

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEARTH, PATIO & BARBECUE ASS'N,)	
Petitioner,)	
)	
v.)	Nos. 10-1113, 10-1181
)	
UNITED STATES DEPARTMENT)	
OF ENERGY, et al.)	
Respondents.)	
)	
)	
NATURAL RESOURCES DEFENSE COUNCIL,)	
Intervenor.)	

**REPLY IN SUPPORT OF RESPONDENTS' MOTION
TO CONTINUE HOLDING CASE IN ABEYANCE
PENDING FURTHER RULEMAKING**

The federal respondents (the United States Department of Energy and the Secretary of Energy) moved on July 15, 2011 to continue to hold the captioned, consolidated cases in abeyance, pending the completion of recently instituted rulemaking proceedings. As we explained in that motion, the Department of Energy recently issued a Notice of Propose Rulemaking, which has since been published in the Federal Register. See 76 Fed. Reg. 43941 (July 22, 2011). A final rule in that proceeding could be adopted as early as November 2011, and adoption of the proposed rule would materially alter – and could well moot – many or all of the issues

petitioner Hearth, Patio & Barbecue Association (HPBA) intends to raise in these cases. We also explained that briefing in these cases following a final rule (with HPBA's opening brief due in December 2011 or January 2012) would allow this Court to consider any remaining issues before the Summer of 2012, HPBA's target date for a decision.

1. HPBA's opposition to the motion appears to misunderstand the relief requested and the relationship of the pending rulemaking to the final rule under review in these cases. The government does not propose to compromise or minimize HPBA's opportunity to challenge the final rule under review, based on any issues that may remain alive between the parties once the pending rulemaking proceedings are complete.¹

There will be ample opportunity for briefing of any remaining issues in these consolidated cases following adoption of any final rule in the pending rulemaking proceeding. Holding these cases in abeyance until then will not deprive HPBA of the opportunity to identify any such issues at that time, when briefing could be based on

¹ As our motion explained, the proposed rule has the potential to moot most or all of the present dispute between the parties concerning the rule under review. In light of HPBA's opposition to the proposed rule, however, it seems likely that some disputes may remain following adoption of a final rule. It is impossible to know at this time what the specific nature of those disputes will be, and any attempt to brief them now would be premature.

an updated regulatory scheme that incorporates the Department of Energy's most recent policies and rules. By contrast, briefs filed before the conclusion of the rulemaking proceedings will necessarily fail to take account of legal developments that will be relevant to any ultimate decision in this case. See, e.g., *Armstrong v. Executive Office of President*, 90 F.3d 553 (“we apply the law in effect at the time we render our decision”) (citing *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974)).

Any prematurely filed briefs would be largely irrelevant once the Department of Energy issues a final rule in the pending rulemaking proceeding, and supplemental or replacement briefs would be required. The government's proposal to hold this case in abeyance for a brief period would avoid that wasteful step. Thus, the government believes that briefing of any issues in this case should await foreseeable and relevant developments now pending before the Department of Energy.

2. HPBA contends that it seeks to challenge the final rule under review on 3 grounds. See HPBA Opp. 2. As we explained in our motion, those arguments are likely to be altered, and may well become moot, following adoption of a final rule in the pending rulemaking proceeding, which could come as early as November this year. See Gov't Mot. 5-7. HPBA's opposition does not articulate why premature and likely irrelevant briefing would serve the interests of the litigants or this Court. For

example, HPBA does not explain why the parties should brief HPBA's opposition to the 9,000 Btu/h input capacity limit in the final rule under review when the proposed rule, if adopted, would eliminate that part of the regulation. See Gov't Mot. 3-4, 6-7.

None of HPBA's arguments justifies premature briefing of this case. HPBA first argues that the pending rulemaking proceeding "is not designed to resolve the dispute between the parties." HPBA Opp. 3. But that is a straw man. The relevant question is not whether the rulemaking proceeding would itself resolve the dispute (although it certainly could, the proposal itself was not designed or intended to do so), but whether briefing of any issues in this case should await a final rule in a plainly relevant administrative proceeding, whose outcome will almost certainly change the relevant legal landscape and require a renewed identification of any remaining issues in this case, as well as a potentially different legal analysis of those issues.

HPBA also offers a confusing and unfounded theory by which adoption of a final rule in the pending rulemaking proceeding depends on the absence of a decision in these cases. See HPBA Opp. 5.² HPBA's own proposal to govern future

² The question whether the final rule under review would "effectively ban virtually all decorative vented gas fireplaces" HPBA Opp. 5, is an element of HPBA's anticipated challenge to the merits of the final rule, with which the government disagrees. See 75 Fed. Reg. 20112, 20128-20130, 20146 (Apr. 16, 2010). But the parties' current disagreement on this question may become moot following adoption of any final rule in the rulemaking proceeding now pending before the Department of Energy. See Gov't Mot. 4-6. HPBA does not dispute that essential point.

proceedings in these cases – a briefing schedule that would conclude in November 2011, approximately the same time that the Department of Energy anticipates a final rule could be issued – does not seek a decision in these cases before the Department of Energy completes the pending rulemaking proceedings. See HPBA Mot. (July 8, 2011) (seeking decision by “Mid-2012”). The sequence of events under any scenario thus would not pose the risk of harm that HPBA perceives.

HPBA appears to misunderstand the limited relief contemplated by the government’s motion in these cases. Briefing would be delayed only until the pending rulemaking proceedings are completed, and could be concluded well in advance of any of the dates in 2012 that HPBA has identified as important.³

HPBA is also mistaken about the effect of both the pending rulemaking and an order continuing to hold these cases in abeyance. Adoption of a final rule in the pending rulemaking proceeding would not “interfere[] with the [C]ourt’s ability to review the rule at issue in this case.” HPBA Opp. 5. To the extent the final rule under review would continue to cause injury to HPBA members following adoption of any new rule, this suit could proceed to briefing and decision on issues relating to any such injuries. Adoption of the proposed rule would alleviate of one of HPBA’s

³ Of course, if the proposed rule is adopted, it would eliminate the requirement that the vented hearth heaters at issue comply with energy conservation standards by April 16, 2013, and thus could also eliminate the perceived need for a decision by 2012.

principal objections to the final rule under review – the 9,000 Btu/h exclusion, see Gov't Mot. 3-4, 6-7. In that event, there would be no dispute (and no cognizable injury) arising from the 9,000 Btu/h exclusion, since it would no longer exist. But HPBA offers no reason that would warrant briefing that issue now.

3. HPBA's unfounded insinuations of impropriety likewise do not support any different outcome here. HPBA suggests that the government is "rushing through" or "push[ing] through" the proposed rule. *E.g.*, HPBA Opp. 5. But HPBA does not argue, and cites no legal authority for any proposition, that DOE lacks authority to exercise its statutory authority to promulgate a notice of proposed rulemaking or a final rule that would implement the changes under consideration here.

The Department of Energy has identified policy changes that warrant further rulemaking and has acted promptly to propose a rule to address those policy goals. That is entirely appropriate. The proposed rule and the anticipated schedule for administrative consideration of the proposal do not short-circuit the applicable deliberative proceedings. As the notice of proposed rulemaking (NOPR) explains, public comment is welcome for a 60-day period, and the Department of Energy will host a public meeting during that period, which will conclude on September 20, 2011. See 75 Fed. Reg. 43941-43942. The government anticipates that a final rule could

be issued as soon as approximately 60 days after the conclusion of the comment period.

4. HPBA's opposition to the government's procedural motion outlines a variety of issues and arguments concerning the policy and legal issues raised in the NOPR. See HPBA Opp. 5-7. Those concerns (including the repeated references to the proposed treatment of gas log sets, see 76 Fed. Reg. 43945, which are not at issue in these consolidated cases) are misdirected. The NOPR encourages interested parties to file comments addressing those and other issues, and we anticipate HPBA will do so. But those issues are not presented in this litigation.⁴

5. HPBA contends that any final rule issued in the pending rulemaking proceeding "would be a considerably different rule than the" final rule under review. HPBA Opp. 8. But there is a substantial and important overlap between the two that was the premise of the government's motion, and that HPBA does not address. The NOPR includes proposals to modify elements of the final rule under review that HPBA has identified as targets for its challenge in this case. See Gov't Mot. 5-7. For

⁴ HPBA's misstatements of the Department of Energy's proposal are unavailing. See, e.g., HPBA Opp. 4 (selectively quoting NOPR to contend that it contradicts itself, omitting the relevant language explaining the rationale of the proposal); compare 76 Fed. Reg. 43944 (distinguishing "mechanical means" of "furnishing warmed air," such as "by expelling or discharging such air," from other "method[s] of heat transfer," such as "radiant heat)."

example, the proposed rule would eliminate the 9,000 Btu/h input capacity limit, rendering any challenge to that regulatory provision moot. See 76 Fed. Reg. 43945. Briefing on that subject now would likely be unnecessary and wasteful.

At this time, there is no way to know what arguments HPBA would raise in these cases following adoption of any new final rule in the pending administrative proceedings. But there remains ample time for briefing of any such arguments following the conclusion of administrative proceedings now before the Department of Energy, even in light of HPBA's expressed preference for a decision in these case by mid-2012.

CONCLUSION

For the foregoing reasons, and those set forth in the government's July 15 motion, the Court should continue to hold these consolidated cases in abeyance, pending the outcome of rulemaking now before the Department of Energy.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

August 1, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2011, I electronically filed the foregoing Reply in Support of Respondents' Motion to Continue Holding Case in Abeyance Pending Further Rulemaking with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Counsel for the parties listed below are registered CM/ECF users, and have been served by the CM/ECF system:

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