COMMENTS OF ATTORNEYS GENERAL OF NEW YORK, CALIFORNIA, MAINE, WASHINGTON, MINNESOTA, ILLINOIS, COLORADO, MARYLAND, VERMONT, MICHIGAN, CONNECTICUT, OREGON, NEW JERSEY, THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA, THE DISTRICT OF COLUMBIA AND THE CITY OF NEW YORK

August 6, 2019

Submitted via e-mail:
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Appliance and Equipment Standards Program
Building Technologies Office
U.S. Department of Energy

Re: Docket No. EERE-2019-BT-NOA-0011
RIN 1904-AE24
Test Procedure Interim Waiver Process

The undersigned state and local government entities submit these comments on the Department of Energy (DOE) May 1, 2019 Notice of Proposed Rulemaking regarding changes to DOE's test procedure waiver process.[1] As government entities charged with reducing the economic and environmental costs of energy use, we have strongly supported DOE's appliance and equipment efficiency program. National efficiency standards have been highly effective in reducing consumer and industrial energy costs and reducing the environmental impacts associated with energy production.[2]

Under the proposed rule, an application by a product manufacturer or other interested party for interim waiver of national, uniform test procedure requirements will be deemed granted, pending decision on the party's petition for full waiver, unless DOE notifies the applicant in writing within 30 business days of DOE's receipt of the application that the interim

[1] Notice of Proposed Rulemaking, "Test Procedure Interim Waiver Process," 84 Fed. Reg. 18,414 (May 1, 2019).

[2] According to DOE, national energy efficiency standards completed through 2016 are expected to save 71 quadrillion British thermal units (quads) of energy by 2020 and nearly 142 quads through 2030—more energy than the entire nation uses in one year. The cumulative utility bill savings to consumers are estimated to be more than $1 trillion by 2020 and more than $2 trillion by 2030. DOE further estimates that as a result of standards, a typical household saves about $321 per year off its energy bills. As consumers replace their appliances with newer models, they can expect to save over $529 annually by 2030. *See* DOE Fact Sheet, "Saving Energy and Money with Appliance Equipment Standards in the United States," *available at* https://www.energy.gov/sites/prod/files/2017/01/f34/Appliance%20and%20Equipment%20Standards%20Fact%20Sheet-011917_0.pdf. National standards have also helped the United States avoid emissions of 2.6 billion tons of carbon dioxide (CO_2) emissions, which is equivalent to the annual CO_2 emissions from nearly 543 million automobiles. *See* DOE Fact Sheet *available at* https://www.energy.gov/sites/prod/files/2016/02/f29/Appliance%20Standards%20Fact%20Sheet%20-%202-17-2016.pdf.

waiver is denied or is granted with conditions. The interim waiver would be immediately effective, without public notice or comment, and would remain in effect for an unlimited duration until DOE makes a decision on the petition for full waiver. In the event DOE denies the petition or grants the petition with conditions, the applicant would then have an additional 180 days to comply with the agency's decision on the petition.

This new proposed interim waiver process would seriously undermine U.S. energy efficiency standards to the detriment of consumers and product manufacturers who comply with existing compliance test procedures. The proposed rule would effectively allow any manufacturer, even one that lacks any legitimate basis to seek a waiver, to sell non-compliant products for at least half a year, and perhaps indefinitely. This unwise proposal would saddle individual consumers and businesses with costs associated with potentially long-lived products that do not meet DOE's energy efficiency standards. Further, the proposal invites abuse and undermines transparency and uniformity in national testing procedures, which are cornerstones of the federal energy efficiency program. The proposed rule exceeds DOE's statutory authority, is arbitrary and capricious, and is otherwise contrary with law. We urge DOE to withdraw the proposal.

I. Background

A. DOE's Test Procedure Program

DOE regulates the energy efficiency of a range of consumer products and industrial equipment pursuant to the Energy Policy and Conservation Act of 1975, as amended, 42 U.S.C. § 6291, *et seq*. (EPCA). The four pillars of EPCA's energy efficiency requirements are (1) product and equipment standards, (2) compliance testing, (3) product labeling, and (4) certification and enforcement. Under this framework, DOE prescribes minimum efficiency standards for covered products and equipment, 42 U.S.C. §§ 6295, 6313, and establishes test procedures by which manufacturers test and certify that their products comply with applicable standards, 42 U.S.C. §§ 6295(s), 6316(a). *See NRDC v. U.S. DOE*, 362 F. Supp. 3d 126 (S.D.N.Y. 2019).

EPCA requires that test procedures be reasonably designed to produce test results that reflect energy efficiency, energy use or estimated annual operating costs of a product during a representative average use cycle or period. 42 U.S.C. § 6293(b)(3). Thus, manufacturers use DOE test procedures to certify that their products comply with applicable energy standards, 42 U.S.C. §§ 6295(s), 6316(a), and to support representations about the efficiency of those products, 42 U.S.C. §§ 6293(c), 6314(d). Manufacturers are prohibited from distributing a covered product without first demonstrating compliance with applicable standards through the use of DOE-prescribed test procedures. *See* 42 U.S.C. §§ 6302(a)(5), 6295(s).

Current DOE regulations permit a manufacturer or other interested party to seek a waiver from applicable test procedure requirements. Pursuant to 10 C.F.R. §§ 430.27(a)(1) and 431.401(f)(2), a manufacturer may submit a test procedure waiver petition for a basic model of a product if the basic model's design prevents it from being tested according to applicable test procedures, or if use of the test procedure would result in materially inaccurate or

unrepresentative energy use data. Any waiver granted by DOE remains in effect until DOE issues amended test procedures that obviate the need for the waiver. 10 C.F.R. §§ 430.27(h)(2), 431.401(h)(2).

While a waiver petition is pending, a manufacturer or other interested party may also apply for an interim waiver. 10 C.F.R. §§ 430.27(a), 431.401(a). The application for interim waiver must demonstrate the likely success of the waiver petition, and address what economic hardships and/or competitive disadvantages are likely to result absent a favorable determination. 10 C.F.R. §§ 430.27(b)(2), 431.401(b)(2). DOE will grant an interim waiver from the test procedure requirements "if it appears likely that the petition for waiver will be granted and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver." 10 C.F.R. §§ 430.27(e)(2), 430.401(e)(2). If administratively feasible, DOE will notify the petitioner of its interim waiver decision within 30 business days of its receipt of the application and will publish that decision in the Federal Register. 10 C.F.R. §§ 430.27(e)(1), 430.401(e)(1). DOE may specify an alternative test procedure as part of its interim decision. *See* 10 C.F.R. §§ 430.27(i)(1), 430.401(i)(1).

DOE regulations require DOE to publish petitions for waiver, 10 C.F.R. § 430.27(b)(iv), as well as determinations granting interim and final waivers. 10 C.F.R. §§ 430.27(e), (f)(2). Waiver applicants and interim waiver recipients must provide written notice to competitors and must furthermore certify to DOE that such notice was sent. 10 C.F.R. § 430.27(c). Within 60 days of DOE's granting of a waiver to a manufacturer for a product employing a particular technology or having a particular characteristic, any other manufacturer distributing a product that results in the same need for a waiver must submit a waiver petition and may also seek an interim waiver. 10 C.F.R. § 430.27(j).

B. DOE's Interim Waiver Proposal

DOE now proposes to amend its test procedure waiver process to permit interim waivers by default without review. Under DOE's proposal, "an application for interim waiver would be deemed granted, thereby permitting use of the alternate test procedure suggested by the applicant," or none at all if an alternate is not provided[3], "if DOE fails to notify the applicant in writing of the disposition of an application within 30 business days of receipt of the application. DOE's decision on the interim waiver application will not depend on DOE's view of the sufficiency of the associated petition for waiver." 84 Fed. Reg. at 18,415. Thus, according to DOE, "manufacturers would need to wait only a maximum of 30 business days before selling products" pursuant to an automatic, "deemed granted" interim waiver. *Id.* If DOE ultimately denies the petition for waiver or grants the petition subject to a different alternate test procedure than one proposed by the manufacturer, the manufacturer would then have a 180-day grace

[3] During a July 11, 2019 DOE webinar to discuss the agency's interim waiver proposal, DOE acknowledged that given the existing language of 10 C.F.R. § 430.27(b)(1)(iii), an interim waiver petition could be complete and deemed granted under the proposal even without an alternate test procedure. *See* DOE July 11, 2019 Interim Waiver Proposal Public Webinar Transcript, available at https://www.regulations.gov/document?D=EERE-2019-BT-NOA-0011-0031 at 98.

period to comply with the applicable test procedure or DOE-specified alternate test procedure. *See* 84 Fed. Reg. at 18,415. There would be no notice to the public – either to consumers or manufacturers – of any interim waiver granted through this 30-day default process.[4]

II. DOE's Interim Waiver Proposal Is Unlawful and Should Be Withdrawn

Under the Administrative Procedure Act (APA), DOE's proposed rule exceeds the agency's statutory authority, is arbitrary and capricious, and otherwise is contrary to law. 5 U.S.C. § 706(2). The proposed rule is an ill-conceived attempt to address a non-existent problem. The proposal invites abuse and undermines EPCA's core principles of promoting energy efficiency through the application of transparent and uniform national standards and testing procedures. The Department should therefore withdraw the interim waiver proposed rule.

A. DOE's Proposal Is Not Authorized By EPCA And Is Contrary To The Statute's Requirements Regarding Compliance Testing.

EPCA does not authorize DOE's interim waiver proposal. Although DOE regulations have long provided for DOE issuance of test procedure waivers and interim waivers (*see, e.g.,* 45 Fed. Reg. 64,108 (Sept. 26, 1980); 51 Fed. Reg. 42,823 (Nov. 26, 1986)), the statutory basis for such exemptions from EPCA's testing requirements is unclear. Neither EPCA nor any other statute that DOE implements expressly authorize the creation of a process for waiving, on a permanent or interim basis, EPCA's test procedure requirements. *Cf.* 42 U.S.C. § 7194 (request for adjustments); 10 C.F.R. § 1003.20 (application for hardship exceptions). DOE's Notice of Proposed Rulemaking fails to identify any statutory authority for its proposed action, relying instead on its citation to regulations that established the agency's process for waiver and interim waivers. The APA requires that DOE reference the legal authority for its proposed action. 5 U.S.C. § 553(b)(2); *see NRDC v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004). DOE's proposal contravenes the APA by failing to identify any statutory authority for its interim waiver proposal.

DOE's proposal is at odds with EPCA's detailed provisions governing adoption of new and amended test procedures (42 U.S.C. § 6293(b)(2)), compliance periods (42 U.S.C. § 6293(c)(2)), and "undue hardship" extension requests (42 U.S.C. § 6293(c)(3)). For example, EPCA requires that DOE promptly publish proposed test procedures for public comment for a period of not less than 60 or more than 270 days. 42 U.S.C. § 6293(b)(2). Similarly, EPCA requires that a manufacturer, distributor, retailer, or private labeler demonstrate compliance using the applicable testing procedure within 180 days after the applicable test procedure is prescribed. 42 U.S.C. § 6293(c)(2). And while EPCA authorizes a petition seeking an extension of the 180-day compliance deadline for hardship reasons, "in no event [can DOE extend such period] for more than an additional 180 days." 42 U.S.C. § 6293(c)(3). Here, DOE's proposal – an amended process by which a manufacturer or other party could obtain an interim waiver from test procedures by default, without notice, and for an indeterminate period – is contrary to the

[4] In its webinar DOE acknowledged that its proposal did not sufficiently provide for public notice of deemed granted interim waivers. *See* DOE Webinar Transcript, at 38-39, 49-50, 79-80.

carefully crafted procedure and strict timeframes Congress set forth in EPCA relating to DOE's testing program.

If Congress had intended to authorize "deemed granted" interim waivers, it could have done so. For example, Congress specifically provided that in the case of amended standards, "[m]odels of covered products in use before the date on which the amended energy conservation standard becomes effective…that comply with the energy conservation standard applicable to such covered products on the day before such date *shall be deemed to comply* with the amended energy conservation standard." 42 U.S.C. § 6293(e)(3) (Emphasis added.) Congress, however, provided no provision for "deemed" compliance with test procedure-related requirements, and therefore presumptively rejected DOE's approach. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (recognizing general presumption that by including language in one part of a statute and omitting it in another, "Congress acts intentionally and purposely in the disparate inclusion or exclusion").

Indeed, EPCA requires DOE to make an affirmative determination that any test procedure used to certify compliance with standards is "reasonably designed to produce test results which measure energy efficiency, energy use, water use…or operating cost…during a[n] …average use cycle." 42 U.S.C. § 6293(b)(4). DOE has acknowledged its "obligation" under EPCA "to ensure that alternative test methods authorized by the Department yield measurements of energy consumption that are representative of actual performance." Amendments and Correction to Petitions for Waiver and Interim Waiver for Consumer Products and Commercial and Industrial Equipment, 79 Fed. Reg. 26,591 (May 9, 2014).[5] Performance of this duty "requires careful analysis and sometimes requires testing by DOE even if the manufacturer provides test data with their submission." *Id.* at 26,593. But under DOE's interim waiver proposal, DOE is not required to make *any* determination before a manufacturer or other interested party can certify the efficiency of a product using an alternative test procedure. Under the agency's proposed procedure, non-compliant products could be sold without any testing at all.

DOE has previously denied interim waiver applications for failure to provide alternate test procedures. *See, e.g.,* Publication of the Petition for Waiver and Denial of the Application for Interim Waiver of LG Electronics from DOE Clothes Dryer Test Procedures, 71 Fed. Reg. 49,437 (Aug. 23, 2006). Indeed, DOE has noted that "where it grants a waiver from applicable test procedures, an alternate test procedure should be in place, where possible, because testing is necessary to verify compliance with the applicable energy standards. Maintaining proper compliance ensures the public that marketed products meet published energy standards." *Id.* at 49,438. Accordingly, DOE's proposed rule not only lacks authorization under EPCA, it is also

[5] *See* Decision and Order Denying a Waiver to Felix Storch, Inc. from DOE Residential Refrigerator and Refrigerator-Freezer Test Procedures, 79 Fed. Reg. 49,292 (Aug. 20, 2014) ("The [DOE] prescribed 90 °F ambient condition has been substantially vetted and accepted by the refrigeration industry for decades and is widely viewed as being reasonably designed to produce results that measure the energy use and efficiency of refrigerators, refrigerator-freezers, and freezers—such as those at issue in FSI's petitions—during a representative average use cycle or period of use. Given this background, and the limited supporting data offered by FSI in favor of an alternative test procedure, DOE cannot conclude that a waiver is appropriate with respect to FSI's request.")

inconsistent with DOE's statutory obligation under 42 U.S.C. § 6293(b)(4) to ensure the use of test procedures that produce test results in accordance with the statutory requirements.

B. DOE's Interim Waiver Proposal Is Arbitrary and Capricious.

DOE has not explained the rationale for its proposed departure from current regulatory practice. During prior rulemakings related to DOE's test procedure waiver process, DOE rejected industry requests to authorize unilateral action, such as expanding the scope of waiver coverage without DOE review and input. DOE observed that allowing a manufacturer "to extend a waiver to additional models unilaterally, would not allow DOE to fulfill its responsibility to ensure that an alternative test procedure is appropriate for the new basic model(s)." 79 Fed. Reg. 26,595. DOE has also emphasized the importance of public notice and has carefully balanced the competitive interests of manufacturers against public notice requirements. For example, in order to address manufacturer concerns about being required to notify competitors of applications for interim waiver prior to the marketing of new basic models, DOE requires notification to other manufacturers after publication of DOE's interim waiver decision. *See* 79 Fed. Reg. 26,593; *see also*, 10 C.F.R. § 430.27(c) (requiring written notification to other manufacturers), § 430.27(j) (requiring petitions for waiver and authorizing interim waiver applications by other manufacturers).

By contrast, DOE's proposal would permit a manufacturer to write its own rules to achieve its desired outcome. There would be no oversight by DOE and no opportunity for public comment or challenge. Other than conclusory statements about public policy favoring reduced regulatory burdens and increased administrative efficiency, 84 Fed. Reg. 18,416, DOE has not explained why a change from its prior positions is warranted. DOE's misplaced focus on deregulation defies its core statutory mission under EPCA to promote energy efficiency.

DOE's proposal arbitrarily dispenses with public notice without reasoned explanation. "When an agency changes its position, it must 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *NRDC v. U.S. DOE*, 362 F. Supp. 3d at 144 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). An applicant's obligation to provide notice of a granted interim waiver is triggered only upon an affirmative decision by DOE to grant the interim waiver request. But under the proposal DOE need never make a formal determination before an interim waiver request is passively "deemed granted." Accordingly, the public notice requirement may never be triggered. Thus, a manufacturer who receives a written interim waiver disposition from DOE must abide by the notice requirements of 10 C.F.R. § 430.27(c), but a manufacturer whose interim waiver application is "deemed granted" need not. DOE has not provided any justification for this disparity and is therefore arbitrary and capricious. *NRDC v. U.S. DOE*, 362 F. Supp. 3d. at 150 (DOE failure to follow agency precedent regarding equitable test for issuance of stay, without explanation, was arbitrary).

DOE contends that the interim waiver proposal "responds to stakeholder concerns regarding lengthy waiting times following submission of interim waiver and waiver applications, and the burden that lengthy processing time imposes on manufacturers, who are unable to sell their products or equipment absent an interim waiver or waiver from DOE." 84 Fed. Reg. at

18,415. However, the sole document DOE cites in support of this contention, consisting of meeting notes from the North American Association of Food Equipment Manufacturers' (NAFEM) regulatory reform roundtable, indicates that any delay in processing waiver applications is due to poor resource management and insufficient staffing by DOE, not a programmatic deficiency requiring changes to DOE regulations.[6] The notes indicate, for example, that DOE's "current process relies on one individual within DOE to review [waiver] requests."[7]

Moreover, DOE's proposal fails to acknowledge the role that manufacturers play in contributing to waiver application processing delays. As DOE itself has observed:

> a manufacturer should petition for a waiver as soon as it realizes that a design (possibly a prototype) either cannot be tested under the DOE test procedure or that the test procedure yields results that are not representative of the model's actual energy consumption. In addition, manufacturers may speed processing of their petitions by providing all of the required information, including proposing a complete, alternative test method at the time the initial application is submitted. Submission of any relevant test data would also be helpful. Manufacturers may also facilitate review by providing an explanation of why the proposed test method more accurately represents the energy consumption of the basic model. *Many of the delays in processing arise from iterative efforts by the Department to obtain sufficient information upon which to base a decision to grant an interim waiver*.

79 Fed. Reg. 26,593 (emphasis added). Significantly, DOE's proposal removes any incentive for manufacturers to provide DOE with sufficient information to facilitate review, essentially relieving manufacturers from their responsibility to provide complete waiver applications. As a result, DOE's proposal assuredly will result in incomplete interim waiver applications being "deemed granted."

DOE has also failed to explain why its proposal is necessary given DOE's non-enforcement policy applicable to situations involving pending waiver applications.[8] DOE's reaffirmance of that policy in 2017 should provide stakeholders more than adequate certainty regarding potential enforcement liability.

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[6] *See* NAFEM Regulatory Reform Discussion Notes (Oct. 31, 2017), available at https://www.energy.gov/sites/prod/files/2018/01/f46/NAFEM%20Regulatory%20Reform%20Roundtable%20Meeting%20Notes%20-%2010.31.17.pdf.

[7] In its webinar DOE acknowledged that in processing 50-plus interim waiver applications over the last three years, only once did the agency meet 10 C.F.R. § 430.27(e)'s 30-day target for disposition of those applications. *See* DOE Webinar Transcript at 16, 20. DOE's suggestion that its proposal will now incentivize the agency to act within 30 days appears unrealistic given the lack of agency plans for additional resources to address existing budget and staff constraints. *Id.* at 17, 19-20, 48.

[8] DOE Enforcement Policy Statement – Pending Test Procedure Waiver Applications (Dec. 23, 2010, re-issued Apr. 5, 2017), available at https://www.energy.gov/gc/downloads/enforcement-policy-application-waivers-and-waiver-process.

For these reasons, DOE's proposal is arbitrary and capricious and should be abandoned.

C. The Proposal Invites Abuse and Undermines DOE's Efficiency Program.

DOE's proposal creates significant potential for abuse and threatens the reliability and effectiveness of DOE's national appliance and equipment efficiency program. By creating a process for obtaining waivers by default, the proposal invites unscrupulous market actors to game the system that Congress established to ensure uniform efficiency standards. The plan contains no protections whatsoever to discourage or prevent bad-faith applications.

While most manufacturers comply with DOE's efficiency standards and testing obligations, under this proposal a manufacturer could submit an incomplete application, propose an inappropriate alternate test procedure – or none at all – and still obtain an interim waiver after 30 days. This harms other manufacturers who play by the rules as well as consumers and businesses who unwittingly purchase products that do not meet minimum efficiency standards.[9]

Even industry leaders have cautioned against DOE's proposal. *See* K. Brugger, "Groups 'stunned' by DOE refusal to hold public meeting," E&E News (June 12, 2019), available at https://www.eenews.net/energywire/stories/1060554727/print. For example, Lennox International Inc., a maker of heating, ventilation and air conditioning equipment recently stated, "We believe this is a reckless approach and could encourage bad behavior that harms consumers." Similarly, the National Electrical Manufacturers Association urged DOE to install "guardrails to ensure the waiver system cannot be exploited 'in some way that is inimical to energy efficiency.'" *Id.* As DOE itself recently noted, "explicit[] approv[al] of alternative test procedures [by DOE]...allows DOE to ensure that manufacturers of similar products are making energy efficiency representations using the same alternative test procedure, which is essential for maintaining integrity in a market." DOE Test Procedures for Central Air Conditioners and Heat Pumps Lifting of Administrative Stay, 83 Fed. Reg. 39,873 (Aug. 13, 2018).

We are not aware of any federal program where a party can obtain an exemption from statutory and regulatory compliance by mere delay on the part of the responsible agency. Providing for automatic, "deemed granted" relief under such a "shot clock" scenario amounts to an abdication of agency responsibility.[10] DOE's proposal would codify a back-door method for

[9] DOE's national cost savings and forgone benefits analysis (84 Fed. Reg. 18,418) underestimates the energy cost savings and environmental benefits that would be lost under DOE's proposal. DOE acknowledged that "[t]o the extent [the proposal] would cause DOE to automatically grant interim waiver requests that it would not have granted in the status quo, this proposal may result in foregone benefits to consumers or the environment." *Id.* at 18,419. In its analysis, DOE considered the interim waivers it "granted with modification" in the period 2016-2018 and calculated the additional energy use and carbon emissions that would have resulted had those waivers instead been "deemed granted." DOE concluded that the loss of benefits was "relatively small." *Id.* However, DOE's focus on historical data for its analysis is overly narrow. Given the likelihood that the proposal will encourage increased interim waiver applications and result in their deemed approval regardless of merit, the foregone benefits of DOE's proposal could be substantial. DOE has "failed to consider an important aspect of the problem" that the proposal creates by incentivizing non-meritorious interim waiver applications. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

[10] The Federal Communications Commission recently declined to embrace such an extreme approach, preferring a more nuanced method for regulating wireless infrastructure installations in order to balance the interest

manufacturers to eschew testing requirements and standards compliance. As the court observed in *NRDC v. U.S. DOE*, the substantive effect of an interim waiver and DOE's stay of a test procedure -- which the court invalidated as arbitrary and capricious -- is that products are not subject to test procedures and can therefore be marketed without compliance. 362 F. Supp. 3d at 142 (citing DOE acknowledgement that interim waiver process is a "more tailored approach" to achieve the exact same ends as staying a test procedure). DOE's interim waiver proposal amounts to a "more tailored approach" to rolling back test procedure and efficiency standards compliance. That kind of agency rollback would lead to the same loss of efficiency Congress intended to prevent through EPCA's anti-backsliding requirement. *See* 42 U.S.C. § 6295(o)(1).

Finally, in the proposed rule DOE asserts that a "deemed granted" interim waiver is not final agency action for purposes of the APA. 84 Fed. Reg. 18416, fn. 5. However, the suspension of compliance requirements under the proposal may well constitute final agency action subject to judicial review, despite DOE's characterization. *See Clean Air Council v. Pruitt,* 862 F.3d 1, 7 (D.C. Cir. 2017) (agency decision to grant interim stay was reviewable final agency action given its removal of industry compliance obligations); *see generally Azar v. Allina Health Services,* 139 S. Ct. 1804, 204 L. Ed. 2d 139, 148 (2019) (rejecting agency characterization of a rule as non-reviewable). To accept DOE's argument that issuance of a final determination on a full waiver application is a prerequisite to judicial review would lead to an absurd result: DOE could evade judicial review of waiver authorizations through inaction on interim waiver and waiver applications.

III. Conclusion

The commenting states and local entities rely on DOE to fulfill its statutory duty to develop and enforce energy efficiency standards consistent with EPCA's requirements, which in turn advance energy efficiency and environmental goals of our states and municipalities. Ensuring that manufacturers certify compliance using fair and appropriate test procedures is a key component of the federal appliance and equipment energy efficiency program. The proposed rule severely undermines that important program. For the foregoing reasons, DOE should withdraw its proposed interim waiver process rule.

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of wireless service providers in timely and streamlined siting application decisions with the interest of localities in protecting public safety and welfare and preserving local authority in the permitting process. FCC, "Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Declaratory Ruling and Third Report and Order," WT Docket No. 17-79; WC Docket No. 17-84 (Sept. 5, 2018) (instead of adopting a deemed granted remedy that would grant a siting application when a shot clock lapses without a decision on the merits, the Commission provided guidance as to the appropriate judicial remedy that applicants may pursue).

Respectfully submitted,

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