

1. Did the Department of Energy err as a matter of law when it denied AHRI's petition for reconsideration of the WICF Rule?
2. Is the Department of Energy's cost-benefit analysis in the WICF Rule contrary to statutory law and/or arbitrary and capricious?
3. Did the Department of Energy further err in the WICF Rule by (a) including, without warning, hot gas defrost as a design option for dedicated condensing units and thereby also evading review for anti-competitiveness effects by the Attorney General; (b) ignoring its own test procedure regulations and related requirements; (c) adopting TSL 2 but setting standards for certain equipment classes beyond those achievable with TSL 2 technology; (d) basing the stringency of a standard on significant errors in a spreadsheet model; and/or (e) failing to respond to significant comments concerning small-business impacts?

STATEMENT OF THE CASE AND FACTS

A. Statutory Background

Several statutes bear on the WICF Rule. Key portions of those statutes are summarized below:

1. Energy Policy and Conservation Act of 1975

Congress enacted EPCA in reaction to the Organization of Oil Producing and Exporting Countries (“OPEC”) Oil Embargo in the 1970s. *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008). EPCA was amended by several follow-on statutes. First came the National Energy Conservation Policy Act (“NECPA”), Pub. L. No. 95-619, 92 Stat. 3206 (Nov. 9, 1978), which added to appliance regulation a new program for regulating the efficiency of industrial equipment. *See* Pub. L. 95-619, § 441 (adding “Part C—Certain Industrial Equipment” to EPCA, currently codified as Part A-1 of Subchapter III, Chapter 77, Title 42 of the U.S. Code, 42 U.S.C. §§ 6311-6317).²

Finally, Congress enacted the Energy Independence and Security Act of 2007 (“EISA”), Pub. L. 110-140, 121 Stat. 1492 (Dec. 19, 2007). EISA, in relevant part, amended EPCA Section 342 to add walk-in cooler and walk-in freezer standards to the industrial equipment category. *See* Pub. L. 110-140, § 312.

² So-called “EPAAct 1992,” Pub. L. 102-486, § 122, 106 Stat. 2776 (1992) and “EPAAct 2005,” Pub. L. 109-58, § 136, 119 Stat. 594 (2005) (Energy Policy Acts of 1992 and 2005, respectively) made significant amendments to the industrial equipment provisions of EPCA.

“DOE’s energy conservation program for covered equipment generally consists of four parts: (1) Testing; (2) labeling; (3) the establishment of Federal energy conservation standards; and (4) certification and enforcement procedures.” 79 Fed. Reg. 32,050, 32,056 (June 3, 2014).

Authority in EPCA to regulate walk-in coolers and freezers is contained in 42 U.S.C. §§ 6311(1), (20), 6313(f), and 6314(a)(9). Walk-ins are defined as follows:

(A) In general—The terms “walk-in cooler” and “walk-in freezer” mean an enclosed storage space refrigerated to temperatures, respectively, above, and at or below 32 degrees Fahrenheit that can be walked into, and has a total chilled storage area of less than 3,000 square feet.

(B) Exclusion—The terms “walk-in cooler” and “walk-in freezer” do not include products designed and marketed exclusively for medical, scientific, or research purposes.

42 U.S.C. § 6311(20). “Walk-ins consist of two major pieces—the structural ‘envelope’ within which items are stored and a refrigeration system that cools the air in the envelope’s interior.” 79 Fed. Reg. at 32,056. The envelope in turn consists of two different types of components—panels and doors. *Id.* at 32,069.

EPCA requires the promulgation of performance-based standards for walk-in coolers and freezers: “Not later than January 1, 2012, the Secretary shall publish performance-based standards for walk-in coolers and walk-in freezers that achieve the maximum improvement in energy that the Secretary determines is technologically feasible and economically justified.” 42 U.S.C. § 6313(f)(4)(A). The statute also provides for at least three years of lead time in between the date of final rule publication and when a covered product is manufactured. *Id.* § 6313(f)(4)(B)(i). Because such standards embody a new regulatory set of mandates, however, Congress also provided that the three years of lead time could be lengthened to up to five years. *Id.* § 6313(f)(4)(B)(ii).

WICF standards must meet the following criteria:

Any new or amended energy conservation standard prescribed by the Secretary under this section for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency ... which the Secretary determines is technologically feasible and economically justified.

42 U.S.C. § 6295(o)(2)(A). Evaluating whether a standard is economically justified requires considering at least six mandatory factors and one discretionary factor: (1) economic impact on manufacturers and

consumers; (2) operating cost savings; (3) energy savings; (4) lessening of product utility or performance; (5) impact of any lessening of competition as determined in writing by the Attorney General (not DOE); (6) need for national energy conservation; and (7) other factors DOE considers relevant. *Id.* at § 6295(o)(2)(B)(i).

2. Congressional Review Act

The Congressional Review Act (“CRA”), Pub. L. 104-121, § 251, 110 Stat. 847 (Mar. 29, 1996), provides that before any rule may take effect the agency must submit it to Congress in a report. 5 U.S.C. § 801(a)(1)(A). The report must include “a complete copy of the cost-benefit analysis of the rule, if any” and “the proposed effective date of the rule.” *Id.* § 801(a)(1)(B)(i), (iii). Major rules³ “shall take effect on the latest of ... 60 days after the date on which—(i) the Congress receives the report ... or (ii) the rule is published in the Federal Register, if so published.” *Id.* § 801(a)(3).

³ “Major rules” are defined as rules that have or are likely to result in “(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.” 5 U.S.C. § 804(2).

This waiting period is designed to give Congress the opportunity to evaluate agency rules and pass a “joint resolution of disapproval” of them, if Congress deems that necessary. *See generally* 5 U.S.C. § 802. If Congress fails to enact a joint resolution of disapproval, the courts may not read that as an endorsement of the relevant regulation. 5 U.S.C. § 801(g).

3. Information Quality Act

The Information Quality Act (“IQA”) is contained in the Treasury and General Government Appropriations Act for FY 2001, Pub. L. 106-554, § 515, 114 Stat. 2763 (Dec. 21, 2000). The IQA is also set out at 44 U.S.C. § 3516 (note). The IQA provides in relevant part that the Office of Management and Budget (“OMB”) and the federal agencies must establish guidelines “for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.” IQA Section (a) & (b)(2)(A). Most importantly, the IQA creates this mandatory duty: the agencies “shall ... establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued” by OMB. *Id.* Section (b)(2)(B).

4. The Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act of 1996

The Regulatory Flexibility Act (“RFA”) was designed “to improve Federal rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small entities.” Pub. L. 96-354, 94 Stat. 1164 (Sept. 19, 1980). The RFA was later amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”). See Pub. L. 104-121, §§ 201-221, 110 Stat. 847 (Mar. 29, 1996). SBREFA’s purposes included ensuring that a vibrant national economy driven by the small business sector be safeguarded by subjecting agency action in relation to the RFA’s requirements to judicial review. *Id.* at § 202(1) & (6). Congress also found that “the requirements of [the RFA], have too often been ignored by government agencies, resulting in greater regulatory burdens on small entities than necessitated by statute.” *Id.* § 202(5).

The RFA/SBREFA enactments require the preparation of a regulatory flexibility analysis by an agency engaged in a federal rulemaking, such as DOE here when it issued the WICF Rule. 5 U.S.C. § 603(a). Such analysis must meet numerous requirements including “a description of and, where feasible, an estimate of the number of small

entities to which the proposed rule will apply;" "a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule;" and "any projected increase in the cost of credit for small entities." 5 U.S.C. § 603(b)(3)-(4) & 603(d)(1)(A). It must include an analysis of alternatives that would reduce the burden of the regulation in question on small entities, including the exemption of small entities from the regulation entirely. 5 U.S.C. § 603(c); *see id.* § 603(c)(4). *See also generally* 5 U.S.C. § 604 (requirements for final reg-flex analyses).

The RFA/SBREFA specifically provides that agency compliance is judicially reviewable. 5 U.S.C. § 611(a)-(b). Section 611(d) permits "judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law." "In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule ... shall constitute part of the entire record of agency action in connection with such review." 5 U.S.C. § 611(b).

5. Key Portions of the Administrative Procedure Act

The Administrative Procedure Act's ("APA's") Section 553(e) provides that "[e]ach agency shall give an interested person the right to

petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). DOE has interpreted APA Section 553(e) to give it the power to reconsider energy efficiency standards set under EPCA. *See, e.g., Energy Conservation Program for Consumer Products: Landmark Legal Foundation; Pet. for Recons.*, 78 Fed. Reg. 49,975 (Aug. 16, 2013); *Energy Conservation Program for Consumer Products: Landmark Legal Foundation; Pet. for Recons.*, 78 Fed. Reg. 79,643, 79,644 (Dec. 31, 2013).

APA Section 705 grants to federal agencies, including DOE, the power to postpone a regulation’s effective date. 5 U.S.C. § 705 (“When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.”). *See also NRDC v. Reilly*, 976 F.2d 36, 38 (D.C. Cir. 1992) (noting use of APA Section 705 in connection with agency reconsideration powers); *Consolidation Coal Co. v. Donovan*, 656 F.2d 910, 915 (3d Cir. 1981) (same).

B. The WICF Final Rule

The WICF Final Rule sets standards that will result in redesigning all of the components of walk-ins to use less energy. To achieve that end the rule actually sets *19 different energy-efficiency standards*: 10 for particular types of refrigeration systems—and 3 for panels, 4 for non-display doors,

and 2 for display doors. 79 Fed. Reg. 32,050, 32,051-52 (June 3, 2014) (Table I.1). Hence, the standards cannot be summed up in a single number. In general, the refrigeration-component standards were set in terms of a minimum AWEF (annual walk-in energy factor, which is expressed in Btu/W-h) that must be achieved. So, for instance, the standard for indoor dedicated condensing refrigeration system coolers with a less than 9,000 Btu/h capacity was set at 5.61 AWEF. *Id.* at 32,050.⁴ The six door standards are all set in the form of an equation and use a different metric—maximum energy consumption measured in KWh/day. Finally, the three different panel standards are set in terms of a third metric—minimum R-value (h-ft²-°F/Btu).

For summary purposes, perhaps the best way to understand the WICF Final Rule is to consider the six packages of 19 sets of standards—called trial standard levels (“TSLs”)—that DOE assembled for analytical purposes at the proposed rule stage.⁵ The TSLs in the NOPR can then be

⁴ Adding to the complexity, two of the 10 refrigeration AWEF standards are set in the form of an algebraic equation. 79 Fed. Reg. at 32,050.

⁵ “Each TSL consists of a standard for refrigeration systems, a standard for panels, a standard for non-display doors, and a standard for display doors.” 79 Fed Reg. at 32,098.

compared to the three packages of TSLs considered at the final rule stage. Table V-22 through Table V-24 in the NOPR sets out DOE's view of the impacts on industry net present value ("INPV"). Review of those tables reveals that the negative impacts on INPV (and thus on American manufacturers) generally escalate in moving from TSL 1 to higher TSL levels. 78 Fed. Reg. at 55,856-58.

In the WICF Final Rule, DOE dropped consideration of TSLs 1 through 3 and renumbered NOPR levels TSLs 4 through 6 as final TSLs 1, 2, and 3. 79 Fed. Reg. at 32,099 (Table V.3—Comparison of NOPR to Final Rule TSL Criteria). The elimination of proposed TSLs 1 and 2 from consideration significantly increased the stringency range of the standard packages considered for selection at the final rule stage. The WICF Final Rule TSL levels 1 through 3 (former proposed rule stage TSLs 4 through 6) correspond to the following levels of stringency:

TSL 1 —“corresponds to the efficiency level with the *maximum NPV* [net present value] at a 7-percent discount rate for refrigeration system classes and components”;

TSL 2 — “represents the *maximum efficiency level* of the refrigeration system equipment classes *with a positive NPV* at a 7-percent discount rate, combined with the maximum efficiency level with a positive NPV at a 7-percent discount rate for each envelope component (panel, non-display door, or display door”); and

TSL 3 – “is the *max-tech level* for each equipment class for all components,” i.e., greater stringency would not be technologically feasible.

79 Fed. Reg. at 32,098 (emphasis added).

In the proposed rule, DOE indicated that it would select the equivalent of TSL 1 in the final rule (NOPR TSL 4). DOE concluded that this trial standard level “represented the highest economically justified efficiency level, even though higher efficiencies were technologically feasible.” *Id.* at 32,066. However, for the WICF Final Rule, DOE adopted TSL 2 (NOPR TSL 5). *Id.* at 32,117. Hence, DOE significantly increased the stringency of the WICF standards over what it had originally proposed and adopted a TSL level that it had previously concluded was not economically justified.⁶ 5th Cir. Doc. # 00512722476 at 12 (AHRI Reconsideration Petition at 7).⁷

⁶ DOE found in the NOPR that “weighing the benefits and burdens of TSL 5 ... benefits to the Nation ... are too low compared to the burdens (*i.e.*, a decrease of 16 percent in INPV for the walk-in cooler and freezer industry with disproportionate impacts on the panel industry).” 78 Fed. Reg. at 55,874. However, in the final rule, DOE changed course and argued: “If the lower bound of the range of impacts is reached, as DOE expects, TSL 2 could result in a net loss of 4.10 percent in total INPV for manufacturers of walk-in refrigeration systems, panels, and doors.” 79 Fed. Reg. at 32,117. DOE never explained how the equivalent TSL (as

DOE's revised cost-benefit "primary estimate" for the WICF Final Rule asserted that (using a 7% discount rate) increased equipment costs in 2013 dollars would be \$511 million whereas the operating cost savings would be \$879 million. But after counting the benefits it attributed to reduced carbon dioxide emissions (an analysis DOE calls the social cost of carbon ("SCC")), DOE claimed that total benefits including operating cost savings would climb to the range of \$981 to \$1,780 million. 79 Fed. Reg. 32,054 (Table I.4 & n.†) (note that the carbon analysis uses a different and lower discount rate, however—3%).

Importantly, DOE's payback analysis concerning the standards it adopted fell short of allowing the agency to claim the benefits of a rebuttable presumption defense in EPCA concerning the package of standards it adopted. *See* 42 U.S.C. § 6295(o)(2)(B)(iii) (creating a rebuttable presumption that a standard is economically justified if it has a three-year

renumbered by DOE) reduced INPV by 16% in the NOPR analysis but reduced INPV by only 4% in the final rule.

⁷ In the final rule, DOE stated that "in response to the comments from stakeholders, DOE reformulated its TSLs." 79 Fed. Reg. at 32,066. However, there was no explanation of any reformulation, it merely deemed them equivalent and renumbered them.

or less payback period). Table V.24 reports median payback periods concerning 15 of the new efficiency standards. Of those, by DOE's own analysis, 6 *failed* to achieve the 3-year or less payback level, 2 standards achieved that payback level, and for 7 of those 15 standards, DOE reports *no payback period at all*. 79 Fed. Reg. at 32,105; *see also id.* at 32,088 (defending DOE's economic justification conclusions without use of the rebuttable presumption). The carbon dioxide-reduction benefits claimed in the rule were thus pivotal; they were necessary to support DOE's conclusion, given all of the applicable factors which had to be addressed, that the WICF Rule could stand without the benefit of the rebuttable presumption.

C. Procedural Background of the Two Consolidated Petitions for Review

1. The Proposed WICF Rule and Rulemaking Comments

DOE began the process connected with the WICF Rule by issuing a Notice of Public Meeting and Availability of the Framework Document in early 2009. 74 Fed. Reg. 411 (Jan. 6, 2009). Similar meetings continued from 2009 to 2011. Amendment to Certified Indices to the Admin. R., 5th Cir. Doc. # 00512963133 (document numbers 0002 through 0072-A8) (Mar.

10, 2015).⁸ On September 11, 2013, DOE published the proposed rule. 78 Fed. Reg. 55,782 (Sept. 11, 2013). A public meeting on the proposed rule was held on October 9, 2013. Doc. ## 0078 & 0088.

During the comment process, AHRI and Lennox filed comments. Doc. ## 0007, 0036-A1, 0055-A1, 0083-A1, and 0114-A1; *see also* Doc. # 0109-A1. Several of the Petitioner-Intervenors also filed comments. Doc. ## 0053-A1 and 0093-A1 (Hussmann) and 0119-A1. A collection of seven large national trade associations⁹ filed both general comments and an IQA petition concerning the proposed rule. Doc. ## 0095-A1 (general rulemaking comments) and 0095-A2 (IQA petition).

2. WICF Final Rule, the AHRI Reconsideration Petition, and the Two Consolidated Petitions for Review

DOE issued the WICF final rule on June 3, 2014. 79 Fed. Reg. 32,050 (June 3, 2014); *see also* Doc. # 0141. DOE provided that the date when the WICF Final Rule's manufacturing lead-time clock started would be August

⁸ All references to "Doc. #" standing alone (*i.e.*, not to "5th Cir. Doc. #") are to the documents listed in the Amended Administrative Record, filed March 10, 2015.

⁹ America's Natural Gas Alliance, American Chemistry Council, American Petroleum Institute, National Association of Home Builders, National Association of Manufacturers, Portland Cement Association, and U.S. Chamber of Commerce.

4, 2014. After rejecting arguments to extend the three-year lead time provided for in EPCA, 79 Fed. Reg. at 32,063, DOE set the date the final rule would begin to apply to products in the marketplace at June 5, 2017. *Id.* at 32,050.

After a thorough review of the final rule, AHRI filed a petition for reconsideration of the WICF Rule on July 30, 2014. 5th Cir. Doc. # 00512722476. App. A (Aug. 4, 2014). Hearing nothing about the reconsideration petition at the agency level in the interim, Lennox and AHRI sought judicial review of the WICF Final Rule on August 4, 2014, as they were required to do to preserve their rights to judicial review. 5th Cir. Doc. # 00512853727, at 2 (Aug. 4, 2014); *see also* 42 U.S.C. § 6306(b)(1) (requiring aggrieved parties to seek judicial review within 60 days of the rule's publication). Lennox and AHRI simultaneously moved to stay the litigation pending DOE's action on the reconsideration petition. 5th Cir. Doc. # 00512722476 (Aug. 4, 2014) (attaching reconsideration petition as Appendix A). DOE acquiesced in that motion. 5th Cir. Doc. # 00512733284 (Aug. 14, 2014). The Court granted that relief on August 20, 2014. 5th Cir. Doc. # 00512739596 (Aug. 20, 2014).

On October 1, 2014, DOE denied the reconsideration petition. 79 Fed. Reg. 59,090 (Oct. 1, 2014). Lennox and AHRI then filed a second petition for review in this Court of the reconsideration denial on November 28, 2014. 5th Cir. Doc. # 00512853727, at 1-3 (docketed Dec. 2, 2014). This Court then consolidated the two petitions and lifted the stay. *Id.* at 2-3. Several intervention motions on both the Petitioners' and Respondents' side were granted. Order, 5th Cir. Doc. # 00512755920 (Sept. 4, 2014); Order, 5th Cir. Doc. # 00512761561 (Sept. 9, 2014); Order, 5th Cir. Doc. # 00512874262.

3. DOE Actions After the Petitions for Review Were Filed

After these events and the finalization of the deadline for this brief, *see* No. 14-60535 Docket Sheet (entry on February 12, 2015), DOE took two further steps. *First*, it published a determination by the Attorney General that the *proposed* WICF Rule would not have a significant adverse effect on competition. *See* 80 Fed. Reg. 9,591 (Feb. 24, 2015). *Second*, DOE issued six different corrections to the WICF Rule. 80 Fed. Reg. 12,078 (Mar. 6, 2015).

SUMMARY OF THE ARGUMENT

The Petitioners challenge the WICF Final Rule and interrelated reconsideration petition denial, calling for the rule to be vacated and

remanded. This challenge is broken down into three parts. Part I argues that DOE erred in denying the reconsideration petition, first by misconceiving the span of its discretion to act on the petition and second by denying the petition on the merits without adequate explanation. Part II argues that the cost-benefit analysis that DOE performed in support of the WICF Final Rule was deeply flawed. DOE overstated benefits of the WICF Final Rule while understating its costs. Additionally, DOE's cost-benefit analysis flunks the IQA's demanding requirements. And even the manner in which DOE dealt with the IQA petition made part of the record here was superficial. Finally, in Part III, the Petitioners set out examples of substantive record-based errors in the WICF Rule.

STANDARD OF REVIEW

1. *Chevron*. This Court reviews agency constructions of statutes delegated to their administration according to the two-part test set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). “[*Chevron Step One*] If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress [*Chevron Step Two*] [However,] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is

whether the agency's answer is based on a permissible construction of the statute." *Id.* at 842-43.

2. *Adams Fruit*. General statutes that govern multiple agencies including the Congressional Review Act, Information Quality Act, Regulatory Flexibility Act/SBREFA, and the APA are not uniquely delegated to the Department of Energy's administration and hence no deference is owed to DOE when it tries to interpret such statutes—meaning that interpretive questions concerning those statutes are to be reviewed *de novo*. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (“A precondition to deference under Chevron is a congressional delegation of administrative authority.”).

3. **The APA**. The APA's chapter 7, which is incorporated by reference into EPCA, provides several categories of judicial review relevant here:

The reviewing court shall ... *hold unlawful and set aside* agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ...

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute¹⁰

5 U.S.C. § 706(2) (emphasis added). Arbitrary and capricious review under APA Section 706(2)(A) proscribes irrational agency action, including but not limited to the following:

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

ARGUMENT

I. THE DEPARTMENT OF ENERGY ERRED IN DENYING AHRI'S RECONSIDERATION PETITION.

DOE gave two basic reasons for denying AHRI's reconsideration petition. *First*, DOE argued that it lacked the power to grant the petition.

¹⁰ APA Section 706(2)(E)'s substantial evidence test is made applicable by EPCA. 42 U.S.C. § 6306(b)(2) ("No rule under section 6293, 6294, or 6295 of this title may be affirmed unless supported by substantial evidence."); *see also* 42 U.S.C. § 6316(a) (making Section 6306 and Section 6295, in relevant respect, applicable to industrial equipment rulemakings like the WICF Rule).

“AHRI’s self-styled ‘petition for reconsideration’ is procedurally improper.” 79 Fed. Reg. at 59,091. *Second*, as an alternative ground, DOE addressed the merits of the reconsideration petition in the most perfunctory way possible, asserting that “AHRI’s petition appears to reflect a fundamental misunderstanding of how to perform the calculations required to rate a given refrigeration component. Accordingly, AHRI’s petition is predicated on a flawed set of calculations and assumptions.” *Id.* That was it—no explanation of which AHRI calculations or assumptions were wrong, and nothing beyond the timid suggestion that it merely “appears” AHRI’s calculations were wrong. *Compare Mercantile Tex. Corp. v. Board of Governors of the Fed. Res. Sys.*, 638 F.2d 1255, 1260 (5th Cir. 1981) (“When, as here, an agency makes only minimal findings, its decision rests on precarious ground.”).

As explained in greater detail below, the first of these arguments fails at *Chevron* Step One and the second is arbitrary and capricious. Because neither can stand, DOE should be instructed to address itself to the merits of the reconsideration petition.

A. As a Matter of Law, DOE Wrongly Concluded It Lacked the Power to Grant the Reconsideration Petition.

DOE's misconception of its own discretion led it to reach the conclusion that it could not grant the reconsideration petition when applicable law plainly gave it the discretion to do so, as explained below. In addition, DOE's decision was contrary to its own prior precedent and thus arbitrary. Hence, the reconsideration denial is invalid.

Agency action that is premised on a misconception of the agency's authority must be reversed:

[I]f [agency] action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.

SEC v. Chenery Corp., 318 U.S. 80, 94 (1943). Cf. 5 U.S.C. § 706(2)(C) (agency action should be held unlawful and set aside not just if it is in excess of statutory authority but if it is "short of statutory right").

Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), well illustrates this fundamental principle. In *Prill*, the court reviewed a National Labor Relations Board ("NLRB") order rejecting an unfair labor practices claim on the twin grounds that the National Labor Relations Act ("NLRA")

compelled such an outcome and that the NLRB was simply returning to an earlier interpretation of what the phrase “concerted action” meant in the NLRA. Consistent with *Chevron*, the court did not itself purport to define what “concerted action” meant, leaving that task to the NLRB. Instead, the court held that “judicial deference is not accorded a decision of the NLRB when the Board acts pursuant to an erroneous view of law and, as a consequence, fails to exercise the discretion delegated to it by Congress.” *Id.* at 942; *see also id.* at 948 (rejecting *both* of the NLRB’s legal premises as wrong—i.e., (i) the NLRB’s conclusion that the NLRA compelled the NLRB’s reading of the statute and (ii) the NLRB’s interpretation of its prior precedent).

DOE’s decision here asserting that AHRI’s reconsideration petition was procedurally infirm was not harmless. Instead, DOE’s misconception of its own span of authority led the agency to conclude that it could not grant the reconsideration petition when applicable law plainly gave it the discretion to do so. Hence, the reconsideration denial cannot stand.

Indeed, DOE itself had never, prior to this case, adopted the view of reconsideration it took in denying AHRI’s petition. For that reason, this case replicates both types of *Prill* error—(1) DOE was not mandated by the

applicable statutes to deny reconsideration and in any event, (2) DOE failed to recognize that its decision in this case was contrary to its own precedent. DOE's conclusion that it lacked authority to grant reconsideration here is 180-degrees different than its conclusion that it could entertain a reconsideration petition in the EPCA context in the case involving Landmark Legal's reconsideration petition concerning microwave oven efficiency standards. *See* 78 Fed. Reg. at 49,975 (suggesting DOE possessed such power under 5 U.S.C. § 553(e) and requesting public comment on the reconsideration petition); *see also* 78 Fed. Reg. 79,643 (Dec. 31, 2013) (denying petition *not* because it lacked the power to adjudicate it, but on the merits—" [b]ased upon its evaluation of the petition and careful consideration of the public comments, DOE has decided to deny this petition for rulemaking.").

Moreover, agency action that is internally inconsistent or fails to consider past agency precedent is not just a violation of *Chenery/Prill* but is arbitrary and capricious. *See, e.g., Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) ("fundamental norm of administrative procedure requires an agency to treat like cases alike."); *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999) (agency acts arbitrarily

when it departs from prior precedent without explanation); *Ashbrook-Simon-Hartley v. McLaughlin*, 863 F.2d 410, 415 (5th Cir. 1989) (reversing internally inconsistent Department of Labor decision).

1. Section 6295(o)(1) Does Not Prevent DOE from Reconsidering EPCA Standards to Make Them Less Stringent When Reconsideration Is Sought Before the Effective Date of the Relevant Rule.

DOE claimed it could not grant the reconsideration motion because that would violate EPCA. 79 Fed. Reg. at 59,091 (“AHRI seeks an amended standard that would increase the maximum allowable energy use or decrease the minimum required energy efficiency of a covered product, contrary to EPCA. See 42 U.S.C. 6295(o)(1)”). In making this argument, DOE ignores that AHRI requested reconsideration *before* the effective date of the WICF Final Rule. Hence, DOE’s interpretation of Section 6295(o)(1) violated *Chevron* Step One because the WICF Final rule did not set minimum energy efficiency standards for refrigeration systems and panels and maximum energy consumption allowed for doors *before it was in effect* and hence that rule could be changed without regard to Section 6295(o)(1) prior to that time. See 79 Fed. Reg. at 32,051-52. EPCA Section 6295(o)(1) (with emphasis added below) provides that “[t]he Secretary may

not prescribe any amended standard which increases the maximum *allowable* energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum *required* energy efficiency, of a covered product.” During the period before the WICF Final Rule became effective, however, that DOE decision did not “require” or “allow” anything. It simply had no legal effect during that period. Hence, by reading Section 6295(o)(1) to apply to a rule that had not yet taken effect, DOE applied an inapplicable statute to bar a timely reconsideration petition.

Moreover, while it would be nonsensical to read the adjectives “allowable” and “required” to apply to standards that had not yet taken effect, DOE’s approach would still be unlawful even if those words were deemed ambiguous. *See Abraham*, 355 F.3d at 204; *see also id.* at 189 (suggesting that the court could have deferred to a prior DOE interpretation of Section 6295(o)(1) if the agency had concluded that it had the power to amend EPCA standards during the one-month window between when they were published (on January 22, 2001) and when they started the lead-time clock (on February 21, 2001)). By taking the position that Section 6295(o)(1) unambiguously forbid the granting of the

reconsideration petition, DOE erred under *Chenery/Prill* by not recognizing its true span of discretion under *Chevron*. See also 78 Fed. Reg. at 49,975 (putting Landmark Legal Foundation reconsideration petition out for public comment without mentioning Section 6295(o)(1)).

Other statutes that are interconnected with Section 6295(o)(1) reinforce the unambiguous grant of authority for DOE to reconsider a final rule before its effective date. And courts regularly look to such interconnected statutes as a guide for interpretation. See, e.g., *Branch v. Smith*, 538 U.S. 254, 281 (2003) (“courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes.”).

First, the issuance of EPCA standards should be harmonized with APA Sections 553(d) (requiring publication of a rule to take place at least 30 days prior to its effective date) and 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”). Allowing reconsideration serves the policy goals of error correction (which DOE’s interpretation of EPCA Section 6295(o)(1) would override here) and agency certainty. See *CAB v. Delta Air Lines, Inc.*, 367 U.S. 316, 329 (1961) (agencies have power to postpone effective dates);

Arlington Oil Mills, Inc. v. Knebel, 543 F.2d 1092, 1094-95, 1099, 1102 (5th Cir.) (agency empowered to reconsider rule and needed to use notice-and-comment procedures to do so; proper remedy for noncompliance was to vacate and remand to perform a procedurally proper reconsideration), *reh'g denied*, 545 F.2d 168 (5th Cir.) (table).

Second, EPCA must be harmonized with the Congressional Review Act. Because this was a major rule, the CRA required at least a *60-day* period after publication before the WICF Rule could become effective. *See* 5 U.S.C. § 801(a)(3); 79 Fed. Reg. at 32,123 (conceding the WICF Rule is a “major rule” and that DOE would so report to Congress). This promotes both administrative error correction and offers Congress the review period it has demanded. *See* Br. of Secretary of Energy in *NRDC v. Abraham*, No. 01-4102, 2002 WL 32395994, at *26 (2d Cir. Nov. 12, 2002) [hereafter “Brief of the DOE Secretary in *Abraham*”].¹¹

¹¹ The argument in this paragraph does not run afoul on the ban on judicial review of compliance with the CRA. *See* 5 U.S.C. § 805. The point here is that the waiting period established by the CRA is one part of the *corpus juris* that reinforces why allowing for EPCA reconsideration petitions is entirely lawful. The Petitioners are seeking judicial review here only *under EPCA* as it incorporates the APA by reference.

Third, EPCA must be harmonized with APA Section 705, which provides another heading of authority to postpone the effective dates of rules. “When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.” 5 U.S.C. § 705. AHRI brought its action for judicial review of the reconsideration denial on Monday August 4, 2014 but DOE had the petition in hand the same day (it was FedEx-ed on August 1, 2014) and could have postponed the effective date of the WICF Final Rule but chose not to do so. *See Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 689-90 (N.D. Ga.) (three-Judge District Court including Fifth Circuit Judge) (approving of Section 705 self-stay by the Department of Labor), *aff’d*, 409 U.S. 1070 (1972).

Indeed, the Departments of Energy and Justice once agreed with the positions above, themselves fully harmonizing EPCA Section 6295(o)(1) with APA Sections 553(d), 553(e), and 705. *See generally* Brief of the DOE Secretary in *Abraham*. Perhaps the only reason DOE has receded from this position in this case is because of the Second Circuit’s decision in *Abraham*. But, as noted above, *Abraham* is no barrier to reconsideration here because that decision recognizes that granting reconsideration during the one-month window between a rule’s publication and the start of the lead-time

clock is entirely permissible. *See Abraham*, 355 F.3d at 204-06 (holding that DOE's postponement during this one-month window was invalid but only *as a procedural matter* for being issued without notice and comment). In this instance, DOE could easily have put the AHRI reconsideration petition out for reconsideration via notice and comment (as it did with the Landmark Legal petition).

Perhaps in recognition of the fact that *Abraham* supports reading EPCA to allow a grant of reconsideration here and postponement of the effective date, DOE's denial of reconsideration failed to mention that decision. Doing so tripped another wire of administrative law error. As noted above, the Supreme Court's seminal *State Farm* decision establishes that agencies err when they "entirely fail[] to consider an important aspect of the problem." 463 U.S. at 43. Especially after *Abraham* indicated that agency reconsideration and postponements of final rule effective dates could occur during the window of time prior to the start of an EPCA rule's lead-time clock, DOE was not free to pretend such a decision had never been issued. And it will be too late for DOE to grapple with *Abraham* for the first time in its responsive brief. *Luminant Generation Co. v. EPA*, 675 F.3d 917, 925-26 (5th Cir. 2012) (vacating EPA action under the Clean Air

Act that was not explained, citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (agencies cannot support their decisions based on *post hoc* rationales)).

Despite the fact that *State Farm* and the ban on *post hoc* rationalizations should bar DOE from addressing *Abraham* now, DOE might attempt to use the portions of *Abraham* that struck down a more ambitious theory of reconsideration that DOE adopted in 2002 because the Second Circuit found that theory inconsistent with EPCA Section 6295(o)(1). See 67 Fed. Reg. 36,368 (May 23, 2002). In that rulemaking, DOE adopted a definition of “[e]ffective date” meaning “the date on and after which a manufacturer must comply with an energy conservation standard in the manufacture of a covered product.” 10 C.F.R. § 430.2 (2003). In other words, DOE adopted a definition of “effective date” equating that term with the compliance date, i.e., the date when the lead-time clock expired and covered products would need to meet the new EPCA standards in the marketplace in light of EPCA’s lead-time requirements. AHRI and Lennox do not need to defend that interpretation of EPCA to prevail here. As *Abraham* itself recognized, DOE action to

postpone a rule during the one-month window after publication poses a very different situation.

However, while reserving all of its rights to respond to DOE arguments in their reply brief, AHRI and Lennox can briefly set out the main reasons why the *Abraham* decision misinterpreted Section 6295(o)(1) to invalidate DOE's 2002 rule defining the "effective date."

First, Abraham ignored the need to harmonize EPCA with APA Section 705, which the Second Circuit never mentioned, despite DOE's reliance on Section 705 in that case. *Second, Abraham* purports to engage in a holistic analysis of EPCA to find that the act of *Federal Register publication* triggers the "anti-backsliding" provision of Section 6295(o)(1). *See Abraham*, 355 F.3d at 195-96. But Section 6295(o)(1) refers to what the efficiency standards *allow* or *require* (i.e., impacts they have once effective), not simply to when they are published. During the lead-time period, the allowed or required efficiency levels are those currently in effect (until the lead-time period expires) and thus DOE can only enforce those levels. Hence, a Section 6295(o)(1) analysis must be based on those levels.

Third, Abraham invokes Section 6295(p), *see id.* at 196, but the pivotal concept in that provision is when rules are “prescribed.” *See* 42 U.S.C. § 6295(p)(1) (equating prescription with publication: “A proposed rule which *prescribes* an amended or new energy conservation standard or *prescribes* no amendment or no new standard for a type (or class) of covered products shall be *published* in the Federal Register.”) (emphasis added). For a similar reason, *Abraham’s* argument that 42 U.S.C. §§ 6295(f)(1)(B) and 6295(m)(1)(B) support invalidating the 2002 DOE rulemaking reviewed in *Abraham* fails because all the Second Circuit argues there is that the terms (or their cognates) “publish,” “establish,” and “prescribe” are synonymous. *See Abraham*, 355 F.3d at 196. But Section 6295(o)(1)’s focus is on blocking the agency from prescribing amended standards that have already increased “allowed” or “required” standards. *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotation marks and citation omitted).

Fourth, and most importantly, a regulation that harmonizes effective dates and compliance dates not only seems to be a viable *Chevron* Step Two regulatory option but to be precisely what Congress contemplated. See 42 U.S.C. § 6313(f)(4)(B)(ii) (provision entitled “Delayed *effective date*” specifically applicable to WICF standards stating that “[i]f the Secretary determines, by rule, that a 3-year period is inadequate, the Secretary may establish an *effective date* for products manufactured beginning on the date that is not more than 5 years after the date of publication of a final rule for the products.”) (emphasis added). This provision thus entirely accords with DOE’s interpretation of EPCA in 2002 (and is wholly at odds with the newer interpretation DOE offered here when denying AHRI’s reconsideration petition).

Fifth, *Abraham* believed itself to be facing a far-fetched claim by DOE to unlimited power that would let the agency perpetually suspend the issuance of new EPCA standards over and over again, preventing such standards from ever becoming effective. See *Abraham*, 355 F.3d at 200 (“To take this scenario to its absurd extreme, under its interpretation, DOE could insulate itself from section [6295(o)(1)’s] operation indefinitely by engaging in a series of ‘reconsiderations’ each time it promulgated a new

set of standards or by simply suspending indefinitely the standards' effective date."'). Putting aside whether that abusive interpretation of EPCA was what DOE was advocating in 2002 (it was not), it is certainly not the span of discretion that AHRI urged on the agency in its reconsideration petition. Instead, AHRI urged a very modest approach:

Error correction allows neither unfettered agency discretion to change policy course and weaken standards, nor does it threaten a steady march toward standards of increased stringency over time. The purpose of the backsliding provision is clearly not to lock DOE into its errors and tie its hands to prevent it from self-correcting errors it can agree were made. For similar reasons, the antibacksliding provision cannot be interpreted to deny the rights provided by the APA regarding rules that are issued in violation of the APA, and that are based on efficiency levels that exceed DOE's statutory authority. Finally DOE's past expressions of agreement with the *Abraham* decision, as far as we are aware, do not appear to extend to mere error correction. (If that is not the case, DOE can, of course, inform us that they view any error correction that has the effect of weakening standards as *ultra vires* under EPCA and AHRI can then proceed accordingly.)

AHRI Recons. Pet. at 6 (5th Cir. Doc. # 00512722476 at 11). Instead of responding to AHRI's invitation to DOE for it to explain its current view of *Abraham*, however, DOE instead entirely ignored that important aspect of the problem under *State Farm*.

2. Section 6295(n) Does Not Eliminate DOE's APA Power to Reconsider EPCA Regulations or to Postpone Their Effective Dates Pending Judicial Review.

In addition to trying to rely on EPCA Section 6295(o)(1), which does not bar granting reconsideration for all of the reasons set forth in the prior subpart of this Argument, DOE also invoked Section 6295(n):

Unlike some other statutes governing standard-setting through rulemaking, EPCA contains no provision setting forth a procedure for agency reconsideration of already prescribed final rules that established or revised energy conservation standards. Instead, the legal framework established in EPCA by Congress provides a means to enable a person to seek amendment of DOE's existing rules under certain circumstances, not reconsideration of a newly promulgated rule. *See* 42 U.S.C. 6295(n). Accordingly, AHRI's self-styled "petition for reconsideration" is procedurally improper.

79 Fed. Reg. at 59,091. But this was an entirely new argument that is inconsistent with DOE's past precedential action on the EPCA reconsideration petition filed by the Landmark Legal Foundation. Neither the *Federal Register* notice putting that petition out for public comment nor the notice denying it ever so much as mentioned Section 6295(n). Hence, DOE's decision to deploy Section 6295(n) here was purpose-built for AHRI's petition for reconsideration alone and represents an important change in course. Unexplained changes in agency course are invalid. *FCC*

v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (“To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* And of course the agency must show that there are good reasons for the new policy.”) (emphasis in original). Here, DOE displayed no awareness it was changing its reconsideration policy and yet it acted *sub silentio* to do so. Nor did DOE set forth “good reasons” for its change in course.

Moreover, the newfangled DOE Section 6295(n) argument (which is entirely absent from *Abraham*) also provides no reason for DOE to claim its hands are tied in a way that prevents reconsideration:

First, nothing in Section 6295(n) indicates that it intended to prevent reconsideration under APA Sections 553(e) or 705. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (“we do not lightly assume that Congress has intended to depart from established principles”). Indeed, prior to this particular case, DOE invoked APA Section 553(e) to allow it to entertain an EPCA reconsideration petition filed by Landmark Legal.

Second, nothing indicates that Section 6295(n) was designed to apply during the period before a new EPCA standard takes effect. DOE currently wants Section 6295(n) to apply on the theory that it creates a one-way ratchet that AHRI's reconsideration petition would fail to satisfy. *See* 42 U.S.C. § 6295(n)(2)(A) (amended standards must result in a "significant *conservation* of energy" not the reverse) (emphasis added). But nothing in Section 6295(n) indicates that it was intended to strip DOE of its baseline APA powers of error correction to prevent a flawed new standard that would increase the stringency of energy-efficiency standards from ever taking effect in the first place, as opposed to placing procedural and substantive restrictions on amending standards that have already taken effect.

B. DOE Acted Arbitrarily and Capriciously in Denying the Reconsideration Petition on the Merits.

DOE also denied the reconsideration petition on the merits. *See* 79 Fed. Reg. at 59,091. But DOE offered nothing more than its say-so that reconsideration should be rejected. DOE asserted that AHRI misunderstood "how to perform the calculations required to rate a given *refrigeration component*." *Id.* (emphasis added). But even in making that

assertion DOE did not appear confident, indicating only that such an error “appeared” to have been made. In any event, the WICF Rule regulates not just refrigeration components, but also the walk-in envelope, i.e., the doors and panels. DOE was entirely mum as to why reconsideration concerning those aspects of the standards could not be granted. *Compare Action for Children’s Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (agencies must act with a reasonable basis, not by using “barebones incantation[s]”).

Agencies act arbitrarily and capriciously when they offer only their own fiat statements to justify their actions. “Courts require that ‘administrative agencies ‘articulate the criteria’ employed in reaching their result and are no longer content with mere administrative *ipse dixits* based on supposed administrative expertise.’ *Appalachian Power Co. v. EPA*, 477 F.2d 495, 507 (4th Cir. 1973) ...” *American Petroleum Inst. v. EPA*, 661 F.2d 340, 349 (5th Cir. Unit A 1981). The agency’s path must be reasonably discernible for it to be upheld. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). And here, there is simply no basis for concluding that DOE’s vague path in denying the petition can be plotted.

DOE erred in a further respect as well. To buttress its mere say-so that the AHRI petition was flawed on the merits, DOE suggested that it

would make the reasons for the denial of the petition clear—*later*. See 79 Fed. Reg. at 59,091 (“DOE believes that it would be beneficial to hold a public meeting to demonstrate how DOE’s test procedure and refrigeration system standards interact with each other and how manufacturers must calculate the efficiency of their respective refrigeration systems.”). But that meeting was not held for three weeks whereas the reconsideration petition was being denied that day, long before the meeting. See 79 Fed. Reg. 59,153 (Oct. 1, 2014) (setting the date for the public meeting as October 23, 2014). Agencies must provide explanations at the same time they choose their actions. They cannot take an action today based on a promised explanation to come later. *Amerijet Int’l, Inc. v. Pistole*, 753 F.3d 1343, 1351 (D.C. Cir. 2014) (“Under well-established law, we evaluate an agency’s *contemporaneous explanation* for its actions”) (emphasis added); see also *N.Y. Currency Research Grp. Corp. v. CFTC*, 180 F.3d 83, 85 (2d Cir. 1999) (“Commission appears to have acted the role of the Queen who declared in a similar fit of pique during the hurried trial of the Knave of Hearts, ‘Sentence first—verdict afterwards.’ Lewis Carroll, ALICE’S ADVENTURES IN WONDERLAND 156 (Justin Todd illus., Crown Publishers 1984).”).

II. THE COST-BENEFIT ANALYSIS PERFORMED TO SUPPORT THE RULE IS CONTRARY TO LAW.

At EPCA's very core is the performance of a detailed, multi-factor cost-benefit analysis. *See* 42 U.S.C. § 6295(o)(2)(B)(i) ("In determining whether a standard is economically justified, the Secretary shall, after receiving views and comments furnished with respect to the proposed standard, determine whether the *benefits of the standard exceed its burdens ... to the greatest extent practicable*") (emphasis added). Yet here, the cost-benefit analysis that DOE performed to support the WICF Rule is woefully deficient. DOE's social cost of carbon ("SCC") analysis is not only an exercise outside the bounds of agency power, it was highly flawed and did not comport with the Information Quality Act. Additionally, the analysis did not treat costs and benefits on an even-handed basis.

A. DOE's Claim to Environmental Regulatory Power Was Unlawful.

DOE specifically asserted that it had environmental rulemaking power here. *See* 79 Fed. Reg. at 32,066 ("DOE routinely conducts a full economic analysis that considers the full range of impacts to the customer, manufacturer, Nation *and environment*, as required under 42 U.S.C.

6295(o)(2)(B)(i) and 6316(a).”) (emphasis added). But there is no such requirement, as neither of those provisions in EPCA references environmental impact, as even a quick scan of them reveals. By relying on this factor in the cost-benefit analysis, which Congress did not intend DOE to consider, DOE acted arbitrarily and capriciously under the APA. DOE might attempt to argue that environmental factors can be considered in light of Section 6295(o)(2)(B)(i)(VII) (“other factors the Secretary considers relevant”), but in this rulemaking DOE specifically disclaimed any such argument by stating that it “has not considered other factors in development of the standards in this final rule.” 79 Fed. Reg. at 32,114. Thus it will be too late in its opposition brief for DOE to argue that environmental factors should be considered part of Section 6295(o)(2)(B)(i)(VII)’s “other factors.” *See, e.g., Trencor v. NLRB*, 110 F.3d 268, 272 (5th Cir. 1997) (agencies cannot defend decisions based on *post hoc* rationalizations).

B. The Department of Energy’s Social Cost of Carbon Analysis Flunks the IQA’s Standards of Decisionmaking Based on Sound Science.

The group of trade associations led by the Chamber of Commerce also filed into the record of this rulemaking a petition under the IQA.

Chamber IQA Pet., Doc. # 0095-A2. DOE accepted the petition into the record and partially addressed it, but left many of the Chamber's IQA points unanswered. 79 Fed. Reg. at 32,096 (referencing commenters arguing that DOE's SCC estimates fail to comply with OMB's "Final Information Quality Bulletin for Peer Review").¹²

The Chamber IQA petition details numerous problems with the SCC analysis that DOE pulled from an interagency working group and plugged into the WICF Final Rule. Chamber IQA Pet. (Sept. 4, 2013), Doc. # 0095-A2; 79 Fed. Reg. at 32,053 & n.7. Several examples will suffice to show these flaws.

First, the interagency process was not transparent. The agencies involved were disclosed but not which of their personnel participated, or whether outside consultants were used. This violates the OMB

¹² Since DOE accepted the IQA petition into the record, any argument that the issue is not reviewable in the course of this rulemaking would also amount to a forbidden *post hoc* rationalization. *Trencor*, 110 F.3d at 272. Additionally, the APA would independently provide Petitioners a cause of action to seek judicial review of an improperly denied IQA petition standing on its own.

guidelines.¹³ Chamber IQA Pet., Doc. # 0095-A2, at 6-7. DOE never responded to this point in the WICF Rule.

Second, the SCC estimates were not subjected to peer review. *See id.* at 7-9. DOE was even forced to concede that the National Resource Council (part of the National Academies of Science) criticized the models the interagency process used as “suffer[ing] from uncertainty, speculation, and lack of information about (1) future emissions of GHGs; (2) the effects of past and future emissions on the climate system, (3) the impact of changes in climate on the physical and biological environment, and (4) the translation of these environmental impacts into economic damages.” 79 Fed. Reg. at 32,094. DOE protested that the *models* adopted by the interagency process and applied by DOE here have been subjected to peer review. *See id.* at 32,095. This ignores one of the key points in the IQA petition: peer review of the models alone is not sufficient because the issue is how the models are being *applied* to justify the WICF Rule in particular. “The SCC Estimates are as much a product of the inputs to the models as

¹³ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8,452 (Feb. 22, 2002).

they are the product of the models themselves. The inputs that drive both the 2010 and 2013 SCC Estimates were never peer reviewed—nor are the majority of them even known.” Chamber IQA Pet., Doc. # 0095-A2 at 9. *See also Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986) (“it is the methodology used in creating the maps and studies, and the meaning to be inferred from them” that must be open to public comment) (citation and internal quotation marks omitted).

Third, in order to translate certain predicted climate-change effects into economic damages, the interagency SCC analysis relies on arbitrary damages functions. “These damage functions translate variables, such as projected sea level rise, to estimated economic damages. By their nature, we know very little about the correct functional form of damage functions. According to a well-known economist, “[the model] developers ... can do little more than make up functional forms and corresponding parameter values. And that is pretty much what they have done.” Chamber IQA Pet., Doc. # 0095-A2, at 12 (citing R.S. Pindyck, *Climate Change Policy: What Do the Models Tell Us?*, NBER Working Paper Series, WP 19244, at 11 (July 2013)). Once again, the Court will search this rulemaking record in vain for a response to the Chamber’s comment putting eminent MIT Professor

Pindyck's analysis before DOE. If anything, the broader record further supports the Chamber's objections. DOE Final Technical Support Document (May 2014) ("Final TSD"), Doc. # 0131 at 16A-11 (referring to "the *need for a thorough review of damage functions*—in particular, how the models incorporate adaptation, technological change, and catastrophic damages. *Gaps in the literature* make modifying these aspects of the models challenging, which highlights the need for additional research.") (emphasis added).

C. DOE's Cost-Benefit Analysis Was Systemically Biased and Invalid in Other Respects.

1. *Mismatch Between Broadly Defined Benefits and Narrowly Defined Costs.* Several of the Nation's most-prominent trade associations filed a collective set of comments on the rulemaking arguing that DOE looked at benefits in the broadest possible sense to include indirect benefits such as reductions in the SCC, but that when it came to considering costs, indirect costs were ignored such as "income loss and job search costs imposed on workers who might be displaced because of higher prices for new walk-in coolers and freezers and their components, and reduced product demand." Chamber of Commerce, *et al.* Comments (Nov. 12,

2013), Doc. # 0095-A1, at 6. DOE entirely ignored that significant comment as well.

2. *Mismatch in the SCC Analysis Looking to Global Benefits.* AHRI pointed out that DOE should not be able to analyze *global benefits* but look only to *national costs*. AHRI Comments (Nov. 2013), Doc. # 0114-A1, at 6. DOE did acknowledge this comment, but its explanations for the logical mismatch are legally defective. *First*, DOE argued that greenhouse gases create a global externality. 79 Fed. Reg. at 32,096. *Second*, DOE argued that the United States cannot solve the problem of climate change alone. *Id.* Both of those responses are *non sequiturs*. DOE's analysis contains a fundamental mismatch. The SCC is measured not just for consumers of products purchased in U.S. markets, but across the entire global population, yet DOE's analysis of costs to consumers counts as consumers only those who make purchases of the covered products in the domestic market. There is also no reason why America's contribution to climate change cannot be based on an analysis that compares costs to benefits on an apples-to-apples basis (*i.e.*, nationally). Additionally, EPCA is *not* an international statute, since, as its text and history in emerging from the OPEC Oil Embargo attest, the purpose of the statute is to

guarantee *this Nation's* welfare and energy conservation not the well-being of other countries. 42 U.S.C. § 6295(o)(2)(B)(i)(VI) (referring to “the need for *national energy and water conservation*”) (emphasis added). EPCA authorizes DOE to conduct only a national analysis. There are no references to global impacts in the statute.

3. *DOE Ignored the Need to Explain a Relevant Market Failure.*

DOE's cost-benefit analysis was not only lopsided but insufficiently grounded in economic theory. The whole point of imposing mandatory standards on the marketplace concerning energy efficiency for products such as walk-ins is to try to solve for a market failure. *See, e.g.,* Noah M. Sachs, *Can We Regulate Our Way to Energy Efficiency? Product Standards as Climate Policy*, 65 VAND. L. REV. 1631, 1650-52 (2012).¹⁴ The EPCA rulemaking factors make this clear by requiring a comparison of operating cost savings to energy savings, in a fashion that will not impose economically inefficient costs on manufacturers, lessen the utility of the

¹⁴ The author of this article suggests various reasons why *he believes* there are market failures in energy efficiency-related markets. Putting aside whether the author's arguments are correct, a critical problem with what DOE placed into the record in this case is that *DOE never attempts to explain* whether and where such market failures exist.

underlying products they buy, or reduce competition between manufacturers. 42 U.S.C. § 6295(o)(2)(B)(i)(I)-(V).

DOE was asked to explain the market failure that justified this onerous set of WICF standards:

Does the DOE truly identify a systemic problem in relation to purchases of walk-in coolers and freezers? We think probably not [A]n obvious question is whether the market may already provide an optimal level of energy savings, at least from an American consumer's perspective. Apparently, there are net financial savings to be had from paying up front for better energy-saving equipment, and the DOE notes that the technology is already available to achieve its planned level of savings. Therefore, we might expect equipment buyers to show a demand for the equipment that provides such savings, *and claims that they are irrationally ignoring the benefits are suspect—particularly when, as in this case, the consumers are mainly business users of refrigeration. If consumers do not buy the more energy-saving equipment, it could simply reflect their preferences for other product attributes*

[C]laims that observed patterns of supply and demand are suboptimal typically rely on further claims that consumers undervalue some element that is highly prized by the regulator

The analysis amounts to nothing more than a claim that the people should make different choices and that the regulator knows best. Actually, we have the people we do, and their preferences are the ones that count.

Mercatus Center Comments (Nov. 2013), Doc. # 0091-A1, at 4-5 (emphasis added).

DOE did not respond at all to this significant comment, which goes to the heart of the rulemaking's analysis and to whether there is an alternative hypothesis to explain why walk-in consumers are not purchasing the types of equipment DOE would paternalistically prefer. (Mercatus is referenced only once, in DOE's discussion of the social cost of carbon, 79 Fed. Reg. at 32,096.) Hence, this is a classic *State Farm* failure "to consider an important aspect of the problem" that requires remand all by itself. 463 U.S. at 43; see also *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (it is "not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.").

4. Mismatch in Looking at a 30-Year Period for Costs But a 300-Year Period for SCC Benefits. AHRI also highlighted that the agency cannot rationally measure costs over only a 30-year period but look at the carbon benefits over *three centuries* (the United States is not even three centuries old). AHRI Comments, Doc. # 0114-A1, at 6. DOE also acknowledged this comment. See 79 Fed. Reg. at 32,097 (arguing that DOE could have gone farther in regulating here because the energy savings it was requiring would go out past 30 years). But again, DOE's response does not meet the

stated objection. The point is that DOE should be doing a fully apples-to-apples comparison of costs and benefits—over the same timespan. DOE cannot decide to look only at a subset of costs and confine those to a 30-year assessment period while looking to direct *and indirect benefits*, with one highly significant category of those indirect benefits being reckoned over a 300-year period.

III. DOE MADE A STRING OF RECORD-RELATED ERRORS IN THIS RULEMAKING.

AHRI maintains that the issues raised in its petition for reconsideration and the issues raised in the rulemaking comments of Lennox and several other AHRI members are well-founded (certainly nothing in DOE's cursory attempt to assert that an unspecified error exists in AHRI's analysis establishes to the contrary) and can be expanded upon by Petitioner-Intervenors. These errors include, but are not limited to, exemplars focused on below: (A) use of hot gas defrost for certain refrigeration units; (B) applying a newly adopted test procedure in an unlawful fashion; (C) adopting TSL 2 but for certain equipment classes setting standards above those achievable with TSL 2 technology; (D)

making patent errors in a technical spreadsheet; and (E) failing to properly analyze small business impacts.

A. Without Notice, Hot Gas Defrost Was Included in the Final Rule as a Design Option for Dedicated Condensing Units— an Error That Violated the Legal Requirement of Attorney General Review of Anticompetitive Effects.

“Hot gas defrost involves the recirculation of hot gas discharged from the compressor to warm the evaporator during a defrost.” Final TSD, Doc. # 0131 at 3-32 to 3-33. In the proposed rule, “DOE did not include hot gas defrost as a design option for dedicated condensing systems because DOE did not believe it was effective at saving energy.” 79 Fed. Reg. at 32,082. “However, in the Final Rule, DOE changed course and included it as a design option. Because DOE stated in the NOPR that it was not including Hot Gas Defrost for Dedicated Condensing Units, stakeholders had no notice that it would be considered as a design option for that type of equipment.” AHRI Recons. Pet. at 16 (5th Cir. Doc. # 00512722476, at 21)).

DOE argued that Heat Transfer Products Group filed a comment arguing that hot gas defrost could be used to increase the efficiency of dedicated systems. *See* 79 Fed. Reg. at 32,082. But in the same breath, DOE

conceded that “Heat Transfer’s literature claims that hot gas defrost causes systems to defrost four times faster, but did not have specific details on the energy savings. See chapter 5” *Id.* DOE, however, did not use an empirical-data basis, as it was required to do. Moreover, chapter 5 of the Final Technical Support Document includes incomplete citations that are yellow highlighted as if to be filled in later by DOE but never were. Final TSD, Doc. # 0131, at 5-52. Chapter 3 contains a further concession: “A more serious consequence of using this defrosting system is cracking and leaking resulting from thermal stresses induced upon the coolant piping due to alternate exposure to high- and low-temperature refrigerant.” *Id.* at 3-33. But DOE nowhere quantifies the economic *costs* of that counterproductive problem, a telling contrast to its inordinate focus on including environmental *benefits* in the SCC area over longer periods of time and lower discount rates. More generally, no record was developed on the performance and reliability problems associated with using hot gas defrost.

This error by DOE is highly significant. Had DOE considered the issue, it would have discovered that adding hot gas defrost as a design option has enormous financial implications for the WICF industry. On

average, the hot gas defrost design feature represents 70% of the increase in AWEF stringency from baseline to max tech for dedicated condensing low temperature outdoor units (“DC.L.O”).¹⁵ Additionally, in the WICF Final Rule’s engineering analysis, the average maximum achievable AWEF using the electric design option is only 90% of the final rule AWEF minimum.¹⁶ Thus, the AWEF minimum DOE established effectively *eliminates* electric defrost, replacing it with hot gas.

Effectively eliminating electric defrost could readily be expected to cause anticompetitive effects in the market traceable to eliminating the electric defrost option many manufacturers utilize. DOE’s hot gas defrost switch in the WICF Final Rule thus creates another problem—evasion of 42 U.S.C. § 6295(o)(2)(B)(i)(V). That provision of EPCA requires a determination concerning competitiveness impacts by the Attorney

¹⁵ Compare AWEF values on Results Summaries of Doc. # 0087 linked at Tab “Equipment Class,” Column J, Rows 45-53 with AWEF values at Results Summaries of Doc. # 0137 linked at Tab “Equipment Class,” Column J, Rows 45-53.

¹⁶ See AWEF values at Results Summaries of EERE-2008-BT-STD-0015-0137 linked at Tab “Equipment Class,” Column J, Rows 59-65; Refer to corresponding “Calculation” tab at each Results Summary for MC.L.N products for Efficiency Levels implementing Design Option-13 “HGD”; compare to Efficiency Levels using “ELD.”

General (thereby committing such review to the Attorney General's discretion under *Adams Fruit*, not to DOE's discretion). EPCA Section 6295(o)(2)(B)(i)(V) effectively assumes that no significant changes are made in between the time of the Attorney General's review at the proposed rule stage and the issuance of the final rule. *See id.* 6295(o)(2)(B)(ii) (requiring the Attorney General to assess the competitiveness impact of "such standard," i.e., the standard that is proposed, not a different one). In this instance, however, that assumption was violated because a very different and more stringent standard was adopted in the final rule.

Indeed, the standards were made considerably more stringent—moving from the TSL tentatively adopted in the NOPR to the actual TSL adopted at the final rule stage, *see supra* Statement of the Case, Part B—meaning that the failure of DOE to reengage with the Attorney General after DOE opted to adopt more stringent standards points up a much larger legal error that affects this whole rulemaking. Significant enough changes were made to the proposed rule that the Department of Justice should again have been consulted before the WICF went final. DOE's failure to do so renders the final rule statutorily deficient under Section 6295(o)(2)(B)(i)(V).

B. DOE Failed to Follow Its Own Regulations Regarding When Test Procedures Must Be Established.

EPCA requires that any new or amended energy-efficiency standard include applicable test procedures. 42 U.S.C. § 6295(r). Substantive standards are required to have applicable test procedures so that manufacturers are not left in the dark as to how compliance with the substantive standards will be measured.¹⁷ Here, DOE issued the NOPR for the substantive standards on September 11, 2013. *See* 78 Fed. Reg. 55,782. But manufacturers could not possibly have commented on how the test procedures combined with the proposed substantive standards because the test procedures would not be finalized until much later. *Compare* 78 Fed. Reg. 55,782 (Sept. 11, 2013) (closing comment period on efficiency rule on November 12, 2013) *with* 79 Fed. Reg. 27,388 (May 13, 2014) (finalizing test procedure rule). Indeed, the test procedure was not finalized until just three weeks before the June 2014 promulgation of the final WICF Rule.

¹⁷ *See* 42 U.S.C. 6291(6) (energy conservation standard is “determined in accordance with the test procedures prescribed under ... section 6293”); 42 U.S.C. § 6295(o)(2)(B)(iii) (referencing efficiency standards “as calculated under the applicable test procedure”); 42 U.S.C. § 6295(o)(3)(A) (new or amended standards require the prior establishment of the test procedure).

Rushing out the substantive standards without offering manufacturers the ability to comment on them in light of the governing test procedure is one of the missteps that prompted AHRI to file for reconsideration. *See, e.g.,* AHRI Recons. Pet., at 21, 5th Cir. Doc. # 00512722476 (AHRI pointing out on reconsideration the problem that the new test procedure created for unit coolers sold separately). DOE nevertheless denied rehearing, noting that a forthcoming public meeting “will help ensure that stakeholders properly apply the test procedure when assessing the compliance of their equipment with the applicable standard.” 79 Fed. Reg. at 59,091. Once again, DOE failed to provide contemporaneous explanation for its actions and that meeting, held four months after the efficiency standards were published, was too little, too late.

Because understanding how proposed substantive standards will be measured in the real world is a necessary aspect of any EPCA standard, and because DOE must have actual data using the test procedure in order to measure the performance of the equipment under the proposed standard levels, DOE bound itself to put test procedures in place *before* the issuance of proposed substantive rules. *See* 10 C.F.R., pt. 430, sub-pt. C, App. A, Rule 7(c) (“Final, modified test procedures *will be* issued prior to

the NOPR on proposed standards.”) (emphasis added). DOE violated that mandatory rule, thereby invalidating this rulemaking because agencies must follow their own regulations. *Fox Television Stations*, 556 U.S. at 515 (“An agency may not ... simply disregard rules that are still on the books. *See United States v. Nixon*, 418 U.S. 683, 696 (1974).”).

This violation of DOE’s legal duties also ties directly to the pivotal hot gas defrost issues addressed in Part III.A. above. Specifically, in violation of its duties in Section 6295(o)(3)(A) and 6295(r), DOE failed to promulgate in advance a test procedure for hot gas defrost. Instead, DOE choose to adopt a system of “nominal values” as a substitute. The term “nominal values” does not appear in EPCA and cannot lawfully replace a test procedure. *See* 79 Fed. Reg. at 27,401 (“DOE agrees with HTPG [Heat Transfer Products Group] that a test procedure for hot gas defrost would be beneficial to capture innovative technologies not currently accounted for by the calculation methodology. Should the industry develop a test method for rating hot gas defrost systems, DOE may consider adopting it.”).

C. Although DOE Adopted TSL 2, DOE Arbitrarily and Capriciously Set Standards for Certain Equipment Classes Above Those Achievable with TSL 2 Technology.

In the WICF Rule, DOE adopted standards at TSL 2. 79 Fed. Reg. at 32,117. For each WICF equipment class (doors, panels, and refrigeration systems), DOE determined which technology matrix constituted TSL 2 and translated that set of technologies into an AWEF standard. *Id.* at 32,099-101. However, in translating DOE's TSL 2 technology matrix into numeric standards for certain equipment classes, DOE incorrectly and without explanation set the minimum AWEF standard at a level that DOE's own analysis indicates is not achievable with TSL 2 technology for certain products.

For instance, DOE set the minimum AWEF standard applicable to multiplex condensing, low temperature refrigeration systems at 6.57. *Id.* at 32,124 (table added at 10 C.F.R. § 431.306(e)). In the WICF Rule, DOE states for such a system with a 9,000 Btu/h capacity, TSL 2 consisted of (i) implementing a set of technology design options referred to by DOE as "efficiency level 4" plus (ii) decreasing the spacing between fins on the evaporator coils in the unit cooler to six fins per inch. *Id.* at 32,099 (Table V.2, Equipment Class MC.L.N, TSL 2). However, DOE's own calculations

indicate that for a 9,000 Btu/h multiplex condensing, low temperature refrigeration system, implementing TSL 2 only achieves an AWEF of 5.94. Final TSD, Doc. # 0131 at 5A-69 (see row entitled "L4" (Efficiency Level) under column entitled "AWEF [Btu/Wh]"). Thus, DOE's own calculations show that the use of TSL 2 technology for a 9,000 Btu/h multiplex condensing, low temperature refrigeration system will not result in compliance with the 6.57 AWEF standard.

Setting standards for these equipment classes at levels above those achievable for all products through TSL 2 technology runs counter to the evidence and analysis before DOE, in clear violation of *State Farm*, 463 U.S. at 43. DOE is required to articulate a rational connection between the facts found and the choice made, *see id.*, and here has offered no explanation for the discrepancy between its standards promulgated and the AWEFs achievable through TSL 2 according to its own analysis. These numeric standards are therefore arbitrary and capricious.

D. DOE's Final Technical Analysis Contained Multiple Errors and Arbitrary and Unexplained Alterations from the NOPR Analysis.

DOE's WICF test procedure incorporates by reference an industry test procedure, AHRI 1250 (I-P)-2009, "2009 Standard for Performance

Rating of Walk-In Coolers and Freezers” (“AHRI 1250-2009”),¹⁸ which is used to calculate AWEF. *See* 10 C.F.R. §§ 431.303(b)(1) and 431.304(c)(10). Under AHRI 1250-2009, AWEF is not calculated identically for all types of WICF refrigeration systems. For instance, for unit coolers with fixed-speed evaporator fans, AWEF is calculated using Equation 123 of AHRI 1250-2009, which uses as an input the variable “LFL,” or Load Factor Low, which in turn is calculated using Equation 122. In contrast, for unit coolers with variable-speed evaporator fans, AWEF is calculated using either Equation 139 or Equation 140. Equation 140 references the variable “LFL,” also Load Factor Low, but as calculated under Equation 133.¹⁹

In DOE’s spreadsheet of the AHRI 1250-2009 calculations underlying its AWEF standards, DOE incorrectly referenced the “LFL” used for unit coolers with fixed-speed evaporator fans in its calculations for unit coolers with variable-speed evaporator fans. *See* DOE Final Rule Engineering

¹⁸ Available at [http://www.ahrinet.org/App_Content/ahri/files/standards_pdfs/AHRI_standards_pdfs/AHRI_1250_\(I-P\)-2014.pdf](http://www.ahrinet.org/App_Content/ahri/files/standards_pdfs/AHRI_standards_pdfs/AHRI_1250_(I-P)-2014.pdf).

¹⁹ Because the DOE’s AWEF calculation erroneously uses a lower load-factor-low associated with fixed-speed fans instead of that for variable speed fans per AHRI 1250-2009, not all products can meet the standard using hot gas defrost. The AWEF for walk-in freezer unit coolers is unachievable regardless of any design change.

Analysis Refrigeration Spreadsheet, Doc. # 0137, "Calculations" tab, Row 361 (wherein cell formulas reference Row 317 (entitled "LFL"), which is listed under the heading in Row 315 "Calculations for AWEF-MC Systems with Single-speed fans"). As a result, the calculation of standard levels for unit coolers that are sold separately uses an incorrect input. This error increased the stringency of DOE's AWEF standards for unit coolers that are sold separately without reasoned basis in the record and renders the standards arbitrary and capricious.

E. DOE Failed to Respond to Significant Comments Concerning Small Business Issues.

Many of the legal issues involved in the rulemaking and this challenge involve large-scale economic and policy issues of cross-cutting importance in administrative law. But these flawed WICF standards will also have very practical harmful impacts at the workaday level of American economic life.

1. *Overbroad Definition of WICFs.* Due to DOE's overbroad definition of walk-ins, *see* 79 Fed. Reg. at 32,068, there are a wide range of cold-storage warehouse applications that will be considered WICFs, yet will not be able to meet the required efficiency levels to adequately cool the

product and meet applicable food safety standards. A sample of affected applications includes meat, dairy, produce, lumber, wine, and beer storage. See Hussmann Comments (Nov. 2013), Doc. # 0093-A1, at Issue 4 and List of Equipment. DOE simply ignored this significant comment entirely, which is arbitrary and capricious under *State Farm*. “[T]he Commission must do more than simply ignore comments that challenge its assumptions and must come forward with some explanation that its view is based on some reasonable analysis.” *ALLTEL Corp. v. FCC*, 838 F.2d 551, 558 (D.C. Cir. 1988). It is no answer to this objection that EPCA Section 6311(20)(A) defines walk-ins as “enclosed storage space.” 79 Fed. Reg. at 32,068. DOE ignores that this definition begins with the phrase “[i]n general,” 42 U.S.C. § 6311(20)(A), thereby conferring on DOE discretion to narrow the definition of walk-ins to *particular* applications it selects in a prudent application of discretion. Additionally, because it ignored Hussmann’s comment, DOE violated the Regulatory Flexibility Act and in particular 5 U.S.C. § 603(a)’s requirement that it produce an “analysis [that] shall describe the impact of the proposed rule on small entities.”

Industry argued that the WICF Rule would create problems for complying with food safety regulations, as DOE acknowledged. 79 Fed.

Reg. at 32,109. DOE did not analyze these problems in the final rule at all; it simply cross-referenced Chapter 12 of the Final TSD. *See id.* When one consults Chapter 12, however, all that can be found is the same recognition (with no analysis by DOE) that manufacturers pointed out food safety problems with the final rule. Final TSD, Doc. # 0131, at 12-44. Merely acknowledging a comment, without responding to it, flouts the substantial evidence test. 42 U.S.C. § 6306(b)(2); *General Chem. Corp. v. United States*, 817 F.2d 844, 850 (D.C. Cir. 1987) (per curiam) (vacating Interstate Commerce Commission decision for lack of substantial evidence because it fell “below the standard of reasoned decisionmaking” necessitating remand for “much-needed elucidation”).

2. DOE’s Selection of a TSL That It Conceded Hurt Small Business Was Arbitrary and Capricious. In the NOPR, DOE conceded that if it selected proposed TSL 5 (which is equivalent to TSL 2 at the final rule stage, which DOE actually opted to impose) such a standard level would have serious deleterious effects including causing some firms to exit the industry. *See* 78 Fed. Reg. at 55,857. Additionally, DOE conceded in the NOPR that this TSL would hurt small businesses. “DOE is concerned about TSL 5 causing disproportionate burdens on small business panel

manufacturers, as explained in the Regulatory Flexibility analysis in section VI.B.4.” 55 Fed. Reg. at 55,874.

Yet, when selecting the TSL 2 standard level it imposed on regulated businesses in the final rule, DOE changed course and stated that the capital conversion and production conversion costs for small businesses were “manageable.” 79 Fed. Reg. at 32,121. That was an unexplained change in course that constitutes arbitrary agency action. *See, e.g., Jicarilla Apache Nation v. Department of Interior*, 613 F.3d 1112, 1114-15 (D.C. Cir. 2010) (“Because we are persuaded Interior failed to consider an important aspect of the problem when it ... failed to engage in reasoned decisionmaking when it made an unacknowledged *volte-face* ... we reverse in part and remand the case to the district court for further proceedings consistent with this opinion.”). DOE’s 180-degree turn is also questionable under the RFA because the RFA obligates agencies to analyze impacts on “small entities,” 5 U.S.C. § 603(a) – which by its plain text includes ripple effects on small business throughout the national economy – not just a review of effects on *regulated* small entities.

CONCLUSION

For the foregoing reasons, the consolidated petitions for review should be granted and the WICF Rule should be vacated, accompanied by a remand that directs DOE to address the merits of any issues raised in AHRI's reconsideration petition not already specifically resolved by the Court in its decision (such as several of the issues in Part III, *supra*).

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with Fed. R. App. P. 32(a)(7)(B) and (C) because it does contains 13,998 words. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, roman style typeface of 14 points or more.

/s/ Jeffrey Bossert Clark

Jeffrey Bossert Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONERS was filed electronically on April 2, 2015, and will, therefore, be served electronically upon all counsel of record.

/s/ Jeffrey Bossert Clark
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