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. UNITED STATES DEPARTMENT OF ENERGY, et al. Respondents.	Nos. 10-1113, 10-1181
NATURAL RESOURCES DEFENSE COUNCIL, Intervenor.	

RESPONDENTS' OPPOSITION TO
PETITIONER'S MOTION FOR A BRIEFING SCHEDULE

Petitioner Hearth, Patio & Barbecue Association (HPBA) filed on July 8, 2011 a motion to govern future proceedings, urging this Court to set a briefing schedule in these cases. For the reasons set forth below, the federal respondents (United States Department of Energy and the Secretary of Energy) oppose that motion.

1. On July 15, 2011, the government filed a motion to govern future proceedings in the captioned, consolidated cases, urging the Court to continue holding these cases in abeyance pending further rulemaking now before the Department of Energy. For the reasons set forth in that motion, we believe immediate

briefing would be wasteful and unnecessary, as the legal landscape would be substantially altered by the rule proposed in that proceeding.

HPBA's motion was filed before the Department of Energy issued the proposed rule on July 14, 2011. HPBA's motion thus necessarily did not take account of this significant administrative development, which, together with the prospect of a final rule that could be adopted as early as November 2011, demonstrates that an accelerated briefing schedule would be inappropriate at this time.

2. HPBA contends that immediate briefing is necessary to "facilitate a decision on the merits before Mid-2012." Pet. Mot. 1 (July 8, 2011). HPBA does not explain either its claimed need for a decision by a date certain or why briefing would need to be completed nearly nine months before a decision is required. Neither the motion nor the attached Affidavit of Kenneth J. Belding offers additional details concerning the specific date by which a decision would be required in these cases.[1]

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[1] Both HPBA's motion and the attached affidavit assert repeatedly that the final rule under review would "effectively ban" certain products. *E.g.*, HPBA Mot. 2; Aff. 2. HPBA does not explain that assertion, which in any event does not itself support HPBA's claimed need for a decision by a date certain. HPBA may seek to demonstrate – in briefing the merits of these cases – that the products at issue cannot be modified to comply with the governing energy conservation standards, although the Department of Energy reached the opposite conclusion. See 75 Fed. Reg. 20112, 20128-20130, 20146 (Apr. 16, 2010). 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.

The affidavit does not identify specific dates by which a manufacturer will need to "mak[e] an immediate, substantial, and irretrievable commitment of resources to launch new or modified products." Aff. 3. Nor does the affidavit explain how a decision by this Court "by Mid-2012 at the latest," *ibid.*, would avoid the need for such a commitment of resources by the company.

3. Assuming that HPBA's use of the phrase "Mid-2012" contemplates a decision by this Court prior to the end of July that year, there is no need for the parties to complete briefing of the issues – which are likely to become moot or at a minimum require substantially different legal analysis following completion of the administrative proceeding now pending before the Department of Energy – by the beginning of November 2011, as the motion requests. Indeed, such a schedule would result in briefs that would become largely irrelevant shortly after the completion of briefing. Supplemental briefs would almost certainly be required to address any remaining issues in light of any final rule adopted by the Department of Energy (which could be completed as early as November 2011).

4. Ample time would remain for a decision by July 2012 – if a decision is necessary to resolve any issues that have not become moot – if this Court instead were to continue to hold these cases in abeyance pending the completion of the administrative proceeding now underway before the Department of Energy. The

parties can prepare and file initial briefs in a period of approximately two months, as HPBA's proposed schedule demonstrates. See HPBA Mot. Att. A (opening brief filed Sept. 7, reply brief filed November 4).

Thus, even assuming HPBA's asserted need for a decision by July 2012, briefing could begin in January 2012, with initial briefs ready for circulation to the panel at least six weeks before oral argument, which could be scheduled before the end of April 2012. The specific dates for such a briefing schedule could be determined once the Department of Energy adopts a final rule in the current administrative proceeding, which could be completed as early as November 2011.

CONCLUSION

For the foregoing reasons, and those set forth in respondents' motion dated July 15, 2011, the Court should continue to hold the captioned, consolidated cases in abeyance, pending the outcome of rulemaking now before the Department of Energy.

Respectfully submitted,

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July 18, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2011, I electronically filed the foregoing Respondents' Opposition to Petitioner's Motion for a Briefing Schedule 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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