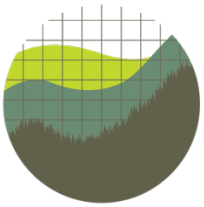

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

November 30, 2020

Attn: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy

Re: Energy Conservation Program: Energy Conservation Standards for Evaporatively-Cooled and Water-Cooled Commercial Package Air Conditioners

Docket No.: EERE-2017-BT-STD-0032

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] respectfully submits comments on the Department of Energy ("DOE")'s proposed determination not to amend the energy conservation standards for evaporatively-cooled and water-cooled commercial package air conditioners.[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

DOE first finds that certain technological improvements are not "practicable" and then finds that the remaining efficiency improvements do not achieve energy savings that clear the "significance thresholds" set by DOE's "Process Rule."[3] These comments focus on the latter determination.

DOE finds that as much as an 8.6% savings of estimated site energy use is not "significant" simply because it is less than the 10%-savings threshold that the Process Rule arbitrarily set.[4] As Policy Integrity's comments on the Process Rule (attached and hereby incorporated) explained, the Process Rule set arbitrary thresholds inconsistent with the statutory text and legislative intent. Setting such thresholds regardless of the costs and benefits of individual standards makes no economic sense and is contrary to congressional intent. DOE fails to analyze either the costs of achieving an 8.6% energy savings, or the benefits to consumers and the environment of such savings. It is unreasonable to assume that a statute like the Energy Policy and Conservation Act, aimed at advancing the national need for energy conservation, would bar a standard that may cheaply deliver real cost savings to consumers merely on the grounds the total energy savings fall short of an arbitrary threshold. Indeed, as the U.S. Court of Appeals for the District of Columbia Circuit held, Congress did not intend for the agency to pass up an essentially "cost-free chance to save energy."[5] The D.C. Circuit elaborated that significance could be evaluated by comparing whether the "value" of the energy savings "outweighed" the "cost."[6]

Contrary to the assumption DOE makes in the Process Rule and implicitly adopts in this proposed determination, there is no single numerical threshold at which energy savings suddenly and obviously stop being "significant." Rather, "significant" is a relative term, a comparator that implicitly calls for the

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[1] This document does not purport to present New York University School of Law's view, if any.

[2] 85 Fed. Reg. 57,149, 57,161 (Sept. 15, 2020).

[3] *Id.* at 57,162.

[4] *Id.*

[5] *NRDC v. Herrington*, 768 F.2d 1355, 1374 (D.C. Cir. 1985) ("We think it unlikely that the Congress that enacted NECPA and its four related energy statutes intended DOE to throw away a cost-free chance to save energy unless the amount of energy saved was genuinely trivial.").

[6] *Id.* at n.19 (discussing administrative costs and other costs, and concluding that "If . . . the value of saving small amounts of energy was outweighed by the cost and trouble of undertaking any appliance program at all, DOE might be justified in determining that those small savings were not significant.").

balancing of factors. As the U.S. Supreme Court has indicated, comparative terms that "admit[ ] of degree" like "significant," "minimize," or "reasonable" typically should be assessed by comparing costs and benefits, because "whether it is 'reasonable' to bear a particular cost may well depend on the resulting benefits."[7]

By defining "significance" by reference to an arbitrary threshold, rather than by a meaningful weighing of the actual costs, cost savings, and environmental benefits of a potential efficiency improvement, DOE has unreasonably failed to consider all the important factors of the decision that the department must make under the statute. DOE's proposed determination is therefore arbitrary. DOE should instead examine the actual costs, cost savings, and environmental benefits of all feasible efficiency improvements.

Respectfully submitted,

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Attached:

Policy Integrity's Comments on Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, *available at* https://policyintegrity.org/documents/DOE_Process_Rule_Comments_2019.5.6_final.pdf.

Policy Integrity's Comments on Notice of Data Availability for the Process Rule, *available at* https://policyintegrity.org/documents/Institute_for_Policy_Integrity_DOE_Process_Rule_NODA_Comments.pdf.

Policy Integrity's Comments on Supplemental Notice of Proposed Rulemaking on Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards, *available at* https://downloads.regulations.gov/EERE-2017-BT-STD-0062-0170/attachment_1.pdf.

[7] *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498, 1506, 1510 (2009).