



COMPETITIVE ENTERPRISE INSTITUTE

**COMMENTS OF THE COMPETITIVE ENTERPRISE INSTITUTE
REGARDING THE ENERGY CONSERVATION PROGRAM FOR CONSUMER
PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT**

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I. INTRODUCTION

The Competitive Enterprise Institute (CEI) is a non-profit public interest organization committed to advancing the principles of free markets and limited government. CEI has a longstanding interest in bringing to light the potentially deleterious consequences of regulations, which are often neglected by federal agencies in their attempts to adopt a regulatory agenda. CEI has previously participated in appliance conservation standards rulemakings, with a particular emphasis on ensuring that the interests of consumers are represented.

Since its enactment in 1987, the National Appliance Energy Conservation Act (NAECA) has been aggressively implemented by DOE. Today, most major energy-using home appliances have been subjected to two or even three rounds of successively tighter standards. Further, with the wave of stringent standards promulgated in the final months of the Clinton administration, this fast regulatory pace will continue for several more years.

The NAECA's goal, that of providing technologically feasible and economically justified energy conservation standards for major energy-using appliances, has largely been accomplished, if not exceeded. As the comments below elucidate, CEI believes that further standards are likely to be adverse to the interests of American consumers, and that further rulemakings should be undertaken with great caution.

II. DOE Must Fully Consider the NAECA'S Consumer Protections In Future Rulemakings

The NAECA contains a number of provisions designed to protect consumers from detrimental energy conservation standards. Unfortunately, the weight given these consumer protections is left to the discretion of DOE. This discretion was abused during the Clinton administration, leading to a number of problematic rulemakings at odds with the pro-consumer thrust of the NAECA.

For example, DOE is required, as part of its determination of a new standard's economic justification, to take into account the impact of a proposed rule on the purchase price of the regulated product.¹ However, the NAECA contains no bright-line rule under which an initial cost increase precludes imposition of a new standard. Thus, DOE

¹ 42 U.S.C. § 6295(o)(2)(B)(i)(II).

conducted an analysis of the clothes washer rule and found that the 2007 standard would increase the initial cost by \$249, an astonishing 59 percent jump.² Despite this unprecedented consumer burden, the agency went ahead with the final rule last January.

Similarly, the agency is required to calculate the life cycle cost of a product in order to determine whether or not the higher initial cost is earned back in the form of energy savings over the life of the product.³ Once again, there are no numerical limits beyond which a standard cannot be promulgated. In the case of the new central air conditioner rule, DOE's analysis found that a majority of consumers will suffer net lifecycle costs.⁴ Despite such clear evidence widespread consumer harm, the agency finalized the rule.⁵

In addition to cost concerns, the NAECA contains provisions to protect consumers from conservation standards that may diminish product choice, features, and performance.⁶ However, the agency has implemented these provisions so loosely so as to render them nearly meaningless. Well-documented concerns about potential adverse impacts of the new clothes washer, air conditioner, and water heater standards were essentially ignored by the agency.⁷

² 66 Fed. Reg. 3,314, 3,315 (January 12, 2001).

³ 42 U.S.C. § 6295(o)(2)(B)(i)(II).

⁴ 66 Fed. Reg. 7,170, 7,188 (January 22, 2001).

⁵ Fortunately, DOE is now reconsidering this standard. 66 Fed. Reg. 38,822 (July 25, 2001). It should also be noted that, pursuant to DOE's interpretive rule, the agency conducted a separate analysis of the impact on consumer subgroups, including low-income households. 10 CFR, Part 430, Subpart C, Appendix A, §5(e)(3)(i)(G). Despite finding a disproportionately adverse impact on low-income households, the agency proceeded with the final rule. 66 Fed.Reg. 7,189.

⁶ 42 U.S.C. § 6295(o)(2)(B)(i)(IV); 42 U.S.C. § 6295(o)(4).

⁷ Competitive Enterprise Institute, Petition for Reconsideration of the Energy Conservation Standard for Clothes Washers, March 13, 2001; Air Conditioning and Refrigeration Institute, Petition For Reconsideration of the Energy Conservation

The NAECA also contains provisions designed to limit any increase in maintenance and repair costs as a consequence of new standards.⁸ Strict energy conservation standards frequently reduce product reliability, resulting in higher maintenance and repair costs (or warranty costs) for consumers.⁹ In the case of the clothes washer rule, reports had already emerged that some compliant models were less reliable than their non-compliant counterparts.¹⁰ Nonetheless, DOE simply ignored such concerns, claiming a lack of clear evidence.¹¹

Given this recent history, CEI is concerned that additional standards harmful to consumers may be implemented. If past is prologue, the NAECA's consumer protections will not receive adequate consideration during the standards-setting process, and the impact on product cost, features, performance, and reliability will again be downplayed or ignored by DOE.

The net harm to consumers may worsen. Most major energy-using home appliances (including heating and air conditioning systems, refrigerators, water heaters, cooking products, clothes washers and dryers) have already been regulated, and DOE is

Standards for Central Air Conditioners and Heat Pumps, March 23, 2001; Gas Appliance Manufacturers Association, Petition for Reconsideration of the Energy Conservation Standard for Water Heaters, February 15, 2001.

⁸ 42 U.S.C. § 6295(o)(2)(B)(i)(II); 42 U.S.C. §6295(o)(4).

⁹ See, *Consumer Reports*, "Spin City: Ratings of Washing Machines and Clothes Dryers," July 1999, pp. 30-33; *Consumer Reports*, "Way Cool: A Guide to Buying Air Conditioning," June 1998, p. 37 (Mid-efficiency models ... may be the least expensive to own overall because they're cheaper to buy and less likely to need repair.").

¹⁰ *Consumer Reports*, "Product Updates," January 2001, p. 46 ("Maytag front loaders [which meet the new standard] were among the less reliable brands and less reliable than Maytag top-loaders [which do not meet the new standard]."); *Consumer Reports*, "Sears Recalls Some Calypso Washers" March 2001, p. 55.

¹¹ See, 65 Fed. Reg. 59,562.

now turning its attention to a list of minor energy-users.¹² The potential energy savings from regulating such products is quite small and easily offset by any adverse consumer impacts.

CEI urges DOE to fully and fairly incorporate the NAECA's consumer protections into all future energy conservation standards rulemakings, and to decline to promulgate any standard not in the best interest of consumers.

III. The Success Of Non-Regulatory Approaches Reduces The Need For Additional Standards

One of the main justifications for federal energy conservation standards was the assumption that they would be necessary to force manufacturers to make products with improved energy efficiency. Whether or not this assumption was true in 1987 when the NAECA was enacted, it certainly is not true today.

Manufacturers have gone beyond the minimum statutory and regulatory requirements for nearly all energy-using products. Indeed, for almost every category of regulated appliance, there are several models that significantly exceed the existing standard. In addition, makers of unregulated appliances offer models that use less energy than the industry average, and are continually improving on energy efficiency. Further, federal energy use labeling requirements and the Energy Star Program (as well as non-governmental sources of energy use information such as *Consumer Reports*) help consumers to easily identify these energy-efficient models.¹³

¹² DOE, 2002 Priority Setting for New Products, October 26, 2001.

¹³ Both these programs may be expanded under H.R. 4, §§ 141 and 142.

Thus, appliances exceeding existing standards for energy use (or in the case of unregulated appliances, models exceeding the industry average) are readily available for consumers who want them. Some consumers choose these models, believing the energy savings make up for the higher price (or other potential drawbacks), while others do not. Under such circumstances, new standards are unwarranted because they do not expand product choice, but merely restrict it.

Federal agencies are required to consider non-regulatory alternatives to major rules.¹⁴ Furthermore DOE has promised to consider non-regulatory approaches, especially in cases where a strict new energy conservation standard may work to the detriment of some consumers.¹⁵ However, the agency has yet to decline to set a new standard based on the success of voluntary approaches. DOE has dismissed non-regulatory alternatives with little more than projections showing they won't save as much energy as a mandatory standard (not surprising, given that no voluntary approach will achieve the 100 percent compliance as with a standard).¹⁶ This is far too high a metric by which to judge non-regulatory approaches.

In recent rulemakings, DOE has noted the availability of models that already meet the proposed standard.¹⁷ The agency has used this fact to underscore the technological feasibility of the standard. But there is another side to the availability of such appliances - it is strong evidence that a standard is unnecessary to serve the interests of consumers, and may actually be counterproductive.

¹⁴ Executive Order 12866, 58 Fed.Reg. 51,735 (October 4, 1993).

¹⁵ 10 CFR, Part 430, Subpart C, Appendix A, § 12 (Interpretive Rule).

¹⁶ 65 Fed. Reg. 59,550, 59,582-3 (October 5, 2000).

¹⁷ 65 Fed. Reg. 59,551.

The NAECA was not designed to reduce product choice, or to force upon consumers ultra-efficient appliances they do not want. The benefits of non-regulatory approaches, and the market availability of efficient appliances in the absence of a standard, should be given more weight in future rulemakings.

IV. The Risks Of Setting Standards For Relatively New Technologies Must Be Taken Into Consideration

Among the list of potential new products that may be subject to future standards are desktop personal computers and peripheral devices.¹⁸ However, these appliances differ from those previously regulated by DOE in that they are still relatively new to the market. Personal computing is likely to continue undergoing substantial technological advances in the years ahead, and the resultant changes in energy use requirements cannot be determined in advance. Indeed, the very definition of what constitutes a desktop computer is becoming hazier with the development and introduction of new products and applications. Energy conservation standards imposed at this time and based on current knowledge could pose unforeseen problems, perhaps jeopardizing the path of further innovation.

By way of contrast, the primary focus of the NAECA thus far has been on much older products, such as refrigerators, air conditioners, water heaters, and clothes washers. Most of these appliances had been on the market for several decades before becoming the subject of regulations. This afforded manufacturers a long period for product development – adding new features, improving performance and reliability, reducing costs – before they had to deal with energy conservation standards.

¹⁸ In addition, many of these devices will be affected by the limits on standby power in §143 of H.R. 4.

The decision not to initially regulate energy use for these products was not a conscious one by DOE – the agency simply did not exist when most modern home appliances were introduced in the early and middle parts of the 20th century. Nonetheless, consumers greatly benefited from an extended period during which these products were allowed to mature, free from the constraints of conservation standards.

Likewise, DOE would serve the interests of consumers well by holding off on conservation standards for personal computers and peripherals (or any other high tech electronic devices), at least until these products have had several more years to develop.

V. DOE Is Statutorily Precluded From Promulgating Any Standard That Does Not Save A Significant Amount Of Energy

Several appliances currently under discussion as new regulatory targets are relatively minor energy users, thus the potential energy savings are quite small.¹⁹ NAECA contains several provisions that serve to preclude the agency from setting appliance conservation standards that fail to save a significant amount of energy.

The first of these provisions is the requirement that all energy conservation standards be “economically justified.”²⁰ This requirement involves a balancing of the benefits to consumers, largely in the form of energy savings from a standard, against the costs, largely in the form of a higher purchase price and/or any adverse impacts on product choice, features, performance, and reliability.

Here, it appears that the statutory scheme has reached the limits of economic justification. Several previously enacted standards were estimated to save consumers

¹⁹ DOE, 2002 Priority Setting for New Products, October 26, 2001.

²⁰ 42 U.S.C. § 6295(o)(2)(a).

between \$20 to \$50 per year, according to DOE. For example, the most recent standard in effect for refrigerators is estimated by DOE to save consumers \$20 per year, and the clothes washer standard scheduled to take effect in 2007 is predicted to save \$48 per year.²¹ In sharp contrast, most of the prospective new appliance standards listed by DOE will save considerably less than \$10 per year. In fact, residential personal computers, monitors, printers, and several other appliances under consideration do not even *use* \$10 of electricity per year. With such small benefits, virtually any non-trivial impact on product affordability or quality would make a standard economically unjustified. Clearly, economic justification should become more of a hurdle if DOE pursues regulations for these appliances.

In addition to economic justification, NAECA contains a stand alone provision that precludes DOE from setting a standard that “will not result in significant conservation of energy....”²² During the Clinton Administration, this provision was interpreted so as to be almost meaningless, to the point where virtually any non-zero estimate of energy savings was deemed “significant.” However, the provision should be given a more rational interpretation and applied as such. If this is done, the provision may well preclude some proposed standards from being promulgated.

The third relevant provision is the requirement that newly classified covered products use more than 100 kilowatt-hours per year.²³ In other words, DOE’s regulatory authority extends only to those appliances specifically listed in the statute, plus any other appliances found to meet the 100 kilowatt-hour minimum. Here, several listed

²¹ DOE Press Release, “Fridge for the 21st Century Saves Money, Fights Pollution,” April 23, 1997; 66 Federal Register 3,313, 3,315 (January 12, 2001).

²² 42 U.S.C. § 6295(o)(3)(B).

²³ 42 U.S.C. § 6292(b)(1)(B).

appliances do not meet this minimum. For example, residential desktop personal computers are estimated to use 56 kilowatt-hours per year, monitors 92 kilowatt hours per year, and laser printers 33 kilowatt-hours per year.²⁴ Therefore, these appliances cannot be the subject of standards.²⁵

Clearly, the NAECA contains a redundancy of provisions designed to protect consumers from energy conservation standards likely to be more trouble than they are worth. DOE must give these provisions full and fair consideration as it considers promulgating new standards for minor energy using appliances.

VI. CONCLUSION

As DOE continues to implement the NAECA, the agency should strive to create a policy that best serves the interests of the appliance-using public. Simply promulgating additional standards should not become a goal in itself. Recent rulemakings have demonstrated that appliance standards can harm consumers, particularly when the NAECA's consumer protections are not given full force. The success of non-regulatory approaches further obviates the necessity of additional rules. Standards for personal computers or any other high tech appliances are particularly troublesome and should be avoided. Standards that save very little energy are not allowed under existing law.

²⁴ DOE, 2002 Priority Setting for New Products, October 26, 2001, at 51, 55, and 60.

²⁵ There were some indications, at the November 6, 2001 hearing, that DOE may be attempting to get around the 100 kilowatt-hour minimum requirement, either by skewing the analysis to overstate energy use for some products, or by manipulating the manner in which products are categorized. Any attempt to circumvent the plain meaning of the 100 kilowatt-hour requirement should be viewed as contrary to both the spirit and the letter of NAECA.

Overall, a far more cautious approach to additional energy conservation standard is warranted.

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