AIR-CONDITIONING, HEATING, & REFRIGERATION INSTITUTE
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Mr. Daniel Simmons,
Assistant Secretary, Energy Efficiency and Renewable Energy
Appliance and Equipment Standards Program
Department of Energy
Mailstop EE-5B
1000 Independence Avenue, SW
Washington, DC 20585-0121
TPWaiverProcess2019NOA0011@ee.doe.gov

VIA EMAIL

Re: AHRI Comments on DOE's Notice of Proposed Rulemaking on the Test Procedure Interim Waiver Process; Docket No. EERE-2019-BT-NOA-0011; RIN 1904-AE24

Dear Mr. Simmons:

The Air-Conditioning, Heating and Refrigeration Institute (AHRI) represents more than 300 manufacturers of air conditioning, heating, and commercial refrigeration equipment. It is an internationally recognized advocate for the HVACR industry and certifies the performance of many of the products manufactured by its members. In North America, the annual output of the HVACR industry is worth more than $20 billion. In the United States alone, AHRI members employ approximately 130,000 people, and support another 800,000 dealers, contractors, and technicians.

AHRI appreciates the Department of Energy (DOE or the Department) concerted effort to address and improve the cumbersome test procedure waiver process. We agree with the Department's assessments that the test procedure waiver application process is time-consuming, opaque, and fraught with uncertainty.

According to the proposal, DOE takes between 162 and 208 days to process an interim test procedure waiver. Common practice suggests that this is an underestimation because many manufacturers consult with the Department prior to submitting applications, therefore the total processing time is longer. AHRI members are well-aware of the work required to develop a bespoke test procedure for a product that falls outside of the mainstream. Writing new test procedures or editing and verifying procedures identified in a waiver application is resource intensive. The test method ultimately approved by DOE, like all regulated test procedures, must be enforceable, repeatable, reproducible, not unduly burdensome, and render representative performance ratings. Laboratory testing may be required. AHRI acknowledges that

both manufacturers and their competitors are disadvantaged by the long-wait times for interim waiver processing.

We agree that procedural improvement is necessary, expeditious action benefits the appliance efficiency program, and DOE should be held to a processing timeline. We recommend amendments that direct the Department to: (1) review test procedure waiver applications to ensure that they are complete and reasonable prior to granting a waiver; (2) publish interim test procedure applications in the Federal Register and allow manufacturers to identify significant concerns prior to DOE's granting of a waiver; and (3) reserve optional limited additional time to investigate open questions that might arise during the comment period. The Department's affirmative action to review, grant, or deny the waiver is necessary—AHRI does not support a "deemed granted" approach.

Background and Policy Considerations

AHRI acknowledges the importance of timely government action. DOE's proposal arises at the intersection of two important policy considerations: (1) government restriction of markets; (2) level playing field for competition.

A test procedure waiver is only necessary and appropriate in circumstances where DOE has exercised its authority over a product or range of products but has not provided a pathway to compliance. A manufacturer of a regulated covered product cannot bring its equipment into compliance with an energy conservation standard unless it tests that equipment to the codified test procedure and certifies compliant results to DOE. If the codified test procedure does not apply, then that product is effectively locked out of the market. This lock-out can occur in two ways: 1. A manufacturer's innovative product does not align with the technical features commonly tested by the widely used test procedure. Harm to innovation is problematic. While manufacturers developing new product have some amount of runway to confer with the Department and prepare a competent test procedure application prior to bringing new products to market, extended application processing could delay the introduction of new products and upset production schedules. 2. A manufacturer has an existing niche product on the market, and DOE introduces a new test procedure that excludes such products from its scope. We note that during multiple different test procedure development cycles, manufacturers have raised specific concerns about the impact of test procedure specifications on existing product, and the Department has responded by demanding that the stakeholders seek a test procedure waiver for the existing product. The Department has a statutory obligation to address existing technology in its test procedure rulemakings. When DOE shifts the burden onto manufacturers, delays are a major problem. Impacted manufacturers do not know the outcome of the test procedure rulemaking until it is published in the Federal Register. Most existing products have six months to comply, but products that are required to seek a test procedure waiver are just beginning the drafting of modifications or an entirely fresh alternate test method and are immediately disadvantaged. These past practices highlight the important of efficient processing of waiver applications.

Fundamental fairness dictates that DOE provide a pathway to compliance as expeditiously as possible. Extended delays could result in irreparable harm.

Timing is key to ensure that interim test procedure waivers are processes fairly. However, the substance of the test may have competitive impacts. If two products compete in the same market, then performance ratings are a major factor influencing consumer choice. Test results that look similar may not be

comparative if the tests used to achieve those results are significantly different. The cost and burden of testing also has competitive impacts. Even if products are different enough to warrant different methods of test, the playing field must be as level as possible to avoid competitive gamesmanship. While interim test procedures are temporary, and therefore the impact of the harm is limited, a fraudulently gained interim test procedure waiver could result in unfair market impacts. To address the possibility of competitive gamesmanship and to increase transparency, AHRI advocates for affirmative intervention by DOE before an interim waiver is granted.

Recommendations:

To ensure consistency, timeliness, and transparency we suggest that DOE create cognizable criteria to determine when an interim test procedure waiver application is complete and that DOE review each application to ensure completeness. Completeness factors included at 10 CFR 430.27(b) would likely suffice, but DOE should also consider articulating a threshold for reasonableness. For example, the application should include some alternate method of test that is not facially designed to unfairly inflate ratings. After an interim waiver is granted, DOE can execute the time consuming deep-dive analytical work of assessing and analyzing the alternate test method, but a smell-test check of each application will prevent unscrupulous applicants from taking advantage.

Next, once DOE has confirmed that an application is complete, DOE should publish the application in the Federal Register or on its website for stakeholder review. A firm agency timeline for publication should be established to prevent applications from languishing in the "completeness-review waiting room." No more than thirty days is an appropriate timeframe.

Once published, DOE should afford stakeholders a thirty-day comment period. Competitors and other stakeholders can then probe the viability of a test method and, via comment, inform the Department if there are significant issues. Stakeholder comments will raise red flags that DOE might not have caught during its completeness assessment. If stakeholders and DOE do not identify any problems, then, DOE should be obligated to issue the interim waiver thirty days after the comment period closes. If DOE, *sua sponte*, or other commenters note problems with the waiver application, then DOE can elect to either: 1. Afford itself an additional thirty days for investigation and review; or 2. Deny or grant the waiver, potentially with modifications. DOE can decide as soon as 30-45 days after the waiver application is filed (assuming 5-15 days to publish a completed application in the Federal Register); the maximum processing time is 120 days. It is important that the Department is permitted no more than 120 days to process the interim waiver application from the time that it is filed. AHRI believes that DOE should be held to a firm timeline, but we are opposed to the automatic granting of an application—DOE should take affirmative action to grant, deny, or modify the waiver application.

Action	Maximum Timeframes
Application Filed with DOE	30 days
DOE reviews for Completeness	
DOE Publishes on Fed Reg/Website	
Stakeholder Comment period	30 days
DOE Reviews Comments/grants or denies waiver	30 days
DOE optional review window	30 days
Final Decision (Mandatory last day)	

A passive grant of an interim test procedure waiver assures timeliness but does not protect against the potential for gamesmanship. AHRI believes that DOE should undertake an affirmative completeness assessment prior to granting an interim waiver. We acknowledge that there is a distinction between the rigor of analysis between an interim waiver and a final waiver assessment. Timeliness can be achieved if DOE's obligations are limited to a check of the application materials to ensure that the interim waiver is granted "is likely to be granted" and is "in the interest of public policy." 10 CFR 430.27(e). Accessible publication is also important to ensure transparency.

180-day Transition Timeframe

AHRI supports the Department's proposed 180-day transition timeframe if the Department ultimately decides to issue a final waiver that modifies the interim waiver method of test. The 180-days gives manufacturers certainty and permits time to retest and recertify equipment accordingly. The current rule is arbitrary because it requires retesting and recertification to occur before the next annual certification deadline. That framework allows for anything from twelve months to twelve hours' notice, depending on what date DOE issues the final determination on the petition. We note that 10 CFR 430.27(k) permits the Department to rescind a waiver if the determination was based on false or inaccurate information. AHRI recommends that if DOE makes such a determination, then the 180-day transition timeline should be discretionary.

AHRI appreciated the opportunity to submit these comments. Please contact me with any questions.

Caroline Davidson-Hood
General Counsel