

ORAL ARGUMENT NOT YET SCHEDULED

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

HEARTH, PATIO & BARBECUE
ASSOCIATION,

Petitioner,

v.

THE UNITED STATES DEPARTMENT
OF ENERGY, and STEVEN CHU,
SECRETARY OF ENERGY,

Respondents.

Case No. 12-1010

NATIONAL PROPANE GAS
ASSOCIATION,

Petitioner,

v.

THE UNITED STATES DEPARTMENT
OF ENERGY, and STEVEN CHU,
SECRETARY OF ENERGY,

Respondents.

Case No. 12-1014

PETITIONERS' MOTION TO HOLD IN ABEYANCE

Petitioners, Hearth, Patio & Barbecue Association (“HPBA”) and National Propane Gas Association (“NPGA”), respectfully move this Court to hold in abeyance the above-captioned cases Nos. 12-1010 and 12-1014

pending resolution of *Hearth, Patio & Barbecue Association v. Dept. of Energy*, Nos. 10-1113 and 10-1181. As discussed below, Nos. 10-1113 and 10-1181 are already being briefed. A decision in those cases could potentially moot some or all of the issues in Nos. 12-1010 and 12-1014. H. Thomas Byron III, counsel for Respondents in Nos. 12-1010 and 12-1014, the United States Department of Energy and the Secretary of Energy (hereafter collectively “DOE”), informs us that DOE will determine its position after reviewing this motion.

1. HPBA in Nos. 10-1113 and 10-1181 is challenging, among other things, energy efficiency standards for “direct heating equipment” in DOE’s final rule entitled, “Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters,” 75 Fed. Reg. 20112 (April 16, 2010). Those cases have been partially briefed.

2. HPBA and NPGA in Nos. 12-1010 and 12-1014 are challenging a final rule of DOE entitled, “Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment,” 76 Fed. Reg. 71836 (Nov. 18, 2011). Petitioners in Nos. 12-1010 and 12-1014 specifically are challenging, among other things, the expansion of the range of products subject to regulation as “direct heating equipment” and

requirements that DOE imposes as an alternative to compliance with the energy efficiency standards imposed by the April 16, 2010 rule. The November 18, 2011 rule did not change the heating efficiency standards adopted in the April 16, 2010 rule (or the regulatory text specifying what a “vented hearth heater” is). Briefing in Nos. 12-1010 and 12-1014 has not yet begun.

3. A decision by this Court in Nos. 10-1113 and 10-1181 on the validity or invalidity of the energy efficiency standards adopted in the April 16, 2010 rule thus could moot, or at least significantly narrow, the issues on appeal in Nos. 12-1010 and 12-1014. It therefore would conserve party and judicial resources to hold Nos. 12-1010 and 12-1014 in abeyance pending resolution of Nos. 10-1113 and 10-1181.

4. In that regard, the November 18, 2011 rule is based on the rule structure adopted by the April 16, 2010 rule, and the provisions of the November 18, 2011 rule cannot even be applied independent of the provisions at issue in Nos. 10-1113 and 10-1181. Thus, should the heating efficiency standards in the April 16, 2010 rule be vacated in Nos. 10-1113 and 10-1181 the operative provisions of the November 18, 2011 rule will be nothing more than a conditional exclusion from a set of requirements that no longer exist.

Accordingly, Petitioners NPGA and HPBA respectfully request the Court to hold Nos. 12-1010 and 12-1014 in abeyance pending resolution of Nos. 10-1113 and 10-1181.¹

¹ HPBA and NPGA note that DOE in Nos. 10-1113 and 10-1181 filed an untimely motion to dismiss as moot or to consolidate with Nos. 12-1010 and 12-1014. DOE in Nos. 10-1113 and 10-1181 also filed a companion motion to hold briefing in those cases in abeyance pending disposition of the motion to dismiss (or alternatively for a 14-day extension of the briefing schedule in Nos. 10-1113 and 10-1181). HPBA opposed those requests with filings in Nos. 10-1113 and 10-1181. On January 30, 2012 the Court issued an order in those cases spending the briefing schedule pending the resolution of DOE's motion to dismiss.

Dated: January __, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January __, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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