



AMERICAN PUBLIC GAS ASSOCIATION

September 16, 2013
Ms. Brenda Edwards
U.S. Department of Energy, Building Technologies Program
1000 Independence Avenue SW
Washington, DC 20585-0121

Docket ID No. EERE-BT-PET-0043

RE: Landmark Legal Foundation Petition

Comment on Reconsideration of the Department of Energy's Final Rule: *Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens*

Dear Ms. Edwards:

The American Public Gas Association (APGA) is pleased to submit comments in response to the request for public comment on the Petition for Reconsideration of the Department of Energy's Final Rule: *Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens* issued by the U.S. Department of Energy (DOE) in the Federal Register on August 16, 2013.¹

APGA is the national association for publicly-owned natural gas distribution systems. There are approximately 1,000 public gas systems in 36 states and over 700 of these systems are APGA members. Publicly-owned gas systems are not-for-profit, retail distribution entities owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities. For more information, please visit www.apga.org.

Background

On February 14, 2012, the Department of Energy ("DOE") published a supplemental proposed rule to set energy efficiency standards for microwave ovens (the "SNOPR").² On June 17, 2013, DOE published a final rule (the "Final Rule").³

¹ *Energy Conservation Program for Consumer Products: Landmark Legal Foundation; Petition for Reconsideration*, 78 FR 49975, (August 16, 2013).

² *Energy Conservation Program: Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens*, 77 FR 8525 (February 14, 2012).

³ *Energy Conservation Program: Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens; Final Rule*, 78 FR 6315 (June 17, 2013).

The Energy Policy and Conservation Act (“EPCA”), 42 U.S.C, § 6293, sets forth criteria and procedures that DOE must follow when prescribing or amending energy conservation standards for various consumer products, including microwave ovens. EPCA requires that any amendment to an energy efficiency standard for certain consumer products (such as microwave ovens) result in the maximum improvement in energy efficiency, and be determined by the Secretary to be both technologically feasible and “economically justified.”

As discussed in the Final Rule, the President’s Executive Order 12866 (clarified by Executive Order 13563) requires that, in proposing or adopting regulations, agencies must assess the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

As part of this cost-benefit assessment, in the SNOPI, DOE relied on a Social Cost of Carbon valuation (“SCC Valuation”). The SCC Valuation is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year. It is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services.

In the SNOPI, DOE provided a 2010 SCC valuation developed by the “Interagency Working Group on Social Cost of Carbon.” This 2010 figure was developed through an interagency process in accordance with Executive Order 12866. However, in May 2013, after the close of the public comment period for the SNOPI but prior to DOE’s issuance of the Final Rule, the Interagency Working Group on Social Cost of Carbon (“IGWSSC”) released updated SCC values.⁴ The IGWSSC published updated cost estimates based on new versions of each climate change integrated assessment model used to arrive at the 2010 estimates, raising the 2010 central value of \$21 per metric ton of CO₂ to \$35 per metric ton. DOE included these revised SCC values in the Final Rule.

The revised SCC resulted in a significant raise in the net present value of U.S. CO₂ emissions by more than \$1 trillion. This significant change was made without the benefit of public comment or consultation. In response, the Landmark Legal Foundation (“Landmark”) filed a petition for reconsideration of the final rule, on the grounds that the Department’s use of the new SCC in the final rule without public comment violated the Administrative Procedure Act.

DOE should seek public comment on the revised justification for the regulation.

DOE should withdraw the Final Rule and provide an opportunity for public comment on the new SCC valuation. By inserting a new SCC valuation into the Final Rule, DOE denied the public the opportunity to comment on DOE’s motivations, methodologies and conclusions in reaching said values. The public has also been denied the opportunity to question the calculations utilized by the IGWSSC to reach the SCC valuation used in the Final Rule.

⁴ Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866, Interagency Working Group on Social Cost of Carbon, United States Government, May 2013.

The Administrative Procedure Act of 1946 (“APA”) generally requires agencies to (1) publish a notice of proposed rulemaking in the Federal Register; (2) allow interested parties an opportunity to participate in the rulemaking process; and (3) issue a final rule accompanied by a statement of its basis and purpose. The APA requires that an agency “shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.” 5 U.S.C. 553(c).

In addition to the APA, multiple Executive Orders have encouraged agencies to involve the public in the rulemaking process, President Obama’s Executive Order 13563, referenced by the Final Rule, states that agencies shall provide, “to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.”

President Obama has also stated publically “if scientific and technological information is developed and used by the Federal Government, it should ordinarily be made available to the public. To the extent permitted by law, there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking.”⁵ In this case, DOE issued the Final Rule with the revised SCC Valuation without providing an opportunity for the public to comment.

The 2013 IWGSCC report, did not provide a detailed account of how the Working Group administered its responsibilities to collect public feedback to ensure that interested stakeholders would have an opportunity to provide comments on the ultimate decision of federal agencies to consider the significantly higher, new cost estimates in their rulemakings. Rather, the Working Group justified the lack of a specific stakeholder engagement process on its decision not to revisit the 2009-2010 interagency modeling decisions (*e.g.*, with regard to the discount rate, reference case socioeconomic and emission scenarios or equilibrium climate sensitivity). The report stated that “[i]mprovements in the way damages are modeled are confined to those that have been incorporated into the latest versions of the models by the developers themselves in the peer-reviewed literature.”⁶ The Department then included the revised 2013 values in the final rule related to microwave ovens because they were the most recent values from the interagency group.⁷ The SCC valuation constitutes a major technical change in the regulation and is the type of relevant scientific and technical finding contemplated by Executive Order 13563.

DOE admits in the Final Rule that other agencies will utilize these new SCC values when calculating the costs and benefits of rules relating to greenhouse gasses, with the potential to dramatically affect agency cost benefit analyses. With the change, government actions that lead to cuts in emissions will appear more valuable. Finalizing such a far-reaching decision without notice and public comment violates the Administrative Procedure Act’s (APA) and Executive Order 13563 and the President’s stated goals of transparency.

⁵ President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, “Scientific Integrity.” March 9, 2009

⁶ *Id.*

⁷ *See* Request for Comments, 78 Fed. Reg. at 49975.

To rectify this violation, DOE should halt implementation of the Final Rule and provide an opportunity for public comment on the new SCC valuation and the calculations utilized by the IWGSCC.

The Administration should subject the Interagency Working Group's Technical Support Document on the Social Cost of Carbon to peer review.

In addition to providing an opportunity for public comment, the Administration should subject the Interagency Working Group's Technical Support Document on the Social Cost of Carbon to peer review. As a matter of policy, Federal Agencies have long sought peer review of scientific assessments that underlie important public policy decisions.

In 2004, the OMB called for more consistency in the use of peer review across government agencies, issuing an Information Quality Bulletin for Peer Review ("OMB Bulletin").⁸ The OMB Bulletin implemented the Information Quality Act of 2001, which directed OMB to issue guidelines to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity of information" disseminated by Federal agencies. The OMB Bulletin also established "minimum standards for when peer review is required for scientific information and the types of peer review that should be considered by agencies in different circumstances."

The IGWSCC Report is exactly the type of information contemplated by the OMB Bulletin. President Obama has also stressed the importance of peer review of scientific information relied up on by the agencies in making policy decisions peer review. In a memorandum to the heads of Executive Departments and Agencies, the President stated, "When scientific or technological information is considered in policy decisions, the information should be subject to well-established scientific processes, including peer review where appropriate."⁹

Public comment and peer review are crucial to realizing the Administration's goals of transparency and scientific accountability. APGA urges the Administration to subject the IWGSCC's Technical Support Document on the Social Cost of Carbon to peer review. APGA thanks the Office of Energy Efficiency and Renewable Energy for its consideration of these comments.

Respectfully submitted,



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⁸ Office of Management and Budget, Information Quality Bulletin for Peer Review. October 2002.

⁹ President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity." March 9, 2009