ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Public Gas Association,	)	
	)	
Petitioner,	)	
	)	
Heating, Air-Conditioning & Refrigeration Distributors International,	)	
	)	
Intervenor in Support of Petitioner,	)	
	)	
Air Conditioning Contractors of America,	)	
	)	
Intervenor in Support of Petitioner,	)	
	)	
v.	)	**Case No. 11-1485**
	)	
United States Department of Energy,	)	
	)	
Respondent,	)	
	)	
Alliance to Save Energy; American Council for an Energy-Efficient Economy; City of New York; Consumer Federation of America; Massachusetts Union of Public Housing Tenants; Natural Resources Defense Council; Air-Conditioning, Heating and Refrigeration Institute,	)	
	)	
Intervenors in Support of Respondent.	)	
	)	

INTERVENOR HARDI'S RESPONSE TO MOTION OF PETITIONER FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR CLARIFICATION

SUMMARY

Petitioner American Public Gas Association's ("APGA") Motion for Reconsideration or in the Alternative for Clarification ("APGA Motion") confirms that, as the motions panel correctly concluded, HARDI deserves its day in court. It asks this Court to reconsider its Order respecting a motion that APGA did not oppose on grounds that APGA did not argue.

In its motion, APGA simply repeats Respondent's and Respondent-Intervenors' arguments against substitution—arguments it did not make before the motions panel (APGA did not oppose HARDI's motion to substitute). APGA asserts that cases addressing the circumstances under which an intervenor may raise specific arguments or issues not raised by the petitioner support the proposition that HARDI should be denied its day in court. However, APGA does not dispute that it argued in its briefs, as did HARDI, that the DFR was unlawfully issued and should have been withdrawn in response to adverse comments. (*See* Pet'r's Br. at 53-60; Pet'r's Reply Br. at 1-2, 5-10, 31.) As explained below, APGA necessarily challenged the validity of the DFR *as a whole* when it made those arguments.

In the alternative, APGA asks this Court to reconsider the motions panel's Order for APGA's convenience. However, APGA's proposed "clarification" burdens the merits panel with additional briefing and should also be denied.

FACTS

On June 27, 2011, the Department of Energy ("DOE") published the direct final rule ("DFR") at issue in this case in the Federal Register. *See* 76 Fed. Reg. 37,408 (June 27, 2011) (codified at 10 C.F.R. § 430.32) (J.A. 357-497). The DFR established standards for not only furnaces but also air conditioners and heat pumps in a single rule, because "DOE … decided to combine … central air conditioner and heat pump and furnace rulemakings into a single combined rulemaking." 76 Fed. Reg. 37,408, 37,421 (J.A. 370). The DFR established accelerated compliance dates and regional energy-conservation standards for all of those products,[1] which apply at the point of installation (as opposed to the point of manufacture) and thereby directly regulate and harm HVAC distributors (i.e., HARDI's members). *See* 76 Fed. Reg. 37,408, 37,426-32, 37,545-48 (J.A. 375-81, 494-97); *see also* Inter's'-Pet'r Reply Br. at 2-4 & Add. III & IV. On October 31, 2011, DOE published a Notice of Effective Date and Compliance Dates for Direct Final Rule ("Notice") in the Federal Register confirming the standards for air conditioners, heat pumps, and furnaces. 76 Fed. Reg. 67,037, 67,037 (Oct. 31, 2011) (J.A. 993).

[1] HARDI was not a party to the joint comment that DOE used to justify issuing the direct final rule establishing standards for air conditioners, furnaces, and heat pumps at issue in this case. (*See* Inter's'-Pet'r Br. at 6, 10.) It did not agree to any of the standards proposed in that joint comment.

On December 23, 2011, APGA timely filed a petition for review of the DFR and Notice. After APGA filed its petition for review of the DFR but before APGA filed its preliminary statement of issues, on January 20, 2012, HARDI timely filed a motion to intervene. HARDI argued that it should be allowed to intervene as of right, in part, because "APGA could settle this case in return for concessions that benefit public gas companies but injure private-sector HVACR distributors." (HARDI Motion to Intervene at 12.) On February 14, 2012, this Court granted HARDI's motion to intervene.

On November 13, 2012, well after final briefs and the joint appendix had been filed, DOE filed a so-called Consent Motion of Respondent to Hold Proceedings in Abeyance to Accommodate Pending Mediation "with the consent of petitioner."[2] (Consent Motion of Respondent at 1.) Then, on January 11, 2013, DOE and APGA filed a Joint Motion of Petitioner and Respondent to Vacate in Part and Remand for Further Rulemaking ("DOE-APGA Settlement Motion") without obtaining agreement or consent from any of the other nine parties to this litigation, including HARDI. The DOE-APGA Settlement Motion stated that the "key, and dispositive, term" of the APGA-DOE settlement involved APGA and DOE moving "for an order vacating *in part the rule under review*…." (APGA-

[2] *See* Consent Motion of Respondent at 2 ("APGA and … DOE are nearing agreement on final terms of a settlement of this case."); *see also* APGA Motion at 3 ("Following the submission of briefs on the merits by all parties, APGA and DOE entered into mediation, from which a settlement resulted….").

DOE Settlement Motion at 2 (emphasis added)). The APGA-DOE Settlement Motion further stated that "*APGA and DOE* have agreed that any vacatur should be limited to the *portions of the direct final rule* … relat[ing] to energy conservation standards for non-weatherized gas furnaces." (APGA-DOE Settlement Motion at 5 (emphasis added)). HARDI did not agree to this.

Intervenors for both Petitioner and Respondent filed oppositions to the APGA-DOE Settlement Motion. On January 25, 2013, six intervenors for Respondent filed an opposition to the APGA-DOE Settlement Motion, stating that they "did not agree with DOE's decision to reach the settlement with APGA and do not support the motion." (Opposition by Intervenor-Respondents City of New York et al. to Motion to Vacate in Part and Remand For Further Proceedings at 2.) HARDI also filed a Response to the APGA-DOE Settlement Motion and Motion to Substitute as Petitioner ("HARDI Motion to Substitute"), which, inter alia, requested that the Court deny the APGA-DOE Settlement Motion in part in the event that HARDI was not permitted to substitute for APGA. (HARDI Motion to Substitute at 9, 19, 24.)

Nine days later, on February 4, 2013, APGA filed a "Reply to Intervenor-Respondents' Opposition to Motion to Vacate in Part and Remand for Further Rulemaking" ("APGA Reply"). APGA did not oppose HARDI's motion to substitute. APGA did not make any of the arguments it is making in its motion for

reconsideration regarding HARDI's motion to substitute when it first had the opportunity to do so. Instead, APGA correctly explained in that filing:

> Comments opposing the DFR were timely filed by many diverse stakeholders …. In October 2011 DOE declined to withdraw the DFR (76 Fed. Reg. 67,037 (Oct. 31, 2011)), despite the clear wording of the statute (and the legislative history) to the effect that direct final rules must be withdrawn in the face of substantive opposition by relevant entities.[3]

(APGA Reply at 5.) In other words, as both APGA and HARDI argued in their merits briefs,[4] DOE's failure to withdraw the DFR in the face of adverse comments from a diverse array of stakeholders was unlawful.

After carefully considering the issues raised by these filings, on May 1, 2013, this Court entered a per curiam Order ("May 1 Order") referring the issues raised by the APGA-DOE Settlement Motion and HARDI's motion to substitute to the merits panel and directing the parties to "address in their briefs, in addition to the merits of the case, the issues presented by the motion to vacate in part and remand and the motion to substitute as petitioner, rather than incorporate those

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[3] The Notice confirming the DFR stated:

> DOE has determined that the adverse comments received in response to the direct final rule do not provide a reasonable basis for withdrawing the direct final rule. Therefore, DOE provides this notice confirming adoption of the energy conservation standards for residential furnaces *and residential central air conditioners and heat pumps* established in *the direct final rule* ….

76 Fed. Reg. 67,037, 67,037 (Oct. 31, 2011) (J.A. 993) (emphasis added).

[4] This issue is discussed in greater detail below in Section I.B.

arguments by reference." (May 1 Order at 1.) This Court sua sponte ordered "that the parties submit, within 30 days of the date of this order, a proposed format for the briefing of this case." (May 1 Order at 2.)

On May 8, 2013, counsel for HARDI invited all of the parties to participate in a conference call to discuss formulation of a joint proposal for the format for the briefing of this case, which was to take place the next morning. After it appeared that many of the parties were unable to participate in the conference call on short notice, counsel for HARDI canceled the conference call and instead proposed that the parties undertake initial discussions as to an appropriate briefing format via email. No parties responded.

On May 13, 2013, APGA filed a motion for reconsideration or, in the alternative, for clarification.

ARGUMENT

I. APGA's Motion for Reconsideration Should be Denied.

Motions for reconsideration are "rarely grant[ed]." D.C. Circuit Handbook of Practice and Internal Procedures at 31. APGA's motion does not warrant making an exception to that general rule. APGA did not make any of the arguments it asks this Court to "reconsider" in the first instance. Its most recent filing, entitled "Petitioner's Reply to Intervenor-Respondents' Opposition to Motion to Vacate in Part and Remand for Further Rulemaking," did not oppose or

respond to HARDI's motion to substitute. Moreover, AGPA's motion for reconsideration is wrong on the merits for at least four reasons.

A. HARDI and Intervenors for Respondent Opposed the Strategic APGA-DOE Settlement Motion.

APGA mistakenly describes the APGA-DOE Settlement Motion as "an unopposed joint motion to vacate and remand the DFR as it relates to the issues raised by APGA on appeal …." (APGA Motion at 6.) But HARDI vigorously opposed the APGA-DOE Settlement Motion to the extent that it disposed of this appeal—and HARDI's remaining claims[5] (including the argument made by *both* APGA and HARDI that DOE erred when it failed to withdraw the DFR in its entirety in response to adverse comments[6]). Numerous intervenors for Respondent also opposed the APGA-DOE Settlement Motion.

APGA's argument that "there is no basis for not granting" the APGA-DOE Settlement Motion (APGA Motion at 4) is also wrong. As HARDI argued, curtailing strategic settlements and gamesmanship that prejudices other parties is a basis for denying that motion in part. (*See* HARDI Motion to Substitute at 19-23.) This Court has suggested that, under such circumstances, denial even of a motion for voluntary dismissal would be appropriate. *See Free Press v. FCC*, 2009 U.S.

[5] *See* Intervenor HARDI's Response to the APGA-DOE Settlement Motion and Motion to Substitute as Petitioner at 19-24.

[6] *Compare* APGA Statement of Issues at 2 ¶ 2; Pet'r's Br. at 3-4, 59-60; Pet'r's Reply Br. at 1-2, 7-10, 31, *with* HARDI's Statement of Issues at 2, ¶¶ 3, 5; Inter's'-Pet'r Br. at 16-22; Inter's'-Pet'r Reply Br. at 8-16.

App. LEXIS 20619, at *2 (D.C. Cir. 2009) (per curiam) (suggesting that it would be appropriate to deny motion for voluntary dismissal filed for "improper strategic reasons" if an intervenor "would be prejudiced by dismissal").[7]

B. APGA challenged the DFR in its entirety.

APGA mistakenly argues that "what is before this Court [is] … HARDI's request to substitute as a petitioner in this case to pursue issues not raised by APGA …." (APGA Motion at 6.) APGA also contends that "APGA's entire case before the DOE addressed whether the DOE erred in issuing the DFR as it relates to non-weatherized gas furnaces." (APGA Motion at 3.) But from the beginning, APGA has taken the position that the DFR should have been withdrawn in its entirety in response to adverse public comments.

On October 13, 2011, APGA commented: "APGA[] appreciates this opportunity to submit comments in response to the *direct final rule* (DFR) issued by … [DOE] to establish minimum efficiency standards for residential furnaces, heat pumps, and other products…. APGA strongly urges the withdrawal of *the direct final rule*…." (J.A. 571(emphasis added)). Likewise, on October 17, 2011, APGA commented: "Under the DOE DFR in this docket, comments are due today…. What this exercise underscores … is the absolute necessity for DOE to

[7] *See* Fed. R. App. Proc. 32.1.

withdraw the DFR ….” (J.A. 890.) APGA did not ask DOE to sever and partially withdraw the furnace standards.

APGA’s petition for review challenged the entire DFR, asking “this Court to review (i) a direct final rule [i.e., the DFR] and (ii) a notice of effective date and compliance dates for direct final rule ….” (APGA Pet. for Review at 1.) It did not contain any limiting language that would suggest that its challenge to the DFR was confined to any specific aspect of it, timely putting DOE on notice that it would have to defend the validity of the DFR as a whole. (*See* APGA Pet. for Review at 1.) In addition, APGA attached copies of the entire DFR and Notice as exhibits to its petition for review.

APGA’s statement of issues also challenged the DFR in its entirety. Consider, for example, APGA’s second issue: “Whether the DOE acted … [unlawfully] in declining to withdraw the direct final rule regarding non-weatherized gas furnace efficiency in the northern region in light of adverse comments from relevant parties opposing the direct final rule….” (Pet’r’s Statement of Issues at 2, ¶ 2.) In addition, APGA’s preliminary statement of issues expressly raised issues that were not limited to the furnace standards, including “[w]hether the DOE acted [unlawfully] in adopting a direct final rule on the basis of analysis and evidence not found in the direct final rule itself” and “[w]hether the DOE issued the direct final rule in violation of the Regulatory Flexibility Act….”

(Pet'r's Statement of Issues at 4, ¶¶ 8, 11.) HARDI made the same arguments. (*See* Inter's'-Pet'r Br. at 16-22, 31-33, 39-40.)

The "Rulings Under Review" section of APGA's principal brief independently confirms that APGA challenged the entire DFR: "*Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Air Conditioners and Heat Pumps*, Direct Final Rule, 76 Fed. Reg. 37,408 (June 27, 2011)…." (Pet'r's Br. at ii.) Likewise, in its principal brief, APGA argued that DOE's "failure to *withdraw the direct final rule* … constitutes an unquestioned abuse of discretion by the agency."[8] (Pet'r's Br. at 59 (emphasis

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[8] Earlier in its principal brief, APGA makes clear what is meant by the acronym "DFR" and the term "direct final rule":

> On June 27, 2011, DOE issued a direct final rule (DFR) *prescribing energy-efficiency standards for various products, including non-weatherized furnaces* in a 30-state northern region of the nation **(JA-357)**. …
>
> DOE received over 30 comments from multiple relevant industry sectors, including energy suppliers, distributors, contractors, and consumers, opposing the DFR on procedural and substantive grounds.
>
> In its Notice…. , DOE determined that these comments "do not provide a reasonable basis for withdrawing the direct final rule," which would become effective the next day, with compliance required on May 1, 2013 **(JA-993)**.

(Pet'r's Br. at 3-4 (emphasis added)). APGA's citations to the Joint Appendix (bolded above) also clarify what APGA is referring to when it uses these terms. Page 357 of the Joint Appendix states: "In *this direct final rule*, DOE adopts… standards for residential furnaces *and for residential central air conditioners and heat pumps*." (J.A. 357 (emphasis added)). And page 993 of the Joint Appendix

added).) It asserted that "a notice of withdrawal was the only lawful choice available to the Secretary." (Pet'r's Br. at 60.) APGA's principal brief "should [be] 'liberally construe[d] … in determining issues presented for review.'" *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 675 (D.C. Cir. 1996) (citation omitted).[9] But APGA's principal brief need not be liberally construed to conclude that APGA challenged the entire DFR.

Likewise, APGA again argued in its reply brief that the entire DFR was illegal and should have been withdrawn:

> The issue is not whether DOE must withdraw a DFR if it receives *any* adverse comments. DOE must review the comments and determine if they "may provide a reasonable basis for withdrawing" a DFR. The detailed and amply supported comments of APGA and other stakeholders clearly met that test. DOE erred by not withdrawing the DFR and considering the merits of the DFR in notice-and-comment rulemaking.[10]

(Pet'r's Reply Br. at 2 (emphasis in original); *see id.* at 1, 7-10, 31.) In a section of its reply brief entitled "THE DFR SHOULD BE VACATED," APGA stated:

> Intervenor-Respondents argue (Br. 42) that if the Court grants APGA's petition, it should remand the DFR without vacatur "to allow DOE to address any deficiencies." They are wrong. EPCA states that

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states: "DOE provides this notice confirming adoption of … standards for residential furnaces *and residential central air conditioners and heat pumps* established in *the direct final rule* …." (J.A. 993 (emphasis added)).

[9] *Abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010).

[10] The Glossary of APGA's reply brief further clarifies that the acronym "DFR" refers to the entire direct final rule, including the energy-efficiency standards for air conditioners and heat pumps. (*See* Pet'r's Reply Br. at iv.)

> DOE "shall withdraw the direct final rule" and proceed with the rulemaking."

(Pet'r's Reply Br. at 31.)

APGA requested as relief in its principal and reply briefs that "[t]he DFR and Notice should be vacated and the case remanded." (Pet'r's Br. at 60; Pet'r's Reply Br. at 32.) HARDI made those same arguments and requested identical relief. (*See* Inter's'-Pet'r Br. at 16-22, 41; Inter's'-Pet'r Reply Br. at 8-16, 21.)

C. HARDI has standing to challenge the DFR in its entirety.

APGA argues that "HARDI has no standing to substitute as a petitioner in this proceeding." (APGA Motion at 6.) APGA is wrong for the reasons stated in HARDI's previous filings. (*See* HARDI Motion to Intervene at 3-7; Inter's'-Pet'r Br. at 13 & Add. II; Inter's'-Pet'r Reply Br. at 2-4 & Add. III; HARDI Motion to Substitute at 11-12 & n. 6.)

D. This Court may properly consider all of HARDI's arguments.

APGA does not dispute that it argued that the joint statement DOE used as a basis for issuing the DFR violated the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6295, because it was submitted by a narrow subset of interested parties.[11] (*See* Pet'r's Br. at 55; Pet'r's Reply Br. at 4-7.) Likewise, APGA does not dispute that it argued in its principal and reply briefs that the DFR

[11] That joint statement proposed "federal minimum energy conservation standards for residential central air conditioners, heat pumps and furnaces." (J.A. 22.)

should have been withdrawn in response to adverse comments. (Pet'r's Br. at 59-60; Pet'r's Reply Br. at 1-2, 4, 7-10, 31.) As explained above, EPCA does not authorize partial withdrawal of a DFR.[12] 42 U.S.C. § 6295(p)(4)(i). If HARDI is permitted to substitute for APGA, it will continue to make those same two arguments, both of which HARDI, like APGA, raised in its merits briefs. (*See* Inter's'-Pet'r Br. at 16-22, 28-31; Inter's'-Pet'r Reply Br. at 8-17.)

Citing dicta from an inapposite 1994 D.C. Circuit case, APGA nonetheless argues that "[t]his Court departs from" the general rule that an intervening party may only raise issues that have first been raised by other parties "only in 'extraordinary cases.'" (APGA Motion at 5 (quoting *NARUC v. ICC*, 41 F.3d 721, 730 (D.C. Cir. 1994) (citation omitted)).) APGA is wrong for at least two reasons. First, as this Court explained in 2007, the Court "may, nevertheless, exercise … [its] discretion to consider intervenors' claims [that were not raised by the petitioner], even absent extraordinary circumstances."[13] *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1305 (D.C. Cir. 2007) (considering claim that was an "essential predicate" to petitioner's claims). Second, and more importantly, that case, like every other case APGA cites, only addresses the circumstances under

[12] *Cf.* 76 Fed. Reg. 37,408, 37,408 (June 27, 2011) ("If DOE receives adverse comment and determines that such comment may provide a reasonable basis for withdrawing the direct final rule, this final rule will be withdrawn ….") (J.A. 357); 76 Fed. Reg. 67,037, 67,037 (Oct. 31, 2011) (J.A. 993).

[13] This case does present extraordinary circumstances, as HARDI's Response to the DOE-APGA Settlement Motion and Motion to Substitute discusses at length.

which an intervenor may make *arguments* outside the scope of the *issues* raised by the petitioner[14]—that line of cases does not address the circumstances under which it is permissible to settle a case without the consent of the other parties and the question of when substitution is appropriate. APGA does not dispute that it raised at least two of HARDI's arguments—which apply to the entire DFR and, if successful, would invalidate the DFR in its entirety.[15]

EPCA's plain language makes clear that DOE was statutorily required to either confirm the DFR in its entirety or withdraw the DFR in its entirety. *See* 42

[14] For that matter, APGA is also wrong to suggest that this Court may only consider intervenors' additional arguments in cases where an intervenor either "had no incentive to file a petition for review" or "was raising a jurisdictional issue…." (APGA Motion at 5.) The case that APGA mistakenly cites for that proposition, *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 (D.C. Cir. 2000), confirms that APGA is wrong, describing the second *Synovus* factor thus: "resolution of *the issue raised* by the intervenor is an 'essential predicate' *to the resolution of the issue raised by* the petitioner." *Id.* at 1161 (citation omitted and emphasis added); *accord Ky. Power Coop., Inc.*, 489 F.3d at 1305; *see U.S. Tel. Ass'n v. FCC*, 188 F.3d 521, 531 (D.C. Cir. 1999) (*Synovus* Court "relied on the fact that *the relevant issue* was 'an essential predicate' *to an issue raised by a petitioner*." (emphasis added)).

[15] Even assuming *arguendo* that some of the issues HARDI has raised were outside the scope of those raised by APGA, they are nonetheless properly before the Court because they are "essential predicates" to APGA's, and HARDI's, argument that the DFR should have been withdrawn in response to adverse comments. (*See* Inters'-Pet'r Reply Br. at 7-8.) All of HARDI's arguments were raised in adverse public comments on the DFR. (*See* Inter's'-Pet'r Br. 20-22.) The *only* way to determine whether adverse comments "may provide a reasonable basis for withdrawing the" DFR, as APGA and HARDI have argued, is to evaluate the issues raised by those comments cumulatively. (*See id.* at 22; Inter's'-Pet'r Br. at 7; J.A. 1006.) Thus, consideration of the issues raised in comments on the DFR is logically anterior to consideration of APGA's, and HARDI's, argument that the DFR should have been withdrawn.

U.S.C. § 6295(p)(4)(i) (discussing circumstances under which the "Secretary shall withdraw the direct final rule"). EPCA does not give the Secretary discretion to partially withdraw a direct final rule by, for example, severing and withdrawing only the furnace standards (relief that APGA never requested). APGA's motion for reconsideration should therefore be denied.

II. APGA's Motion for Clarification Should Be Denied.

APGA states that "[i]f the Court refuses to reconsider its May 1 Order, then APGA requests clarification. The Court's order seems to assume that this case has not already been fully briefed on the merits …." (APGA Motion at 7.) But the motions panel's order is clear on its face—and for good reason. And the Court has been repeatedly made aware that this case has been briefed on the merits.[16]

As the May 1 Order's language makes plain, it is designed to reduce the workload of the already overburdened merits panel—not the workload of APGA's counsel:[17] Yet APGA seems to read the Court's May 1 Order as "requir[ing] the

[16] *E.g.*, DOE-APGA Settlement Motion at 3; HARDI Motion to Substitute at 8 ("[L]ong after final briefs were submitted, APGA and DOE filed the APGA-DOE Settlement Motion…."); Respondent's Reply in Support of Joint Motion and Opposition to Substitute Petitioner at 13-14.

[17] APGA states that it "entered mediation because it believed that the process, if successful, would result in savings of time and resources." (APGA Motion at 6.) But as APGA recognizes, "[t]his case has already been submitted on the merits, with all briefs and the joint appendix lodged with the Court.…" *(Id.* at 7.) All that remains is oral argument. APGA only has APGA to blame for entering into a mediation process that resulted in a "joint" settlement motion to which nine of the eleven parties in this case did not agree. APGA's decision to enter into a settlement

parties to file supplemental briefs only on outstanding issues not already briefed, raised by the two pending motions…. (APGA Motion at 7.) But the May 1 Order does not use the phrase "supplemental briefs" and plainly asks the parties to file briefs that address all of the issues in this case without incorporating those arguments by reference. This is because the Court did not intend for the parties to simply file supplemental briefs. If it had, it would have said so. This commonsense conclusion is confirmed by this Court's sua sponte Order to submit a proposed briefing format, discussed below. If the Court had merely intended for the parties file supplemental briefs, this would have been entirely unnecessary and the Court would have directed the parties file supplemental briefs and set a briefing schedule.

The per curiam Order also made clear that the Court intended for the parties to at least attempt to confer and reach agreement as to a mutually acceptable briefing format that would reduce this Court's workload: "The parties are *strongly urged* to submit *a joint proposal* and are reminded that the [C]ourt looks with extreme disfavor on repetitious submissions …." (May 1 Order at 2 (emphasis added)). This Court was thereby signaling to the eleven parties in this case that it did not want the merits panel to have to wade through a morass of filings related to the two pending motions, much of which overlap with the issues raised in the

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agreement that imposed binding duties and obligations on other members of the regulated community without their consent is the cause of the additional time and expense APGA already has incurred.

parties' final briefs (filed on October 12, 2012). This Court should deny APGA's motion for clarification and make clear that this Court's legitimate interest in ensuring that cases are efficiently briefed trumps APGA's interest in minimizing its workload.

CONCLUSION

For the foregoing reasons, the Court should DENY Petitioner's Motion for Reconsideration, or in the Alternative, for Clarification and ORDER any other relief it deems necessary, just, and proper.

Respectfully submitted,

/s/ Amber D. Abbasi

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Date: May 28, 2013

CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 25(d), D.C. Circuit Rule 27(a)(1), and this Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that, on this 28th day of May 2013, I have served the foregoing Response to Motion of Petitioner for Reconsideration or in the Alternative for Clarification upon the counsel listed in the Service Preference Report via e-mail through this Court's CM/ECF system, as indicated below.

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