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August 18, 2023

Ms. Julia Hegarty
U.S. Department of Energy
Office of Energy Efficiency and Renewable Energy
Building Technologies Office, EE-5B
1000 Independence Avenue SW
Washington, DC 20585-0121

Re: Request for an Extension of the Comment Period
Energy Conservation Program: Energy Conservation Standards for Consumer Water Heaters, EERE-2017-BT-STD-0019, RIN 1904-AD91, 88 Fed. Reg. 49058 (July 28, 2023)

Dear Ms. Hegarty:

The American Gas Association (“AGA”), American Public Gas Association (“APGA”), National Propane Gas Association (“NPGA”), and Spire Inc., Spire Missouri Inc., and Spire Alabama Inc. (collectively, “Joint Requesters”) respectfully request that the Office of Energy Efficiency and Renewable Energy (“EERE”), Department of Energy (“DOE”), extend the public comment period by 30-days in the above-referenced proceeding. The notice of proposed rulemaking and request for comment (“NOPR”)¹ address several product classes and the overall proposal requires careful consideration in order to develop meaningful stakeholder comments. As discussed herein, additional time to provide comments in response to the NOPR is justified.

AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 77 million residential, commercial, and industrial natural gas customers in the U.S., of which 96 percent — more than 74 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than one-third of the United States’ energy needs.²

¹ *Energy Conservation Program: Energy Conservation Standards for Consumer Water Heaters, EERE-2017-BT-STD-0019, RIN 1904-AD91, 88 Fed. Reg. 49058 (July 28, 2023).*

² For more information, please visit www.aga.org.

APGA is the trade association for more than 730 communities across the U.S. that own and operate their retail natural gas distribution entities. They include not-for-profit gas distribution systems owned by municipalities and other local government entities, all locally accountable to the citizens they serve. Public gas systems focus on providing safe, reliable, and affordable energy to their customers and support their communities by delivering fuel to be used for cooking, clothes drying, and space and water heating, as well as for various commercial and industrial applications.³

NPGA is the national trade association of the propane industry with a membership of about 2,400 companies, and 36 state and regional associations that represent members in all 50 states. Membership in NPGA includes retail marketers of propane gas who deliver the fuel to the end user, propane producers, transporters and wholesalers, and manufacturers and distributors of equipment, containers, and appliances. Propane gas fuels millions of installations nationwide for home and commercial heating and cooking, in agriculture, industrial processing, and as a clean air alternative engine fuel for both over-the-road vehicles and industrial lift trucks. Roughly 75% of NPGA's members have fewer than 100 employees, and are considered small businesses. The proposal directly addresses products which currently, and in the future, may rely on propane for fuel, and as such, the proposal has the potential to have a direct and significant impact on NPGA's members.

Spire Inc., Spire Missouri Inc., and Spire Alabama Inc. (collectively "Spire") are in the natural gas utility business. Spire Inc. owns and operates natural gas utilities that distribute natural gas to over 1.7 million residential, commercial, and institutional customers across Missouri, Alabama, and Mississippi, and Spire Missouri Inc. and Spire Alabama Inc. are the largest natural gas utilities serving residential, commercial, and institutional customers in Missouri and Alabama, respectively.

Joint Requesters provide the energy needed to fuel consumer water heaters, thus making them critical stakeholders.

On July 28, 2023, DOE published in the Federal Register a proposed rule to revise energy conservation standards for consumer water heaters. DOE provided stakeholders only 60-days or until September 26, 2023 to comment on the NOPR. To sufficiently analyze the NOPR and the related documents, an additional 30-days is required. DOE's determinations in this proceeding will have significant implications for consumers and the energy industry. Any modifications to the efficiency standards, large or small, will have significant ramifications on suitable water heater availability for customers and the marketplace for years to come.

In the NOPR, DOE deviates from its own procedures, aka the "Process Rule,"⁴ in two ways that prejudice stakeholders. DOE has determined not to conduct an Advanced Notice of Proposed Rulemaking.⁵ Then DOE determined to shorten the comment period because "stakeholders have

³ For more information, please visit www.apga.org.

⁴ *Energy Conservation Program for Appliance Standards: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment*, 86 Fed Reg. 70892 (Dec. 13, 2021) ("Process Rule"). See also 10 C.F.R. Part 430, Subpart C, Appendix A.

⁵ NOPR at 49075.

already been afforded multiple opportunities to provide comments on this rulemaking.”⁶ This is despite the fact that multiple proposals had been filed in this proceeding and this is the first time DOE has publicly responded to such proposals. Importantly, the Process Rule states that “[t]here will be not less than 75 days for public comment on the NOPR, with at least one public hearing or workshop.”⁷ It is unreasonable on its face for DOE to shave 15 days off of its own procedures when the statutory deadline has been exceeded not by days or months but by years. Joint Requesters and other stakeholders should not be prejudiced for DOE’s own administrative deficiency. It is an important tenet of administrative law that a federal agency adhere to its own policies, rules and regulations. Ad hoc departures are not proper, for such activities disrupt orderly processes and harm predictability, which are the hallmarks of lawful administrative action.⁸

Furthermore, the public comment period for the NOPR encompasses a summer period when many stakeholders are away from work. This will make it difficult to develop meaningful comments in response to the NOPR. This challenge is paired with the fact that stakeholders continue to face significant supply chain and worker shortages that pose further obstacles to giving these important documents the critical review and feedback that are required. DOE has also issued various other proposed and final rules that warrant stakeholder attention and review.⁹ Moreover, many stakeholders have limited staff available to review the various pending proposed rules and to provide meaningful comments during overlapping and concurrent comment periods. In the end a 60-day comment period for two rules is the functional equivalent of two sequential 30-day comment periods. DOE should endeavor to provide stakeholders with sufficient time to meaningfully comment on all its proposals.

Further compounding the artificially limited comment period for the consumer water heaters proposal is the fact that DOE appears to have deviated from past practice by not releasing the prepublication version on its website and sending a notice out to stakeholders the same day. DOE appears to have released the prepublication notice to certain select groups on or before July 21, but delayed sending the email notice out to stakeholders that signed up for email notice until July 24, 2023. This was only four days before it was published in the Federal Register. Therefore, instead of having about 90 days to comment (75 days from publication plus the roughly 15 days between

⁶ NOPR at 49068.

⁷ Process Rule at 70927; *see* Section 6(f)(2) of Appendix A. The Process Rule also states that “[t]he length of the public comment period for pre-NOPR rulemaking documents will vary depending upon the circumstances of the particular rulemaking, but will not be less than 75 calendar days.” Process Rule at 70926; *see* Section 6(d)(2) of Appendix A.

⁸ *See, e.g., Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (“[I]t is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned . . . for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.”); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) (“It is axiomatic that an agency must adhere to its own regulations.”); *Mine Reclamation Corp. v. FERC*, 30 F.3d 1519, 1524 (D.C. Cir. 1994) (on its way to decision an agency must follow its own regulations).

⁹ *See e.g., Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products*, 88 Fed. Reg. 50810 (Aug. 2, 2023) (proposed rule comment period pending); *Energy Conservation Program: Energy Conservation Standards for Consumer Boilers*, EERE-2019-BT-STD-0036 (prepublication version posted, proposed rule comment period pending); *Energy Conservation Program: Energy Conservation Standards for Commercial Water Heating Equipment*, EERE-2021-BT-STD-0027 (prepublication final rule posted).

prepublication and Federal Register publication), stakeholders would have only 64 days (60 days plus 4 days to have it in the Federal Register due to the belated release of the typescript prepublication version) to review the proposal and provide comments. Therefore, additional time is needed because any normal delay between the issuance of the prepublication version/email notification and when the item is published in the federal register was simply non-existent.

While the Administrative Procedure Act (“APA”) does not establish a minimum comment period for rulemakings, courts require that agencies provide a “meaningful” opportunity for comment.¹⁰ In short, “[t]he opportunity for comment must be a meaningful opportunity” and “in order to satisfy this requirement, an agency must also remain sufficiently open-minded.”¹¹ As discussed herein, additional time is needed to meaningfully analyze and respond to the NOPR.

Given the numerous compounding factors impacting stakeholders’ ability to develop meaningful comments in the allotted time, DOE should extend the comment period by at least an additional 30-days. This will allow for sufficient time for all stakeholders to review and understand the NOPR, TSDs, and associated spreadsheets in order to develop meaningful comments on the complex and important issues addressed by these documents. Providing a 30-day extension for comments in this proceeding will not cause a significant delay in DOE’s consideration of the record and any next steps.

Joint Requesters thank you for the review and consideration of this letter. If you have any questions regarding this submission, please do not hesitate to contact the undersigned.

¹⁰ See, e.g., *Rural Cellular Ass'n v. Fed. Commc'ns Comm'n*, 588 F.3d 1095, 1101 (D.C. Cir. 2009), *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002).

¹¹ *Rural Cellular Ass'n*, 588 F.3d at 1101.

Respectfully submitted,



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