

No. 23-1285

**In the United States Court of Appeals
for the District of Columbia Circuit**

AMERICAN GAS ASSOCIATION; AMERICAN PUBLIC GAS ASSOCIATION;
NATIONAL PROPANE GAS ASSOCIATION;
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY; OFFICE OF ENERGY EFFICIENCY
AND RENEWABLE ENERGY, DEPARTMENT OF ENERGY; JENNIFER M.
GRANHOLM, SECRETARY, U.S. DEPARTMENT OF ENERGY,
Respondents.

**PETITIONERS' NON-BINDING STATEMENT OF ISSUES TO BE
RAISED**

Pursuant to the Court's October 16, 2023, Order, Petitioners American Gas Association, American Public Gas Association, and National Propane Gas Association file this Non-Binding Statement of Issues to be Raised in the above captioned case. The non-binding list of issues Petitioners intend to raise in challenging final rule at issue in this case ("Final Rule")¹ are as follows:

¹ Energy Conservation Program: Energy Conservation Standards for Commercial Water Heating Equipment, 88 Fed. Reg. 69,686 (Oct. 6, 2023).

1. Did the Department of Energy (“DOE”) exceed its authority under the Energy Policy and Conservation Act by imposing new energy conservation standards for commercial water heaters without a separate class for non-condensing commercial water heaters?
2. Did DOE exceed its authority under the Energy Policy and Conservation Act by imposing new energy conservation standards for commercial water heaters that will result in the unavailability of noncondensing gas-fired water heaters?
3. Did DOE exceed or arbitrarily or capriciously exercise its authority under the Energy Policy and Conservation Act by failing to consider important “performance characteristics (including reliability, features, sizes, capacities and volumes” that are currently provided by non-condensing commercial water heaters, which will be made unavailable by the Final Rule?
4. Did DOE lack “clear and convincing evidence” to justify new energy conservation standards for commercial water heaters that will result in the unavailability of noncondensing gas-fired water heaters?
5. Was DOE’s decision to make non-condensing gas-fired commercial water heaters unavailable to consumers arbitrary and capricious?
6. Was the DOE’s consideration and treatment of fuel switching contrary to its authority under the Energy Policy and Conservation Act?

7. Did DOE act arbitrarily, capriciously, or contrary to law by failing to follow its own Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards by, among other things, failing to consider the negative consequences of accelerating fuel switching from natural gas to electricity?
8. Did DOE lack “clear and convincing evidence” to support its conclusion that the new standards for commercial water heaters in the Final Rule are economically justified?
9. Was DOE’s determination that the new standards in the Final Rule are economically justified arbitrary and capricious?

Dated: November 15, 2023

Respectfully submitted,

Renée Lani
Assistant General Counsel
AMERICAN PUBLIC GAS ASSOCIATION
201 Massachusetts Ave., NE, Suite
C-4
Washington, DC 20002
202-464-0836
rlani@apga.org

Randolph L. Elliott
MCCARTER & ENGLISH, LLP
1301 K St. NW, STE 1000 West
Washington, DC 20005

/s/ Michael B. Schon
Steven P. Lehotsky
Michael B. Schon
LEHOTSKY KELLER COHN LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
mike@lkcfirm.com

Mithun Mansinghani
LEHOTSKY KELLER COHN LLP
629 W. Main St.
Oklahoma City, OK 73102
mithun@lkcfirm.com

(202) 753-3400

relliott@mccarter.com

Counsel for Petitioner American Public Gas Association

Counsel for Petitioners American Gas Association and National Propane Gas Association

Michael L. Murray

Matthew J. Agen

AMERICAN GAS ASSOCIATION

400 North Capitol Street, N.W.

Washington, DC 20001

(202) 824-7000

MAgen@aga.org

MMurray@aga.org

Counsel for Petitioner American Gas Association

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2023, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to the parties.

/s/ Michael B. Schon

Michael B. Schon