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April 6, 2006

Alexander Karsner
Assistant Secretary of Energy
U. S. Department of Energy
Office of Energy Efficiency and Renewable Energy
Room EE-2J
1000 Independence Avenue, SW
Washington, DC 20585

RE: California Preemption Exemption Petition
Clothes Washers
DOE Docket Number EE-RM-PET-100

Dear Mr. Karsner:

The National Electrical Manufacturers Association (NEMA) submits these comments in response to the Department of Energy's request for comments in this docket announced in the Federal Register on February 6, 2006. NEMA is the leading trade association in the United States representing the interests of electroindustry manufacturers. Founded in 1926 and headquartered near Washington, D.C., its 430 member companies manufacture products used in the generation, transmission and distribution, control, and end-use of electricity. Domestic shipments of electrical products within the NEMA scope exceed $100 billion.

NEMA's Interest in this Proceeding

Several products manufactured by NEMA members are designated "covered products" pursuant the Energy Policy and Conservation Act (EPCA), as amended, and which are regulated under this important national legislation. These include lighting systems products and electrical power generation and distribution equipment. A cornerstone of this national regulation is the statutory provision for express federal preemption of State regulation, in which Congress recognized that only in limited circumstances could a State chart a path differently than the federal regulatory scheme for products specified in the federal law. One of those limited pathways for State deviation from the national program is to petition the Department of Energy for a waiver from preemption, as the California Energy Commission has done in this proceeding.

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As this is the first occasion for a State to seek a waiver of preemption since EPCA was amended in 1987, NEMA and its members who manufacture and sell products for which there is express preemption of State regulation under EPCA, as amended, write to express their views on the preemption waiver requirements as this proceeding could have precedent-setting consequences.

The Federal Preemption of State Regulation

Appliance efficiency regulation in the United States has been from the outset a national, federal program beginning with EPCA in 1975 as part of a "comprehensive national energy policy." S. Conf. Rep. 94-516, at 116 (1975). Clothes washers were one of thirteen appliance products slated for federal regulation by EPCA in 1975. Federal preemption of State appliance efficiency regulation was part of EPCA, and the provision allowing a State to seek a waiver of preemption was a component of the federal program in the 1975 legislation. Initially, EPCA required that the predecessor of the Secretary of Energy, before approving a petition for waiver, determine that "there is a significant State or local interest to justify such State regulation" [that was more stringent than the national regulation], except in cases where he "finds that the State regulation unduly burden interstate commerce." *See* Pub L. 94-163, 89 Stat 871 (1975).[1]

The National Appliance Energy Conservation Act of 1987 (NAECA) changed EPCA's waiver provision significantly. As the Senate Report describes this change:

> New section 327(d) allows States to file petitions seeking waiver of Federal preemption. This subsection provides *new and more stringent criteria* that a State must establish by a preponderance of the evidence in order to receive an exemption. The State is required to show that its regulation is needed to meet "Unusual and compelling" State or local interests.

S. Rep. No 100-6 at 9 (1987), *reprinted* at 1987 U.S.C.C.A.N. at 60. As further noted in the Senate Report, "States may petition DOE to be waived from Federal preemption, but achieving the waiver is difficult." *Id.* at 2. This heightened requirement, changing the State's burden from showing "a significant State or local interest" to establishing "by a preponderance of the evidence that such State regulation is needed to meet unusual and compelling State or local energy interests" is consistent with the stated purpose of NAECA:

> 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.

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[1] The National Energy Conservation Policy Act in 1978 contained a minor amendment to the waiver provision, clarifying that a State petitioner did not have to establish as part of its petition that the State regulation would not impose an undue burden on interstate commerce. S. Rep. 95-351 at 118, reprinted at 1978 U.S.C.C.A.N. at 8162.

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S. Rep. No. 100-6 at 2 (1987), *reprinted* at 1987 U.S.C.C.A.N. at 52. The twin goals of reducing the consumption of energy while simultaneously reducing regulatory and economic burden on appliance manufacturers through a consistent *national regulatory program*[2] is further reflected in (1) NAECA's test for what constitutes "unusual and compelling" State interests, and (2) what an interested party might establish in a petition proceeding that would prevent the Secretary of Energy from granting such a Petition.

"Unusual and compelling State or local interests" means interests which are (1) substantially different in nature or magnitude than those prevailing in the United States generally, and (2) are such that the costs, benefits, burdens, and reliability of energy savings resulting from the State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens and reliability of alternative approaches to energy savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to regulation. This second group of factors is to be evaluated in the context of a State's energy plan and forecast. 42 U.S.C. §6297 (d)(1)(C).

Even if the Secretary should find that the State has met its burden of showing "unusual and compelling State or local interests" by a preponderance of the evidence, a waiver petition cannot be granted if an interested party establishes by a preponderance of the evidence, either (1) "that such State regulation will significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on a national basis" *or* (2) "that such State regulation is likely to result in the unavailability in the State of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of the Secretary's finding." 42 U.S.C. §6297(3, 4).

The text of EPCA, as amended by NAECA in 1987, clearly reveals that obtaining a waiver of federal preemption is "difficult" and was intended to be difficult (S. Rep. No. 100-6 at 2 (1987)), because Congress placed a substantial premium on uniform national appliance efficiency regulation so that national commerce in appliances was uniformly affected by such regulations and that the State regulation did not deprive consumers in the State of appliance products that were available to them at the time of the waiver proceeding and would continue to be available to consumers outside the State.

NEMA's Comments on the Petition

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[2] Congress also expressed concern that between 1980 and 1987, the DOE had

> ". . .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.
>
> Because of this trend, appliance manufacturers were confronted with the problem of a growing patchwork of differing State regulations which would increasingly complicated their design, production and marketing plans. Regulations in a few populous States could as a practical matter determine the product lines sold nationwide."

S. Rep. No 100-12 at 4 (1987), *reprinted* at 1987 U.S.C.C.A.N. at 55. Congress clearly disfavored a "general policy of granting petitions" in favor of a uniform national program.

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In its *Federal Register* Notice, the DOE recited a number of issues for which it has solicited comment. NEMA will not address the CEC Petition with respect to clothes washers specifically or issues raised in the Notice that relate to the impact on clothes washers, as there are other interested parties who would offer greater expertise on that subject. But a few of the issues raised by the DOE in its Notice are more generic, and NEMA comments on those issues.

- "Are California's water interests 'unusual and compelling,' and how do they compare to those of the National and of other States?"

- Are there other factors and information in addition to the information in addition to the California Petition the Department should consider in determining whether California's water interests are "unusual and compelling?"

- "Should the phrase, 'in the United States generally' be interpreted to include comparison to regions as well as national averages? Are the water use issues in California substantially different in nature or magnitude than those prevailing in other western states?"

Each of these first three issues on which the DOE seeks comment are thematically connected.

NEMA believes that the DOE should look at water use issues faced by other States or regions of the United States (and it should be part of California's burden to present information) to determine whether or not they are similarly situated to California. This inquiry serves two statutory purposes: (1) it allows the DOE to determine just how "unusual and compelling" California's interests really are; and (2) such information can be informative as to the "extent to which the State regulation is likely to contribute significantly to a proliferation of State appliance efficiency requirements and the cumulative impact such requirements would have." 42 U.S.C. §6297(3)(D). For example, it is well known that Arizona and other western states draw from the same water resources as California. These states, like California, experience arid and sometimes drought climate conditions. Arizona and Nevada's recent population growth rate is greater than California's, http://www.census.gov/Press-Release/www/releases/archives/population/006142.html, and their population growth rates are projected to be significantly greater than California's population growth rate through 2030. http://www.census.gov/Press-Release/www/releases/archives/population/004704.html. Urban growth is substantial in these states too.

In its Petition, California represents to the DOE that it has been pursuing water efficiency for residential, commercial, industrial, and agricultural customers for sometime and most of the "low hanging fruit" opportunities for savings have been achieved. Other strategies for water conservation do not seem to have priority for California because "funds are limited." (Petition at page 1). That fact, however, does not make California "unusual."

California's Petition presents information that arguably demonstrates a "significant State interest" in water use, in the manner contemplated by EPCA in 1975 (see discussion on page 2,

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infra), yet it does not present information that demonstrates why these interests are "unusual," in the manner contemplated by NAECA in 1987, compared to other states in the West or elsewhere (except that California is simply larger). With the NAECA 1987 amendments, Congress wrote the "significant State interest" test for a waiver of preemption out of the statute in favor of a more "difficult" requirement that those interests be "unusual" as well as "compelling."

CONCLUSION

Since this Petition is one of first impression to be decided by DOE since NAECA was enacted in 1987, NEMA and its members who manufacture and sell products covered by EPCA, as amended, are interested in seeing that the principles established by NAECA for a waiver of preemption are rigorously applied to support Congress' manifest interest in uniform national appliance efficiency regulation: that waivers be granted only when the State's interest are both "unusual" and "compelling," and that the waiver would not significantly burden manufacturing, marketing, distribution, sale or servicing of a product, or deprive consumers in California of the availability of product that they had available to them at the time the DOE makes its determination.

Very truly yours,