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Representing Manufacturers of Heating, Ventilating, Air-Conditioning and Refrigeration Products

April 6, 2006

Ms. Brenda Edwards-Jones
United States Department of Energy
Building Technologies Program
Mailstop EE-2J
Room 1J-018
1000 Independence Avenue, SW
Washington, DC 20585-0121

Re: California Preemption Exemption Petition
Docket EE-RM-PET-100

Dear Ms. Edwards-Jones:

The Air-Conditioning and Refrigeration Institute (ARI) appreciates the opportunity to submit these comments in response to a petition of the California Energy Commission (CEC) to gain exemption from federal preemption regarding California's water conservation standards for residential clothes washers.

The importance of this proceeding and the precedent that is set by the Department of Energy (DOE) in reviewing and adjudicating this petition cannot be understated. In enacting the National Energy Appliance Conservation Act (NAECA) in 1987, Congress stated, "The purpose of S. 83 is to reduce the Nation's consumption of energy and to reduce the regulatory and economic burdens on the appliance manufacturing industry through the establishment of national energy conservation standards for major residential appliances."[1]

When NAECA was enacted, Congress recognized that a growing patchwork of state regulations was harming manufacturers and consumers, stating:

> During the 1970's some States began enacting appliance efficiency standards on their own. NECPA provides that the Federal standards preempt State standards, except that States may petition DOE to grant a waiver from preemption if a State is able to show justification for its standards over those of DOE. While DOE adopted its policy of the 'no-standard' standards, it also initiated a general policy of granting petitions from States requesting waivers from preemption. As a result, a system of separate State appliance standards has begun to emerge and the trend is growing.

[1] S. REP. 100-6, S. Rep. No. 6, 100TH Cong., 1ST Sess. at 2 (1987).

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> Because of this trend, appliance manufacturers were confronted with the problem of a growing patchwork of differing State regulations which would increasingly complicate their design, production, and marketing plans. Regulations in a few populous States could as a practical matter determine the product lines sold nationwide, even in States where no regulations existed.[2]

NAECA and the waiver of preemption provision that is the sole basis for the CEC's petition were purposefully crafted by Congress to make exemption from preemption difficult to obtain. Indeed, Congress stated, "States may petition DOE to be waived from Federal preemption, but achieving the waiver is difficult." [3]

To ensure DOE does not go down the path of generally granting petitions from states again, and to ensure that the intent of Congress is carried out, DOE, in reviewing a petition for exemption from preemption, should start with the presumption that the petition is rejected unless the state can demonstrate an "unusual and compelling" interest.[4]

To comply with the intent of Congress, DOE must strictly apply the statutory provisions and must require the petitioning state to meet a presumption against granting a waiver from preemption. To do otherwise would eviscerate the federal appliance efficiency program and create anew the very situation Congress intended to correct in the adoption of NAECA and in subsequent amendments to the federal appliance efficiency program.

Even absent a presumption against granting an exemption from preemption, the CEC's petition should be rejected, because:

1. The CEC has failed to demonstrate an "unusual and compelling state or local energy interest."
2. The CEC's petition is supported by outdated information.

No demonstrated "unusual and compelling state or local energy interest"

To successfully obtain an exemption from preemption, a state must demonstrate an "unusual and compelling state or local energy interest."[5] This is further defined as requiring the state to prove that its interest is "substantially different in nature or magnitude than those prevailing in the United States generally. . . ."[6] Congress provided

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[2] S. REP. 100-6, S. Rep. No. 6, 100TH Cong., 1ST Sess. at 4 (1987).
[3] S. REP. 100-6, S. Rep. No. 6, 100TH Cong., 1ST Sess. at 2 (1987).
[4] 42 U.S.C. §6297 (d)(2)(b)
[5] Id.
[6] 42 U.S.C. §6297 (d)(1)(c)

direction on the meaning of "substantial," stating, "In general, a state may not receive a waiver either prior to the effective date of the federal standard or during the 3 to 10 year 'lock-in' period for the federal standards except if the state can show that an 'energy emergency condition' exists within the state which imperils the health, safety and welfare of its residents."[7]

In reviewing the CEC's petition, the CEC did not even come close to proving an "energy or water emergency condition within the state that imperils the health, safety, and welfare of its residents."[8] Instead, the CEC set forth a series of assertions regarding California with which everyone can agree:

1. California is the largest state,
2. California's population is increasing,
3. California will remain the largest state for the foreseeable future,
4. California has large water and energy needs because it has a large population, and
5. Portions of California have suffered a drought or excess water at differing times over the last decade.

However, none of the information provided by the CEC demonstrates what the law requires, i.e., that California has an "unusual and compelling state energy interest that is substantially different in nature or magnitude than those prevailing in the United States generally."[9] Simply stating that California is the largest state, without additional compelling evidence, is not sufficient to meet this burden. In addition, other states have experienced and continue to experience droughts. Many states, particularly in the sunbelt, are experiencing population growth, and many states, particularly in the West and Northeast, have serious energy and water concerns.

The CEC failed to present any evidence comparing other states' per capita energy and water use or energy and water supply and demand forecasts. In fact, the only evidence the CEC did present contains an admission that other states are experiencing similar water shortage issues.[10] In addition, data from DOE's Energy Information Administration shows that the state of California has one of the lowest per capita energy consumption in the United States. California ranks 49th out of 51 states (including the

[7] S. REP. 100-6, S. Rep. No. 6, 100TH Cong., 1ST Sess. at 2 (1987).
[8] Id.
[9] 42 U.S.C. §6297 (d)(1)(c)
[10] "Thus for the first time ever, the seven states that rely on the Colorado, especially California, are confronting the possibility of a serious shortage." CEC Petition page 11.

District of Columbia in per capita energy use. Only the states of New York and Rhode Island consume less energy per capita.[11]

Therefore, the CEC has not presented any evidence that California has an "unusual and compelling state energy interest that is substantially different in nature or magnitude than those prevailing in the United States generally."[12] Failing to meet this burden, the CEC petition should be rejected.

Petition is supported by outdated information

Not only must a state demonstrate an "unusual and compelling state or local energy interest," this interest must be 'evaluated within the context of the State's energy plan and forecast . . . .'"[13] The state plan and forecast presented by the CEC this evaluation is the 2005 **Draft** California Water Plan. As indicated by its name, this is a draft report - - A report that has not been approved or endorsed by California's Department of Water Resources. To support the draft report, the CEC filed a copy of the 1998 California Water Plan. Neither of these reports reflects the current California water plan, which was formally adopted by the California Department of Water Resources in December 2005. Therefore, the CEC's filing should be rejected because it is not supported by the State's current plan and forecast as required by the plain language of the statute.

ARI is the trade association representing the manufacturers of over 90 percent of North American-produced air conditioning and commercial refrigeration equipment. ARI represents a domestic industry of approximately 200 air conditioning and refrigeration companies, employing approximately 150,000 men and women in the United States. The total value of member shipments by these companies is over $55 billion annually.

We appreciate the opportunity to provide comments on the CEC petition. If you have any questions regarding our comments, please do not hesitate to contact me.

Sincerely,

Stephen R. Yurek
General Counsel
Vice President, Policy and Public Affairs

[11] Table R2. Energy Consumption by Source and Total Consumption per Capita 2001, Ranked by State, *State Energy Consumption, Price, and Expenditure Estimates*, Energy Information Administration (December 16, 2004). http://www.eia.doe.gov/emeu/states/_seds.html
[12] 42 U.S.C. §6297 (d)(1)(c)
[13] 42 U.S.C. §6297 (d)(1)(c)(2)