No. 14-2147, 14-2159 & 14-2334 (consolidated)

United States Court of Appeals for the Seventh Circuit

ZERO ZONE, INC., AIR-CONDITIONING, HEATING AND REFRIGERATION INSTITUTE, AND NORTH AMERICAN ASSOCIATION OF FOOD EQUIPMENT MANUFACTURERS,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY & ERNEST MONIZ, in his official capacity as Secretary, United States Department of Energy,

Respondents.

On Petition for Review of Final Regulations of the Department of Energy
Agency No. EERE-2010-BT-STD-0003 &
Agency No. EERE–2013–BT–TP–0025 (consolidated)

REPLY BRIEF OF PETITIONERS ZERO ZONE, INC. & AIR-CONDITIONING, HEATING AND REFRIGERATION INSTITUTE

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Introduction

The recurring theme of the Department of Energy's ("DOE's") brief is its repeated invocation of harmless-error doctrine.[1] This is to concede there is good reason to think that DOE made errors in the first place; the agency merely seeks to dismiss them as matters that should not affect the validity of the commercial refrigeration equipment ("CRE") regulations. The venerable principle the government completely ignores, however, is *Chenery*. Beginning with *Chenery I*, the Supreme Court made clear that the "grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("*Chenery I*"). *Chenery II* amplified:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

SEC v. Chenery, 332 U.S. 194, 196 (1947) ("*Chenery II*").

Arguments that an agency engaged in harmless error must be vigorously probed in light of *Chenery I & II* to ensure that an agency is not dodging or indef-

[1] *See, e.g.*, DOE Br. 15 (used in overarching fashion in DOE's *Summary of Argument*), 33 (used as to DOE's greenhouse gas analysis); and 54 (used as to the Attorney General's review of impacts on competitiveness).

initely postponing its core duties to explain itself consistent with the Administrative Procedure Act's rationality mandate. *Compare, e.g., Spiva v. Astrue*, 628 F.3d 346, 353 (7th Cir. 2010) (reversing and remanding where government "seem[s] determined to dissolve the *Chenery* doctrine in an acid of harmless error") *with Illinois v. ICC*, 722 F.2d 1341, 1348-49 (7th Cir. 1983) (concluding harmless error happened to outbalance *Chenery* concerns where it was "*inconceivable*" that the agency would come to a different conclusion on remand) (emphasis added).

DOE does not acknowledge *Chenery* and instead invokes harmless error as if that were the entirety of the controlling law. Yet judged against the comments filed before the agency, DOE blew off numerous issues and cannot stand now on insufficient explanations belatedly offered by the Department of Justice (or by the *amicus* entity supporting DOE). As this Court held in a case involving harmonization of harmless-error doctrine and *Chenery*, agency attempts to take refuge in supposed harmless error can often be "too pat." *Sahara Coal Co. v. OWCP*, 946 F.2d 554, 558 (7th Cir. 1991).

Closely connected to the government's attempt to deep six its *Chenery* constraints is that on several critical issues challenged in AHRI's petition, explanations for agency action are entirely lacking or seriously deficient. *See, e.g., Settling Devotional Claimants v. Copyright Royalty Bd.*, --- F.3d ---, 2015 WL 4772437, *1 & *13 (D.C. Cir. Aug. 14, 2015) (agency must rely on "*some* relevant and creditable

methodological evidence, even if it was far from perfect" — "King Solomon was not subject to the Administrative Procedure Act; the Royalty Judges are.") (emphasis in original). On issue after issue, DOE's explanations prove scant or absent. This defect is most apparent in connection with DOE's response to petitioners' assignments of error concerning DOE's defective economic analyses (*see, e.g.,* AHRI Br. at Parts II & III.C.-D.) and DOE's review of small business impacts (*see id.* at Part III.A.).

Finally, completing the trio of major administrative law principles over which DOE ran roughshod, DOE also ignored that it was bound by its own regulations. *See, e.g., Pearce v. OWCP*, 647 F.2d 716, 726 (7th Cir. 1981) ("It is well settled that reasonable regulations promulgated pursuant to statutory authority have the force and effect of law."). The test-procedure regulations that DOE issued ran afoul of this principle and yet the government's brief offers nothing in defense of this clear violation of law. *See* AHRI Br. at Part I.

ARGUMENT

I. DOE Changed the Applicable Test Procedures in Violation of Both Its Own Regulations and EPCA.

The government defends its switch away from the 2012 test procedures to the 2014 test procedures by noting that "[t]here was a test procedure in place at the time of the standards rulemaking." DOE Br. 14. That is correct — as far as it goes. The 2012 test procedures were in place when the new CRE efficiency

standards were proposed. *See id.* at 12. Had those test procedures been left alone, AHRI would not be here arguing that the new 2014 test procedures rule was legally defective. The fatal problems are two-fold: (1) DOE proposed new test procedures in 2013 *after* it had proposed the new CRE standards and, even worse, (2) DOE did not finalize the 2014 test procedure rule that would be applied to assess compliance with the new CRE standards until *after* it had issued the new CRE standards.[2] The fact that now-superseded 2012 test procedures were in place before the 2013 proposed CRE standards and thus before the 2014 final CRE standards is an absolute *non sequitur*. The 2012 test procedures at this point are in the rearview mirror and manufacturers can't rely on them.

DOE's next line of defense is that when it decided in 2013 to propose altering the 2012 test procedures, it was merely "clarifying" the 2012 rule and thus did not "establish a new test procedure." DOE Br. 16. But a new test procedure is a new test procedure. There is no exception in EPCA Section 6293 or in DOE's Process Rule exempting "clarified" test procedures from the requirements of EPCA or of that rule.

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[2] *Compare* 78 Fed. Reg. 55,890 (Sept. 11, 2013) (proposed new CRE rule) *with* 78 Fed. Reg. 64,296 (Oct. 28, 2013) (proposed new test procedures rule); *compare also* 79 Fed. Reg. 17,726 (Mar. 28, 2014) (final new CRE rule) *with* 79 Fed. Reg. 22,278 (Apr. 21, 2014) (final new test procedures rule).

DOE's obligations in the Process Rule are pellucid: "Final, modified test procedures *will be issued prior to* the NOPR [notice of proposed rulemaking] on proposed standards." 10 C.F.R., pt. 430, sub-pt. C, App. A, Process Rule 7(c) (emphasis added). DOE thus violated the plain text of its own Process Rule. The 2014 new test procedure it adopted obviously fell within the term "[a]ny … modification[]." Even a mere clarification is a form of "modification." And "'any' means 'any.'" *Manning v. United States*, 546 F.3d 430, 436 (7th Cir. 2008).

Nor could the government claim at oral argument that its 2014 modified test procedures somehow were not "necessary," for it is conspicuously arguing the opposite to this Court. DOE parrots the new test procedures rule's preamble, claiming that it needed to modify the test procedures in order "'to clarify certain terms, procedures, and compliance dates' in order 'to improve . . . repeatability and remove ambiguity.' 79 Fed. Reg. 22,278 (Apr. 21, 2014)." DOE Br. 12. As such, the 2014 test-procedures rule is inescapably a "*necessary* modification[]" within the meaning of the Process Rule. It must be vacated for noncompliance with the straightforward chronological requirement this rule imposes demanding that modified test procedures be in place not just *before* finalization of the new substantive standards but *before* new substantive standards are even *proposed*. *See also* 42 U.S.C. § 6295(o)(3)(A) (new or amended standards require the prior establishment of the test procedure).

The whole point of test procedures is to define the measuring rod by which substantive energy efficiency standards can be judged. 42 U.S.C. § 6291(6) (energy standard is "determined in accordance with the test procedures prescribed under … section 6293"); 42 U.S.C. § 6295(o)(2)(B)(iii) (referencing standards "as calculated under the applicable test procedure").

DOE never contests the applicability of the text of its Process Rule or the purpose of putting such a process rule in place. "An agency may not interpret its regulations in a manner so as to nullify the effective intent or wording of a regulation." *Bahramizadeh v. INS*, 717 F.2d 1170, 1173 (7th Cir. 1983); *cf. Weyerhaeuser Co. v. U.S. R.R. Ret. Bd.*, 503 F.3d 596, 603 (7th Cir. 2007) (citing *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1136 (D.C. Cir. 1979) ("[t]he fact that a regulation as written does not provide [the agency] a quick way to reach a desired result does not authorize it to ignore the regulation or label it 'inappropriate'").

The government further pretends as if AHRI's objections to the new test-procedures rule are based only on Section 6295(r) of the Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6295(r). DOE Br. 15-16. But AHRI's argument is premised on the text of the Process Rule as well, which implements the policies of Section 6295(r) in *Chevron* fashion. AHRI Br. 17-19. DOE ignores this, along with the venerable principle that agencies are bound by their own rules. *See, e.g., Terry v. Astrue*, 580 F.3d 471, 476 (7th Cir. 2009).

The government wisely does not invoke *by name* a harmless-error defense because to do so the error identified must have "clearly had no bearing on the procedure used or the substance of decision reached." *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764-65 (9th Cir. 1986) (quoting *Braniff Airways v. CAB*, 379 F.2d 453, 461 (D.C. Cir. 1967)). DOE's structural error of ignoring the chronological requirement in the Process Rule does not meet that standard.

Courts have rejected agency attempts to bat away conceptually similar failures to comply with notice-and-comment procedures by arguing they were harmless. *See, e.g., United States v. Reynolds*, 710 F.3d 498, 517 (3d Cir. 2013) ("This distinction between technical errors and complete procedural failures is a sensible one: it is driven by a concern that harmless error analysis could be used to eliminate the notice and comment requirements …."). Indeed, "great caution in applying the harmless error rule" must be employed in the rulemaking context. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992). The key issue is whether the procedural error "defeat[s] the purpose of the bypassed requirements." *United States v. Utesch*, 596 F.3d 302, 312 (6th Cir. 2010). Here, the purpose of the Process Rule's simple requirement of putting horse (test procedures) before cart (substantive efficiency standards) would be subverted if it could be sidestepped whenever DOE thought it expedient. A key purpose of the chronological requirement was to get the test-procedures-vs.-substantive-

standards sequence correct and lock that sequence in to avoid disputes about whether test-procedure stringency changes had occurred. That purpose is eviscerated if DOE can disregard the binding sequence established by its Process Rule.

Nevertheless, DOE's final line of defense to the procedural invalidity of its 2014 test-procedures rule has the strong flavor of harmless error. To sidestep the Process Rule's sequencing requirement, DOE argues that its mere clarification of the 2012 test-procedures rule should be excused because it did not change the stringency of the energy conservation standards. *See* DOE Br. 16.

First, DOE altered the legal *status quo* to manufacturers' detriment by issuing the 2014 test-procedures rule. Before modifications were made to the 2012 test-procedures rule, AHRI Standard 1200 as incorporated therein was used in the field every day. Indeed, the final test-procedures rule effectively admitted that DOE's calculations in the substantive efficiency standards final rule were *themselves* premised on how the 2012 test procedures were used in the field.[3]

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[3] "AHRI, Hill Phoenix, Hussmann, and Zero Zone further believed, *and provided quantitative justification to support*, that *DOE must have used case length in the engineering analysis for the 2009 and the current rulemaking*. (Docket No. EERE-2012-BT-STD-0003) The commenters stated *it is impossible to have* a typical 30-inch by 67-inch door have *13 square feet of TDA without including the mullions and door frames and provided analysis to support this viewpoint*." 79 Fed. Reg. at 22,300 (emphasis added). DOE never disputed these points.

The government offers no response to the fact that it *conceded* that the test procedures in its final 2014 rule materially changed the *status quo*. *See* 79 Fed. Reg. at 22,300 ("DOE acknowledges that defining TDA as strictly the total length of transparent area *may be inconsistent with the method used by industry to calculate TDA today. As a compromise*, DOE is adopting in this final rule, a method for calculating the TDA of CRE basic models ….") (emphasis added).[4] By acting "inconsistent[]ly" with the method in use, which was what Congress mandated in 42 U.S.C. § 6313(c)(1)(D) (adopting AHRI Standard 1200), as DOE recognizes (DOE Br. 17 n.3), DOE not only violated the proper sequencing requirement of the Process Rule, DOE violated EPCA in *Chevron*-one terms. AHRI Br. 22 (explaining this error). At no point in the test procedures rule did DOE explain how its approach could square with Congress's hard-wiring of AHRI Standard 1200 into the text of EPCA. And under *Chenery*, it is too late now for the government's advocates to try that.

Second, while DOE sets out how its initial proposal was more radical than what it finally adopted, this cynical argument that it could have been worse for manufacturers cannot save the new test-procedures rule either. For DOE does

[4] Similarly, DOE's argument that the *L* dimension of the total-display-area ("TDA") calculation was not "demonstrated in the literature," DOE Br. 17, inherently means that the preexisting regulatory regime in the 2012 test procedure was changed by its 2014 test-procedure rule since DOE's modifications served, in DOE's view, to patch this perceived literature gap.

not contest that its proposal would have increased the required efficiency by about 10% overall, revealing that DOE was predisposed at the outset toward entirely disregarding the Process Rule's sequencing requirement and its obligations under Section 6293(e). *See id.* at 18.

Third, DOJ's last line of defense tells this Court it should trust that DOE did not change the stringency of the CRE standards with its new 2014 test procedure. *See* DOE Br. 18-19. But the manner in which DOE proceeded ensures there would be little data in the record to support future manufacturer challenges to test procedure revisions altering the stringency of the substantive standards. That move created two problems. Foremost, DOE violated its important duty under EPCA to avoid assessing too cavalierly the impact of test-procedure changes on compliance with substantive energy standards. *See* 42 U.S.C. § 6293(e)(1) (DOE must analyze "to what *extent*, if any the proposed test procedure would alter the measured energy efficiency, measured energy use, or measured water use of any covered product as determined under the existing test procedure.") (emphasis added).

Nowhere does DOE reference any testing or analysis, or offer any numeric proofs using examples or empirical data showing that the 2014 test-procedure changes left CRE stringency unaffected. DOE stated twice only that it "believes" its 2014 test procedures did not change CRE stringency. 79 Fed. Reg. at 22,301.

That is not a proper statement of basis and purpose. *Indiana Sugars, Inc. v. ICC*, 694 F.2d 1098, 1100 (7th Cir. 1982) ("Conclusory formulations based upon *ipse dixit* are insufficient …. There must be an articulated rational connection between the facts found and the choices made."). DOE's appellate advocates try to make DOE's mere subjective "beliefs" as stated in the record sound grounded in objective fact, *see, e.g.*, DOE Br. 19 ("DOE determined …"), but that is just a subtle violation of the holding in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962), that agency action cannot be bootstrapped into validity by counsel's *post hoc* rationalizations.

DOE's approach handicapped manufacturers' ability to counter DOE's unsupported assertions that the test procedures were not altering the CRE standards, for DOE first proceeded in a fashion that would have increased their stringency by 10%. Then DOE adopted a new test procedures approach differing from what it had proposed. Since manufacturers could not read DOE's mind about the "compromise" DOE would ultimately opt to impose, they were prevented from setting out in detail in the record why DOE's comparative stringency conclusion in the final rule is flat wrong.[5]

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[5] To get past this, the government tries to argue that Zero Zone supported DOE's approach. DOE Br. 19. That is misleading. Zero Zone suggested that an approach involving *some* offsetting allowance for the increased stringency that DOE's proposed test-procedure changes would create *might* be acceptable. *See* EERE-2013-BT-TP-Doc. 7 at 206-07. But the main thrust of Zero Zone's comments was clearly to op-

It is simple to demonstrate that DOE's 2014 test procedure increases stringency. Consider just the two manufacturer refrigeration cases that Hussmann analyzed in its comments. *See* EERE-2013-BT-TP-Doc. 11, Exh. A, at 2. For the Manufacturer A and B examples there, it is possible to calculate the CRE standard level required and compare the different outcomes obtained using the 2012-vs.-2014 test procedures. For Manufacturer A, the TDA_{AHRI} (TDA using AHRI's Standard 1200 in the 2012 test procedures) is 65.76 ft.^{2}. The TDA_{AHRI} for Manufacturer B is 66.55 ft.^{2}. Using those figures, the energy level under the 2014 CRE final rule that would result for Manufacturer A using the 2012 test procedures, is 34.83 kWh/day and for Manufacturer B is 35.22 kWh/day. *See id.*

The *L* variable that DOE's 2014 test procedures refashions *changes* the resulting standard level demanded of the equipment, as seen from Hussmann's examples. Specifically, Manufacturer A's transparent length is 10.83 ft. and for Manufacturer B transparent length is 11.41 ft. *See id.* (table, Manufacturer A column, row 7 & Manufacturer B column, row 7). Given DOE's new 10% factor, this is all that can be added to transparent areas to provide some (but not a complete) offset against the lost benefits of the discarded 2012 test procedures as applied in

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pose *any* such stringency increases. DOE conceded this. *See* 79 Fed. Reg. at 22,300 ("Zero Zone recommended that DOE not alter the calculation of TDA from that assumed in the engineering analysis [i.e., the AHRI Standard 1200] for the ongoing energy conservation standard rulemaking ….''). Zero Zone never agreed that the specific 10% add-on factor was an adequate offset.

the field (*see* 79 Fed. Reg. at 22,301 col. 1). Hence, the most the Manufacturer A case can reckon as its length, *L*, is now 11.91 ft. (1.1 x 10.83 ft.) and the most a Manufacturer B case can reckon as *L* is now 12.55 ft. (1.1 x 11.41 ft.). This causes the resulting standard level using DOE's 2014 test procedure *to drop* from 34.83 kWh/day to *33.31 kWh/day* for the Manufacturer A case and from 35.22 kWh/day to *34.65 kWh/day* for the Manufacturer B case.[6] This corresponds to *stringency increases of 4.4% and 1.6%*, respectively. DOE's assertion that the 2014 test procedures "should not change the measured energy consumption of covered equipment," DOE Br. 13, is off the mark.

Finally, DOE argues that even if the 2014 test-procedures rule is defective, the remedy would be only to invalidate DOE's redefinition of the *L* variable. *See* DOE Br. 19-20 n.4. This again ignores *Chenery*. DOE, not AHRI, opted to roll out the 2014 substantive CRE and 2014 test-procedures rules on parallel time tracks.[7]

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[6] The Manufacturer A case example will serve to explicate the math: The governing efficiency standard formula for equipment class VCT.RC.L is (0.49 x TDA) + 2.61. *See* 79 Fed. Reg. 17,726, 17,727 (Table I.1, left column). Under DOE's 2014 definition, TDA is calculated as D_h x allowable *L* (*i.e.*, the transparent *L* plus the 10% add-on factor) in square feet. Refer to EERE-2013-BT-TP-Doc. 11, Exh. A, at page 2 for visual depiction of D_h and *L* as to the cases in question. As noted on this page, D_h for the Manufacturer A case equals 5.26 ft. 5.26 ft. times the 11.91 ft. allowable *L* under DOE's new rule equals 62.65 ft.^{2}. Since the TDA for the Manufacturer A case is 62.65 ft.^{2}, the efficiency formula yields 33.31 kWh/day.

[7] DOE opted to make the 2014 test-procedures rule applicable beginning May 21, 2014. AHRI Br. 18-19 n.6. That was six days *before* the new CRE energy-efficiency standards kicked in. *Compare* 79 Fed. Reg. at 22,278 *with* 79 Fed. Reg. at 17,726. That move was thus independently arbitrary because in the 2014 CRE final rule, DOE had

DOE has defended the new test-procedures rule as not altering the substantive stringency of the new CRE rule. Hence, if DOE's premise that the new test-procedures rule did not alter the stringency of the CRE rule is *incorrect*, as shown above, then both rules must fall because the Court can have no assurance as to how DOE would use its policy discretion to fix the problem — would it (i) revert the test procedures back to their 2012 state, (ii) reduce the stringency of the CRE rules, or (iii) something in between? "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." *Chenery I*, 318 U.S. at 88.

II. DOE's Cost-Benefit Analysis Remains Riddled with Error.

AHRI presented several challenges to DOE's cost-benefit analysis. DOE did not rebut any.

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previously promised that the 2012 test procedures would be used. *See* 79 Fed. Reg. at 17,735. In any event, under *Chenery*, DOE must be held to its decision to set an effective date making the 2014 test procedures applicable to measure compliance with the 2014 CRE rule.

Part of the government's brief can be read as if it is asserting that *only* the 2012 test-procedures rule would apply as to the new 2014 CRE standards. DOE Br. 16 ("DOE made clear that the 2012 test procedure rule is 'to be used in conjunction with the amended standards promulgated in th[e] energy conservation standards final rule.'"). But (a) it becomes clear elsewhere that DOE is arguing that because the 2014 test-procedures rule "clarifies" the 2012 test-procedures rule, the 2014 test-procedures rule trumps; (b) DOE's unlawful mere-clarification argument is deconstructed above; and (c) the 2014 test-procedures rule was effective May 21, 2014 so it now controls and DOE cannot maintain to the contrary.

First, AHRI argued that DOE has no delegation of environmental regulatory power under EPCA. AHRI Br. 23-24. DOE provides no response. This alone requires reversal of the substantive CRE rule under review. AHRI anticipated that DOE might try to argue that environmental regulatory power was housed in 42 U.S.C. § 6295(o)(2)(B)(i)(VII)'s "other relevant factors" language but AHRI noted such an avenue of retreat is impossible because DOE wholly disclaimed use of that factor. 79 Fed. Reg. at 17,806. Hence, *Chenery* would bar its use. To its credit, DOE did not invoke that factor.

Remarkably, however, *amicus* the New York University Institute for Policy Integrity ("IPI") arrives on the scene to plug this gaping hole in DOE's CRE rule. IPI devotes the entire Part I of its brief to arguing that DOE possesses the authority to regulate under EPCA for environmental purposes under factor six governing EPCA standard-setting, 42 U.S.C. § 6295(o)(2)(B)(i)(VI) ("the need for national energy and water conservation"), which IPI mislabels as 6295(o)(2)(B)(vi). IPI Br. 5. This is creative, but doesn't hold up: (1) EPCA specifically defines "energy" much more narrowly as "electricity, or fossil fuels …." 42 U.S.C. § 6291(3); and (2) DOE nowhere adopted such a rationale and under *Chenery* it could not be ascribed to DOE even by a court. IPI asserts that DOE claimed environmental authority under factor six at 79 Fed. Reg. at 17,738, part of the CRE final rule preamble. But DOE does not claim environmental authority there; it notes that en-

ergy savings carry environmental co-benefits in the form of "reduced emissions of air pollutants and GHGs associated with energy production (i.e., from power plants)." *Id.* That is not the same thing.

Finally, even if IPI were channeling DOE's views going back to the time the CRE rule was issued (which there is no evidence of), its brief is an improper *amicus* submission. When undersigned counsel was contacted by IPI's Denise Grab on July 21, 2015 seeking AHRI's consent to file as *amicus*, AHRI would never have provided such consent if it had known that IPI was aiming to try to speak for DOE in defending a key part of AHRI's challenge that DOE opted to remain mum about. *Chenery* and *Burlington Truck Lines* prohibit agencies from standing on the *post hoc* rationalizations of *their own*, *government-appointed* appellate counsel; all the more so there is no conceivable legal basis for sustaining a DOE rulemaking in light of the *post hoc* rationalizations of appellate counsel employed by a university *amicus* group. One category of improper *amicus* briefs are those that multiply the words available to the party they support. *See Ryan v. CFTC*, 125 F.3d 1062, 1064 (7th Cir. 1997) (Posner, J., in chambers). The IPI brief fails the *amicus* standards because it seeks to do what an *amicus* for a federal agency cannot do (end run *Chenery*) and because it tries to use its allocation to make up for words DOE expended defending against other arguments. The IPI brief should be stricken. "The filing of an amicus brief is the exception, not the rule, in the

Seventh Circuit." PRACTITIONER'S HANDBOOK FOR APPEALS at 123 (7th Cir. 2014 ed.).

Second, AHRI argued that DOE's social cost of carbon ("SCC") analysis was flawed. Here, the government principally defends DOE by arguing harmless error — DOE's rules were sufficiently justified on the basis of *non-SCC benefits* (that the supposed total energy savings to consumers outweighed costs to manufacturers). *See* DOE Br. 33-34. But DOE's entire analysis was premised on the unrealistic assumption that consumer demand for the equipment would not change in response to higher prices, which led to an overstatement of the energy savings and understatement of manufacturer costs.

The monetized benefits of emissions reductions that DOE calculated were highly material to DOE's decision to adopt numerous particular product standards. *See* AHRI Br. 11 (noting *both* that DOE failed to set out payback periods for 32 of the 49 product standards it imposed *and* that 10 of the 49 standards failed to achieve the 3-year-or-less median payback level that would allow DOE to claim a rebuttable economic presumption in favor of the rules). As to that set of 42 of 49 standards, from what DOE said, the consideration of monetized emissions benefits is what justified the push to more regulation. In any event, the government's defense of the CRE rule fails because its brief never responds to these points by AHRI.

Relatedly, DOJ's brief argues that DOE would have adopted the same CRE standard levels even without SCC benefits on the ledger, citing 79 Fed. Reg. at 17,810. DOE Br. 34. But on page 17,810, DOE says precisely the opposite: "After careful consideration of the analyses results and, weighing the benefits and burdens of TSL 3, DOE finds that the benefits to the Nation from TSL 3, in the form of energy savings *and emissions reductions* … outweigh the burdens, in the form of a decrease in manufacturer INPV [industry net present value]." 79 Fed. Reg. at 17,810 (emphasis added). Hence, yet another *Chenery* problem is laid bare. DOE explicitly factored emissions reductions into its policy calculus and yet its brief says DOE found that such emissions benefits were *unnecessary* to the standards adopted. Both cannot be true. Hammering this *Chenery* problem home further, the government invokes a comment by the Appliance Standards Awareness Project ("ASAP"). DOE Br. 34 (citing Doc. # 91, at 7). ASAP *does make* the argument DOE's advocates imagine DOE to have made, but did not. ASAP, however, is not DOE.

Third, the government argues that the Information Quality Act ("IQA") creates no judicially enforceable rights, citing *Mississippi Commission on Environmental Quality v. EPA*, 790 F.3d 138, 185 (D.C. Cir. 2015). *See* DOE Br. 36. AHRI does not dispute that the IQA itself creates no cause of action. But that does not mean it is judicially unenforceable. The famed NEPA statute also does not come

equipped with its own cause of action and yet noncompliance with NEPA is enforceable via the APA. *See Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 952 (7th Cir. 2003) ("This court's review of agency action under NEPA is governed by the APA.").[8] With great respect for both *Mississippi Commission*[9] and *Salt Institute v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006), both panels overlooked the key point that the APA is a valid vehicle for carrying IQA challenges.

DOE ignores that it accepted the U.S. Chamber's IQA petition into the administrative record and so can hardly argue now that consideration of the defects that petition pointed out are off limits. AHRI Br. 25 n.8. AHRI also noted its challenge to the defects in DOE's SCC analysis were premised directly on the APA and not on the IQA as a private cause of action (a strawman argument AHRI never made) as well as on the IQA as enforceable through the medium of the

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[8] *See also Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996) (en banc) ("NEPA does not offer a private right of action for individual plaintiffs seeking to enforce the EIS procedural requirement, a private individual must found his right to sue on some other basis …." — locating that right in the APA in non-Endangered Species Act cases); *Maryland Dep't of Human Res. v. HHS*, 763 F.2d 1441, 1445 n. 1 (D.C. Cir. 1985) ("The Supreme Court has clearly indicated that the Administrative Procedure Act itself, although it does not create subject-matter jurisdiction … does supply a generic cause of action in favor of persons aggrieved by agency action.").

[9] *Mississippi Commission* also states that the IQA is not enforceable in a rulemaking challenge because it uses the verb "disseminated." 790 F.3d at 185. But the IQA also uses the verb "maintained." 44 U.S.C. § 3516 (note), Section (b)(2)(B). It is hard to imagine a more obvious maintenance and dissemination of scientific and technical information than relying on it in the *Federal Register* to provide support for adopting a nationwide rulemaking costing hundreds of millions of dollars.

APA. *See id*. DOE dodges the substance of the critiques in the IQA petition filed into the record. The agency offers no response at all to its use of arbitrary damages functions with made-up parameters as criticized by Professor Pindyck, *see* AHRI Br. 27. Nor does the government's brief attempt to defend (i) the opaque interagency process used to create the SCC estimates, (ii) the lack of peer review thereof, or (iii) failing to adequately describe how the off-the-shelf interagency SCC analysis was applied to the CRE rulemaking in particular. *See id.* 25-28.[10] All DOE mounts is a boilerplate argument that if it merely acknowledges data uncertainties, it may rely on whatever data it wants and draw whatever conclusions from such uncertain data it wants. DOE Br. 34-35.

Fourth, DOE offers no meaningful defense of its mismatched and bloated conception of environmental benefits as contrasted with narrowly defined costs — for costs, DOE considered itself statutorily restricted to an analysis of direct costs inside America's boundaries to manufacturers/consumers of CRE equipment, whereas it was free to extrapolate direct and indirect benefits out to every human on the globe. The government points the Court to the same portions of the CRE rule that AHRI assailed in its opening brief. *Id.* at 35 (citing 79 Fed. Reg. at

[10] Once more, IPI tries to come to the rescue. IPI Br. 8-19 (Part II). But for the reasons given above, it is not proper for this organization to try to plug those holes in DOE's record or for DOE to try to rely on off-loading its defenses against AHRI's arguments (if any) to IPI.

17,729-30 & 17,779). AHRI noted that the two explanations offered for the mismatch — carbon is an international externality and the U.S. cannot solve climate change alone — were non-responsive: DOE cannot explain why rulemaking *costs* could not have been assessed globally *or* why analysis of the benefits of carbon regulation could not easily be confined to domestic benefits so apples-to-apples comparisons of costs and benefits are done. AHRI Br. 29. Finally, DOE offers no response to the fact that DOE *is textually confined* to analyzing only domestic impacts by EPCA, which makes DOE's regulatory mismatch a *Chevron* step-one problem and not just a violation of the APA. Reading DOE's responsive brief, it is as if pages 28-30 of AHRI's brief did not exist. *See Owner-Operator Indep. Drivers Ass'n v. FMCSA*, 494 F.3d 188, 205 (D.C. Cir. 2007) ("agency … failed even to respond to the petitioner's argument in its brief"). DOE also offers no defense of its use of mismatched time periods. *See* AHRI Br. 36-43.

As before, IPI's brief cannot fill this gap. *See supra* n.10. Even if it could, IPI's argument that DOE can differentially look at climate benefits globally because doing so advances America's national interests misses the point. Globally considering the adverse economic ripple effects of the costs of new efficiency standards *would also* have advanced the U.S.'s national interests. At best, IPI's argument might justify a global look at carbon benefits; but this alone cannot explain why costs could not be similarly reckoned. And IPI has no answer to the fact

that especially in light of the canon disfavoring extraterritoriality, when Congress in EPCA directs DOE to "consider … the need for *national* energy and water conservation," 42 U.S.C. § 6295(o)(2)(B)(i)(VI) (emphasis added), it should be taken at its word. IPI's argument proves too much — any domestically focused statute could be circumvented by the conceptual move of positing what's good for the world is good for the U.S.

Fifth, the government failed to respond to AHRI's argument that DOE never established there was any foundational market failure to justify the CRE standards. AHRI Br. 30. Instead, the government proceeded as if the entirety of AHRI's argument was premised on the Mercatus Center's critique of DOE's use of the capital-asset pricing model (ignoring that the George Washington University also filed broader comments highlighting the lack of an identified market failure in the record, AHRI Br. 31 n.12). Even regarding Mercatus's objections, the government offers no response to DOE's concession that it failed to analyze an entire category of risks. *Id.* at 32. Hence, it is another end run round *Chenery* when the government argues that "DOE reasonably concluded that the risk associated with investment in commercial refrigeration equipment does not reach the level that AHRI suggests." DOE Br. 26. DOE's assertion is free of citations to the CRE rule and ignores DOE's concession that it did not analyze the risks Mercatus identified. DOE never grappled with the thrust of Mercatus's point, which was

that a *particularized* analysis of capital costs was required, not the mere use of *averaged* data. AHRI Br. 32. DOE's counsel cobbles together how *they* would have responded to the Mercatus comment, including by citing a comment from Danfoss about markets for repaired equipment. But the point is inescapable that DOE *itself* did not adopt that rationale.

Finally, AHRI also explained how DOE inexplicably altered prior cost analysis regarding the use of improved insulation. There, AHRI adopts NAFEM's reply.

III. DOE's Other Analytical Defaults Remain Unanswered.

AHRI pointed to four further categories of DOE errors: (1) DOE's analysis of small-business issues flunked the RFA; (2) the Attorney General's competitiveness analysis was defective; (3) DOE's assumption of perfect price inelasticity for CRE equipment is wholly unsupported; and (4) DOE's arguments that the CRE rule would create jobs and improve wages were ill-reasoned.

First, regarding the RFA, DOE's argument that it could not act to exempt small businesses from EPCA because EPCA standards must be framed as "a single national standard," DOE Br. 51, makes little sense. If DOE sets a standard that does not apply to all manufacturers of a given class of equipment (for instance because it exempts small manufacturers) such a standard becomes no less "single" or "national." All DOE has done is describe the metes and bounds of its "single national standard."

The government's arguments from 42 U.S.C. § 6295(t) fail — nothing about the grant of power to create a back-end exemption from standards already in place implies that a topic the statute is silent on (here a front-end carving out of small businesses from complying with new standards) is beyond DOE's power. Since multiple statutes are to be harmonized and construed not to conflict, the RFA/SBREFA's directive that the option of exempting small businesses be considered means that DOE must do so in EPCA rulemakings. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("so long as there is no 'positive repugnancy' between two laws . . . . a court must give effect to both."). DOE argues that because the RFA refers to significant alternatives "such as" exempting small business, DOE had the option not to look at that alternative. *See* DOE Br. 50-51. This argument is illogical — "such as" is an obvious synonym of "including but not limited to." "Such as" and cognates of "include" are terms of *illustration*, meaning only that they are not exhaustive (*see Samantar v. Yousuf*, 560 U.S. 305, 316 (2010)), but we are unaware of an agency construing a directive defined by illustrative example as one that lets the agency ignore the examples given.

Second, both the substance and procedural elements of how the Attorney General discharged his EPCA duty and the manner in which DOE notified the public of the Attorney General's decision cannot stand. Adding procedural insult to injury (since the document had previously been posted to regulations.gov), DOE

ultimately decided to publish in the *Federal Register* the Assistant Attorney General for Antitrust's decision (as delegated to him the Attorney General), but DOE sent it there only *one day* before DOE filed its brief in this Court and it was not published until even later. *See* 80 Fed. Reg. 44,892 (July 28, 2015).[11] More importantly, the Antitrust Division's entirely conclusory "determination" hardly merits that label. Assistant Attorney General Baer's letter states, in relevant part: "Based on this review, our conclusion is that the proposed energy conservation standards for commercial refrigeration equipment are unlikely to have a significant adverse impact on competition." *Id.* This offers nothing for this Court to subject to judicial review and is not befitting of the deeply analytical tradition of the Department of Justice's Antitrust Division. *Hartigan v. Federal Home Loan Bank Bd.*, 746 F.2d 1300, 1305-06 (7th Cir. 1984) (judicial reviewability must be presumed). Congress did not go to the trouble of instructing the Attorney General to assess the "nature and extent" of any anticompetitiveness impacts "in writing" and to publish the results in the *Federal Register*, 42 U.S.C. § 6295(o)(2)(B)(ii), merely to create a check-the-box exercise. The APA applies to

[11] DOE argues its procedural tardiness is harmless error. DOE Br. 54. But in reality, this is a situation in which DOE is clearly trying to dissolve its statutory obligations in acid. *See supra Spiva*, 628 F.3d at 353 (which the government cites (DOE Br. 33) but seems to have failed to recognize was a case *chastising* the Justice Department). The letter issued in an attempt to discharge the Attorney General's responsibilities is so devoid of content as to plainly flunk APA standards.

EPCA rulemakings, *see* AHRI Br. 14-15 (including the APA's *substantial evidence test*), and so *diktat*-like conclusions devoid of legal or evidence-based reasoning cannot meet the governing APA standards.

Third, DOE responds that it was acceptable for it to make the wholly illogical assumption that commercial refrigeration equipment was *perfectly* price inelastic because stakeholders did not provide elasticity data to DOE. DOE Br. 30. First, it makes no sense for an agency to make an unrealistic assumption and then claim refuge in manufacturers not providing it with other data. DOE had a threshold duty to avoid irrationality; it "may not tolerate needless uncertainties in its central assumptions when the evidence fairly allows investigation and solution of these uncertainties." *Gas Appliance Mfrs. Ass'n v. Department of Energy*, 998 F.2d 1041, 1047 (D.C. Cir. 1993). Perfect price elasticity is quite rare; and here it seems wholly implausible. When pressed, even DOE puts no stock in its own assumption. *See, e.g.*, 79 Fed. Reg. at 17,700 ("DOE recognizes that increased cost for closed equipment meeting the amended standards in today's final rule has the potential to influence a shift from more efficient closed equipment to open equipment.").

DOE is also engaged in improper burden-shifting, trying to slough off its APA duties onto manufacturers. *See International Ladies Garment Workers' Union v. Donovan*, 722 F.2d 795, 827 (D.C. Cir. 1983) (even where "a limited amount of

hard data exists," basic administrative law "responsibility[ies] required the Secretary to do more than simply dismiss concerns raised in comments because of their lack of substantiating evidence"). DOE is perfectly willing to search high and low for data whenever it suits its purposes. Witness its extensive (though flawed) SCC analysis and contrast that with its pretense here that before DOE can assess whether equipment price increases will reduce demand, the regulated public must show it chapter and verse on that.

Finally, the government tries to give the back of the hand to AHRI's point that DOE's job and wage analysis was defective. AHRI Br. 56-58. This, the opposition brief asserts, is just a parade of horribles, ignoring that consumers will benefit and these benefits will be enhanced by supposedly short payback periods. DOE Br. 37. But this ignores that AHRI has assailed the purported savings as not justified by a market failure DOE has described (*supra* 22) and because the EPCA rebuttable-presumption threshold regarding the payback period was not crossed here by numerous product classes (*supra* 17). Most importantly, at no point does the government defend DOE's rosy scenario of wage increases and job growth in the Final TSD at chapters 16.4 and 16.5.

Conclusion

The consolidated petitions for review should be granted, the CRE Rule should be vacated, and the accompanying CRE Test Procedures should remanded on the TDA issue.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing reply brief complies with Fed. R. App. P. 32(a)(7)(B) and (C) because it does contains 6,990 words. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) as modified by Cir. R. 32(b) because its main text has been prepared in a proportionally spaced, roman style typeface of 13 points (or larger for headings) and its footnotes have been prepared in a proportionally spaced, roman style typeface of 12 points.

/s/ *Zachary W. Byer*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF PETITIONERS was filed electronically on August 19, 2015, and will, therefore, be served electronically upon all counsel of record.

/s/ Zachary W. Byer
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