ARGUED ON MARCH 20, 2015
DECIDED ON JULY 14, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1123

ENERGY FUTURE COALITION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Review of Final Action of the
United States Environmental Protection Agency

RESPONDENTS UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND GINA McCARTHY'S OPPOSITION TO PETITION FOR REHEARING

JOHN C. CRUDEN
Assistant Attorney General

MICHAEL C. AUGUSTINI
Environmental Defense Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 616-6519

OF COUNSEL:
MARK M. KATAOKA
Office of General Counsel
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

September 21, 2015

RESPONDENTS' CERTIFICATE AS TO PARTIES

Pursuant to Circuit Rules 28(a)(1) and 35(c), Respondents United States Environmental Protection Agency and Gina McCarthy (collectively "EPA") submit this Certificate as to Parties.

1. Parties and *Amici*

All parties, intervenors, and *amici* appearing in this Court are listed in Petitioner Energy Future Coalition et al.'s (collectively "Energy Future") petition for panel rehearing.

September 21, 2015

/s/ *Michael C. Augustini*
Counsel for EPA

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INTRODUCTION

On July 14, 2015, the Court issued its decision upholding EPA's alternative test fuel regulation, 40 C.F.R. § 1065.701(c). This regulation was promulgated as part of EPA's nationwide program under the Clean Air Act to regulate harmful emissions from motor vehicles. See "Control of Air Pollution From Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards," 79 Fed. Reg. 23,414 (Apr. 28, 2014) ("Tier 3"). The Court rejected all of Petitioners' ("Energy Future's") challenges on the merits, and held that it was not arbitrary and capricious for EPA to consider the "commercial availability" of a proposed alternative test fuel. See Energy Future Coalition, et al. v. EPA, 793 F.3d 141, 146-47 (D.C. Cir. 2015). The Court concluded that it was "entirely commonsensical and reasonable" for EPA to apply the alternative test fuel provision to vehicle manufacturers because, among other things, the challenged provision helps ensure that vehicle certification testing accurately reflects the vehicle's emissions performance when driving out on the road. Id.

Moreover, the Court found that the alternative test fuel provision did not create an unacceptable "catch-22," rejecting Energy Future's assertion that the regulation would be impossible for vehicle manufacturers to satisfy. Id. In short, the Court found the provision to be reasonable and consistent with the Act.

Energy Future's request for panel rehearing identifies no error or issue of law or fact that warrants revisiting the Court's decision upholding the alternative test fuel provision. See Fed. R. App. P. 40(a)(2) (requiring a rehearing petition to state with particularity the issues that the panel "overlooked or misapprehended"). As elaborated below, Energy Future does not seek reconsideration of the Court's holding that EPA's alternative test fuel rule is reasonable and consistent with the Clean Air Act or argue for a different result. Rather, Energy Future takes issue only with a point the Court expressly declined to reach – namely, whether EPA can relax the alternative test fuel provision consistent with 42 U.S.C. § 7525(h). The Court made clear that it was not offering a definitive or binding interpretation of 42 U.S.C. § 7525(h) in that regard. See Energy Future, 793 F.3d at 147, n.3 ("We do not decide here whether the test fuel regulation's 'commercially available' requirement is compelled by the statute or whether, consistent with the statute, EPA could relax the 'commercially available' requirement. We need not reach that question and do not imply an answer one way or the other."). Thus, EPA does not agree with Energy Future that the decision creates a risk of confusion in future administrative proceedings or limits EPA's broad regulatory authority with respect to emission testing, including its authority to evaluate and potentially approve alternative test fuels in the future. Accordingly, the revision to the opinion Energy

Future seeks is unnecessary, and EPA respectfully submits that the Court should deny the rehearing request.

ARGUMENT

I. THERE IS NO BASIS AND NO NEED FOR PANEL REHEARING

A. The Court's Ruling In EPA's Favor Is Not At Issue.

As noted above, the Court unequivocally held that it was reasonable for EPA to consider the "commercial availability" of a proposed alternative test fuel under the Clean Air Act. Energy Future, 793 F.3d at 146-47. Accordingly, the Court upheld 40 C.F.R. § 1065.701(c) and denied Energy Future's petition for review of this alternative test fuel provision. It is important to emphasize that in its request for rehearing Energy Future does not seek to revisit the Court's holding or argue that the Court committed any error in reaching that result. See Pet.Br. at 4, 13-14 (accepting the Court's rationale for sustaining EPA's alternative test fuel rule). The only issue upon which Energy Future seeks rehearing relates to the Court's references to 42 U.S.C. § 7525(h), references which admittedly are "not necessary to the result" and "outcome of this case." See Pet.Br. at 1, 5. Thus, the petition provides no occasion for the Court to reconsider its holding that 40 C.F.R. § 1065.701(c) is reasonable or to alter the final disposition in EPA's favor. See generally Easely v. Reuss, 532 F.3d 592, 593-94 (7th Cir. 2008) (noting that the purpose of a panel rehearing is to address an overlooked issue or correct a

misapprehension); City of Holyoke Gas & Elec. Dep't v. FERC, 954 F.2d 740, 745 (D.C. Cir. 1992) (denying rehearing where the party failed to develop its argument or point to supporting evidence); Cheney Railroad Co. v. Interstate Commerce Commission, 902 F.2d 66, 71 (D.C. Cir. 1990) (declining to consider a new argument presented in a petition for rehearing).

B. The Court Need Not Revisit Its Opinion.

The principal contention Energy Future advances in support of panel rehearing is that the Court purportedly adopted some specific interpretation of 42 U.S.C. § 7525(h) that might make it more difficult for EPA to approve new, alternative test fuels in the future. In the interest of avoiding potential unintended consequences or confusion in future administrative proceedings, Energy Future makes a limited request that the Court amend its opinion to remove this purported "interpretation" of § 7525(h), which Energy Future alleges could preclude EPA from relaxing the "commercially available" criterion at 40 C.F.R. § 1065.701(c)(1)(ii). See Pet.Br. at 2, 5, 13-14 (arguing that the Court's "interpretation" of § 7525(h) may give rise to unfounded questions as to EPA's authority to approve "forward-looking" test fuels).

Had the Court's decision held that the Clean Air Act requires EPA to establish test procedures that exactly mirror "actual current driving conditions," with no ability for EPA to consider, e.g., fuel market conditions expected to be

applicable to the vehicle in the near future, then rehearing might be appropriate. However, EPA does not believe that is what the Court held. EPA also does not agree with Energy Future's reading of the Court's decision as providing "two separate grounds" for upholding the test fuel provision. See Pet.Br. at 3-4. Nor does EPA view the Court's references to 42 U.S.C. § 7525(h) as interpreting § 7525(h) in the manner suggested by Petitioners or in any way restricting EPA's authority or ability to consider requests to use new alternative test fuels and approve them, where appropriate, under 40 C.F.R. § 1065.701(c) or other applicable provisions. Cf. Gersman v. Group Health Assoc., Inc., 975 F.2d 886, 897 (D.C. Cir. 1992) ("Binding circuit law comes only from the holdings of a prior panel, not from its dicta."); American Civil Liberties Union of New Jersey v. Schundler, 168 F.3d 92, 98 n.6 (3d Cir. 1999) (noting that the "standards for rehearing en banc look to the panel's *decision*, not to the panel's dicta.").

EPA did not promulgate the challenged rule pursuant to 42 U.S.C. § 7525(h). Nonetheless, EPA's approach in the challenged rulemaking was entirely consistent with, and informed by, the language of 42 U.S.C. § 7525(h).[1] Similarly, while the Court's decision finds that EPA's rule was "rooted in (if not compelled by)" 42 U.S.C. § 7525(h), the Court was careful to add a footnote

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[1] The rule specifically required by the Congressional directive in 42 U.S.C. § 7525(h) was completed in 1996. See 61 Fed. Reg. 54,852 (Oct. 22, 1996).

declining to decide whether the Clean Air Act, including § 7525(h), requires test fuels to be "commercially available." Energy Future, 793 F.3d at 147 n.3 ("We need not reach that question and do not imply an answer one way or the other."). Nor is it necessary for the Court to accept Energy Future's invitation to engage now in such hypothetical statutory analysis at this stage of the proceedings, especially where Energy Future concedes that the Court's references to § 7525(h) are not necessary to the result (i.e., denial of the petition for review), and where the Court expressly made clear that it was *not* reaching the kind of interpretation issues that Energy Future now claims the Court reached.[2] In short, Energy Future simply has not established that there is a need for even a limited panel rehearing to revise the Court's opinion in the manner suggested. Instead, the best course is to allow EPA an opportunity to first address the kinds of statutory interpretation questions raised by Petitioners, and any related concerns, in a concrete setting in a future administrative action.

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[2] As noted above, EPA does not read the decision to interpret the Clean Air Act as requiring equivalence between test fuels and current market fuel. Nevertheless, EPA does not object if the Court wishes to re-affirm, in accordance with its Footnote 3, that the Court's opinion is not interpreting § 7525(h) in this manner or otherwise purporting to address issues that were not before the Court.

C. EPA Retains Broad Authority To Evaluate Alternative Test Fuels And May Address Any Issues In Future Administrative Actions.

In EPA's view, the Court's decision upholding 40 C.F.R. § 1065.701(c) and finding EPA's rule to be reasonable preserves and does not limit EPA's discretion to consider alternative test fuels and approve them when appropriate.[3] EPA continues to have broad regulatory authority with respect to emission testing, 42 U.S.C. § 7525(a)(1), including the discretion to consider vehicle manufacturers' requests to use new test fuels. EPA believes that there is nothing in the Court's decision that prevents EPA from allowing vehicle manufacturers to innovate and develop new technologies, consistent with the Agency's past practice, including using new alternative test fuels when appropriate, without undermining the integrity of the National emission control program.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for rehearing. The Court correctly held that EPA's alternative test fuel provision is reasonable and Petitioners have presented no grounds for rehearing by the panel.

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[3] Although EPA demonstrated why a test fuel's "commercial availability" is a reasonable factor to consider when evaluating a request to approve an alternative test fuel, it bears repeating that in the challenged rulemaking EPA did not require it or define what "commercial availability" means in all circumstances. The Agency has ample discretion to consider requests on a case-by-case basis, and may evaluate trends and future market projections when considering whether to approve an alternative test fuel that is not currently on the market.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

/s/ *Michael C. Augustini*
MICHAEL C. AUGUSTINI
Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 616-6519
Counsel for Respondents

MARK M. KATAOKA
Office of General Counsel
U. S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

September 21, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to the Federal Rules of Appellate Procedure and Circuit Rule 35, I hereby certify that the foregoing brief complies with the applicable page limitation as it does not exceed 15 pages, excluding the parts exempted by Fed. R. App. P. 32. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word's Times New Roman 14-point font.

/s/ *Michael C. Augustini*
Michael C. Augustini
U.S. Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2015, the foregoing brief was served electronically through the Court's CM/ECF system on all registered counsel appearing in this matter.

/s/ *Michael C. Augustini*
Michael C. Augustini
U.S. Department of Justice