IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LENNOX INTERNATIONAL, INCORPORATED; AIR-CONDITIONING, HEATING AND REFRIGERATION INSTITUTE, Petitioners, v. UNITED STATES DEPARTMENT OF ENERGY; ERNEST MONIZ, in his official capacity as Secretary, United States Department of Energy, Respondents.	No. 14-60535

JOINT MOTION EMBODYING SETTLEMENT AGREEMENT OF ALL PARTIES FOR PARTIAL VACATUR AND REMAND AND TO HOLD THESE CASES IN ABEYANCE

Pursuant to Federal Rule of Appellate Procedure 27 and Fifth Circuit Rule 27, all parties (defined as including intervenors) hereby jointly move this Court to enter an order (1) vacating the rule under review in part and remanding to respondent Department of Energy (DOE) for further notice-and-comment rulemaking concerning the vacated portions of the rule; and (2) holding the remainder of these cases in abeyance as described below. The reasons for this motion, and the details of the parties' requests, are set forth below.

1. The parties have engaged in settlement negotiations, which have led to agreement on the terms of a settlement. This Joint Motion describes, defines, and embodies the terms of this settlement agreement.

2. The parties have agreed to jointly move this Court for an order vacating the rule in part and remanding for further rulemaking by DOE. Specifically, the parties respectfully request that the Court enter an order that:

> (1) vacates those portions of the final rule, 79 Fed. Reg. 32,050 (June 3, 2014), relating to the two energy conservation standards applicable to multiplex condensing refrigeration systems operating at medium and low temperatures and the four energy conservation standards applicable to dedicated condensing refrigeration systems operating at low temperatures; and (2) remands those six standards to DOE for rulemaking in accordance with the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6291 *et seq.*, and all other applicable provisions of federal law (anticipating that DOE will support a negotiated rulemaking, as the parties have agreed).

3. The parties hereby jointly move this Court to hold the remainder of these cases in abeyance pending the completion of certain actions by DOE. Specifically, the parties respectfully request that the foregoing order provide that:

> (3) the remainder of these cases are held in abeyance pending (a) DOE's use of its best efforts to issue, within six months of an order by this Court granting this motion, a public document initiating a process for establishing the manner in which DOE will address error correction in future rulemakings; and (b) DOE's use of its best efforts to issue, within twelve months of an order granting this motion, a final document setting forth the manner in which DOE will address error correction in future rulemakings. DOE's evaluation of options for error correction will include, but may not be limited to, a procedure for reconsideration of energy conservation standard rulemakings consistent with EPCA and the Administrative Procedure Act (APA).

4. As explained below, the parties have agreed that, following entry of the foregoing order, DOE will undertake several additional actions, including the issuance of an enforcement policy statement. Furthermore, in the event that DOE satisfies its obligations to issue the two error-correction documents identified above in the timeframe described above, petitioners agree that they will move this Court to dismiss their pending petitions for review with prejudice, and all parties agree that they will consent to that dismissal.

STATEMENT

1. These consolidated petitions for review challenge a final rule issued by DOE setting energy conservation standards for walk-in coolers and walk-in freezers, 79 Fed. Reg. 32,050 (June 3, 2014) (amending 10 C.F.R. §§ 431.302, 431.304, 431.306), and an agency decision denying reconsideration of the final rule, 79 Fed. Reg. 59,090 (Oct. 1, 2014). Petitioners Lennox International, Inc., and the Air-Conditioning, Heating and Refrigeration Institute filed a petition for review of the final rule on August 4, 2014, and they filed a second petition for review of the agency decision denying reconsideration of the final rule on December 1, 2014. This Court consolidated the two petitions for review. Since the filing of the first petition for review, various entities have intervened. The parties have now agreed on final terms of a settlement agreement to resolve these cases.

DISCUSSION

1. Petitioners have challenged the nineteen energy conservation standards applicable to components of walk-in coolers and walk-in freezers that are set forth in DOE's final rule under review, 79 Fed. Reg. 32,050, 32,051-52 (June 3, 2014) (Table I.1); *id.* at 32,123-24 (codified at 10 C.F.R. § 431.306(a), (c)-(e)). Petitioners and certain intervenors have raised arguments concerning the substance of the nineteen standards, as well as the procedure that led to their adoption by DOE.

a-1. In light of those arguments, all parties, including DOE, have concluded that it is appropriate for DOE to undertake new rulemaking proceedings regarding six of the nineteen standards: (1) the two standards applicable to multiplex condensing refrigeration systems operating at medium and low temperatures; and (2) the four standards applicable to dedicated condensing refrigeration systems operating at low temperatures. *See* 10 C.F.R. § 431.306(e) (codifying these six standards, together with four distinct standards applicable to dedicated condensing refrigeration systems operating at medium temperatures). In those rulemaking proceedings, DOE will consider the appropriate standards and provide an opportunity for petitioners, intervenors, and others to offer additional comments concerning any proposed standards. DOE will use its best efforts to issue a final rule establishing the remanded standards by December 1, 2016, by negotiated rulemaking or otherwise.

a-2. In order to undertake the rulemaking proceedings contemplated by the parties' settlement agreement, the portion of the rule under review establishing these

six standards must first be vacated. Accordingly, the parties request that this Court issue an order vacating and remanding for further rulemaking the six standards just identified (and thus partially vacating the relevant portions of the final rule).

a-3. The final rule on review also established thirteen other energy conservation standards applicable to other components of walk-in coolers and walk-in freezers: (1) four standards applicable to dedicated condensing refrigeration systems operating at medium temperatures; (2) three standards applicable to panels; and (3) six standards applicable to doors. *See* 79 Fed. Reg. at 32,051-52 (Table I.1); *id.* at 32,123-24 (codified at 10 C.F.R. § 431.306(a), (c)-(e)). The parties have agreed that these standards should not be vacated and remanded to the agency for further rulemaking. Accordingly, the vacatur ordered by this Court should be limited to the portions of the final rule that relate to the two standards for multiplex condensing refrigeration systems operating at medium and low temperatures and to the four standards applicable to dedicated condensing refrigeration systems operating at low temperatures.

b-1. On remand of the six standards identified above, DOE will present this matter to the Appliance Standards and Rulemaking Advisory Committee (ASRAC) for its consideration and approval, and will support the creation of a working group to initiate a negotiated rulemaking. DOE will further recommend to ASRAC that it establish a four-month period for the working group to reach consensus, measured from the date of the working group's first meeting to the date the working group submits its final "term sheet" to ASRAC.

b-2. In addition, during the rulemaking on remand for the six standards identified above, DOE will consider any comments (including any accompanying data) regarding any potential impacts of these six standards on installers. During the rulemaking on remand, DOE will also consider and substantively address any potential impacts of these six standards on installers in its Manufacturer Impact Analysis, consistent with its "manufacturer" definition under 10 C.F.R. § 431.302, and, as appropriate, in its analysis of impacts on small entities under the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*

b-3. Finally, the negotiated rulemaking will be open to any issues related to the six vacated and remanded standards as well as the installer issues noted above, consistent with the ASRAC charter.

2a. In addition to their challenge to DOE's final rule, petitioners and certain intervenors have challenged the agency's denial of a petition for reconsideration of the final rule, 79 Fed. Reg. 59,090 (Oct. 1, 2014). Among other arguments, petitioners and those intervenors have contended that the agency has the discretion to correct errors alleged in petitions for reconsideration.

2b. Following an order by this Court granting this motion, DOE has agreed to address these parties' concerns by engaging in a process for establishing the manner in which DOE will address error correction in future rulemakings consistent with EPCA and the APA. Specifically, DOE will use its best efforts to issue, within six months of an order by this Court granting this motion, a public document initiating a process for

establishing the manner in which DOE will address error correction in future rulemakings. In addition, DOE will use its best efforts to issue, within twelve months of an order by this Court granting this motion, a final document setting forth the manner in which DOE will address error correction in future rulemakings. DOE's evaluation of options will include, but may not be limited to, a procedure for reconsideration of energy conservation standard rulemakings consistent with EPCA and the APA.

2c. As part of the aforementioned process for examining the manner in which DOE will address error correction in future rulemakings, the agency will consider whether to address only technical errors or to also provide for the correction of other types of errors, including legal errors. Petitioners and intervenors will retain any legal rights to challenge or otherwise dispute the agency's final procedure for addressing error correction.

3a. Petitioners and some intervenors have also raised concerns about the time required to comply with the four energy conservation standards applicable to dedicated condensing refrigeration systems operating at medium temperatures. *See* 10 C.F.R. § 431.306(e) (providing that refrigeration systems manufactured starting on June 5, 2017, must satisfy those standards); 79 Fed. Reg. at 32,050. As explained above, the parties have agreed that those four standards should not be vacated and remanded. In light of the fact that the settlement agreement described herein calls for further rulemaking proceedings regarding the other six standards applicable to

refrigeration systems, some parties and intervenors are concerned about the date by which manufacturers must comply with the four standards applicable to dedicated condensing refrigeration systems operating at medium temperatures.

3b. Following an order by this Court granting this motion, DOE has agreed to address those concerns by issuing and publishing on the DOE website an enforcement policy statement addressing the agency's policy for enforcing the four standards applicable to dedicated condensing refrigeration systems operating at medium temperatures. DOE commits to update its website, with a reasonable degree of promptness, as to compliance with the deadlines contained in the enforcement policy statement so as to keep regulated manufacturers apprised of the effectiveness of the enforcement policy statement. The enforcement policy statement is attached to this motion as an addendum, titled "Enforcement Policy Statement Regarding Walk-in Cooler/Walk-in Freezer Refrigeration Systems." The key provision of the enforcement policy statement is as follows:

> In an exercise of its enforcement discretion, DOE will not seek civil penalties or injunctive relief concerning violations of the four energy conservation standards applicable to dedicated condensing refrigeration systems operating at medium temperatures that are promulgated at 10 C.F.R. § 431.306(e), provided that
>
> > (1) the violations are related to the distribution in commerce of [walk-in cooler and walk-in freezer] refrigeration system components manufactured prior to January 1, 2020; and one of the following two conditions is met:
> >
> > (2) (a) if [ASRAC] establishes a working group to engage in negotiations concerning the rulemaking contemplated in the

> aforementioned settlement agreement and the first working group meeting is held on or before August 31, 2015, DOE receives recommended standards from ASRAC (i) by January 22, 2016 or, (ii) if ASRAC does not meet by that date, at the first ASRAC meeting held thereafter; or
>
> (2)(b) if ASRAC establishes a working group to engage in negotiations concerning the rulemaking contemplated in the aforementioned settlement agreement and the first working group meeting is held after August 31, 2015, DOE receives recommended standards from ASRAC (i) no later than 144 days after the date of the first working group meeting, or (ii) if ASRAC does not meet within the 144-day window, at the first ASRAC meeting held thereafter.

4. Nothing in the settlement of this litigation shall be construed to limit the rights of any party, including any intervenor, to make any arguments it deems appropriate in the contemplated rulemaking proceedings. The making of the settlement agreement and its acceptance or approval by this Court shall not in any respect constitute an admission by any settling party or intervenor that any allegation or contention in the proceeding below or these appeals is true or valid. It is further understood and agreed that the settlement agreement—the terms of which are set forth in this joint motion and the addendum—constitutes a negotiated agreement and, except as explicitly set forth therein, no settling party shall be deemed to have approved, accepted, agreed on, or consented to any principle or position taken by any party in this proceeding. The settlement agreement shall not be the basis for assessing fees, expenses, or costs pursuant to any applicable federal statute. The settlement

negotiations culminating in the settlement agreement are privileged and confidential and may not be used as or received in evidence in any proceeding.

5. Pursuant to a term of the parties' settlement agreement, the parties jointly request this Court to hold the remainder of these cases in abeyance pending (1) DOE's use of its best efforts to issue, within six months of an order by this Court granting this motion, a public document initiating a process for establishing the manner in which DOE will address error correction in future rulemakings; and (2) DOE's use of its best efforts to issue, within twelve months of an order granting this motion, a final document setting forth the manner in which DOE will address error correction in future rulemakings. DOE's evaluation of options for error correction will include, but may not be limited to, a procedure for reconsideration of energy conservation standard rulemakings consistent with EPCA and the APA. Once the agency has complied with these two obligations, petitioners will move to dismiss the pending petitions for review with prejudice, and all intervenors will consent to that dismissal. During this abeyance, petitioners and petitioner-intervenors reserve the right to seek enforcement of the terms of this settlement agreement from this Court, for instance if the enforcement policy statement referred to above is not issued in accordance with the terms of this settlement agreement.

6. Finally, should this Court decline to issue the requested order as it is proffered herein, the settlement agreement shall dissolve.

CONCLUSION

For the foregoing reasons, this Court should enter an order that:

(1) vacates those portions of the final rule, 79 Fed. Reg. 32,050 (June 3, 2014), relating to the two energy conservation standards applicable to multiplex condensing refrigeration systems operating at medium and low temperatures and the four energy conservation standards applicable to dedicated condensing refrigeration systems operating at low temperatures;

(2) remands those six standards to DOE for rulemaking in accordance with the Energy Policy and Conservation Act, 42 U.S.C. § 6291 *et seq.* and all other applicable provisions of federal law (anticipating that DOE will support a negotiated rulemaking, as the parties have agreed);

(3) holds the remainder of these cases in abeyance pending (a) DOE's use of its best efforts to issue, within six months of an order by this Court granting this motion, a public document initiating a process for establishing the manner in which DOE will address error correction in future rulemakings; and (b) DOE's use of its best efforts to issue, within twelve months of an order granting this motion, a final document setting forth the manner in which DOE will address error correction in future rulemakings. DOE's evaluation of options for error correction will include, but may not be limited to, a procedure for reconsideration of energy conservation standard rulemakings consistent with EPCA and the APA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 29, 2015, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

s/ Sydney Foster
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ADDENDUM

Enforcement Policy Statement Regarding
Walk-in Cooler/Walk-in Freezer Refrigeration Systems
[DATE]

On June 3, 2014, the U.S. Department of Energy (DOE) published in the Federal Register a final rule under the Energy Policy and Conservation Act, 42 U.S.C. § 6291 *et seq.*, which set forth energy conservation standards for walk-in coolers and walk-in freezers (WICFs). 79 Fed. Reg. 32,050. On August 4, 2014, petitioners Lennox International, Inc., and the Air-Conditioning, Heating and Refrigeration Institute filed a petition for review of that final rule in the United States Court of Appeals for the Fifth Circuit, and on December 1, 2014, petitioners filed a second petition for review in the same court of an agency decision denying reconsideration of the final rule. Various parties intervened in the cases.

Having considered the procedural and substantive defects alleged by petitioners and some intervenors, the parties entered an agreement to settle these cases on July 29, 2015. In an exercise of its enforcement discretion, DOE will not seek civil penalties or injunctive relief concerning violations of the four energy conservation standards applicable to dedicated condensing refrigeration systems operating at medium temperatures that are promulgated at 10 C.F.R. § 431.306(e), provided that

(1) the violations are related to the distribution in commerce of WICF refrigeration system components manufactured prior to January 1, 2020; and one of the following two conditions is met:

(2) (a) if the Appliance Standards and Rulemaking Advisory Committee (ASRAC) establishes a working group to engage in negotiations concerning the rulemaking contemplated in the aforementioned settlement agreement and the first working group meeting is held on or before August 31, 2015, DOE receives recommended standards from ASRAC (i) by January 22, 2016 or, (ii) if ASRAC does not meet by that date, at the first ASRAC meeting held thereafter; or

(2)(b) if ASRAC establishes a working group to engage in negotiations concerning the rulemaking contemplated in the aforementioned settlement agreement and the first working group meeting is held after August 31, 2015, DOE receives recommended standards from ASRAC (i) no later than 144 days after the date of the first working group meeting, or (ii) if ASRAC does not meet within the 144-day window, at the first ASRAC meeting held thereafter.