



Office of Commissioner
Rohit Chopra

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

STATEMENT OF COMMISSIONER ROHIT CHOPRA

*Regarding the FTC EnergyGuide Rule
Commission File No. R611004
December 22, 2020*

Summary

- After significant delays due to the unlawful actions by the Department of Energy, the FTC is finalizing a new EnergyGuide rule that will help save families money, promote innovation, and reduce carbon emissions stemming from residential energy use.
- Given the excessive burden of energy costs for low-income families, the FTC should take additional steps to prevent abuses in this industry using authorities granted by Congress that the agency has largely ignored.
- In addition to addressing “slamming” and “cramming,” the FTC can also protect consumers and honest businesses by deterring corporate “greenwashing” and halting anticompetitive conduct and mergers in the energy sector.

COVID-19 has exacerbated the longstanding problem of excessive energy burden on low-income families that stems, in large part, from inefficient appliances and climate control devices. In addition to making it harder to afford rent, stay-at-home orders and remote work and learning are leading to greater energy consumption – and higher energy bills – for millions of households. There are worrisome signs that many families may face power shutoffs because they cannot afford heat and electricity.¹

Today, the Federal Trade Commission is finalizing a rule that will help to reduce the long-term burden of high energy bills on low-income families, promote greater energy efficiency, and reduce carbon emissions from residential housing. This rule has long been delayed due to the uncertainty created by the Department of Energy regarding these new efficiency standards.

After years of unlawful inaction by the Secretary of Energy, portable air conditioners will now be subject to higher efficiency standards and will be sold with EnergyGuide labels to assist purchasers of this product. The Commission’s decision to require compliance by 2022, rather than 2025, as originally proposed, is a win that will save millions of dollars in energy costs. This action is an example of how clear rules can promote innovation, efficiency, and other broad benefits.

¹ See Tony Romm, *Millions of Americans risk losing power and water as massive, unpaid utility bills pile up*, WASH. POST (Oct. 1, 2020), <https://www.washingtonpost.com/business/2020/10/01/power-water-gas-bills/>.

However, this rule is only possible due to private litigation filed by consumer groups, energy efficiency advocates, and state attorneys general that forced the federal government to follow the law. The Secretary of Energy's failure to adhere to the law is deeply troubling, and it will need to play catch-up on many other energy-intensive appliances found in American homes. The FTC and Department of Energy can and should take further steps to reduce the considerable energy burdens for families and to lower carbon emissions.

Excessive Energy Burden for American Families

Many families, particularly those living in rental housing, face higher energy bills stemming from inefficient appliances and products, since many landlords have little incentive to install energy-efficient equipment.² One study found that multifamily rentals are the least likely of any type of housing to use energy efficient products, which contributes to greater energy burden for these families.³

Congress has long sought to promote energy independence, increase the efficiency of products in the U.S. market, and reduce the environmental impact of household appliances and goods. For example, the Energy Policy and Conservation Act requires the Department of Energy to establish efficiency standards for certain appliances and other products. The Department of Energy is required to update these standards periodically, but is forbidden from weakening them. After the Department of Energy issues any standard, the FTC is tasked with promoting comparison shopping through EnergyGuide labeling and similar programs, which incentivizes innovators to exceed the minimum efficiency standards.

The Department of Energy's Unlawful Delay Tactics

The federal government, including the FTC, has been working since 2015 to implement higher standards and labeling for portable air conditioners, a feature of many apartments without central air conditioning. Portable air conditioning units are particularly energy-intensive. In 2016, new standards that were projected to reduce tens of billions of kilowatt-hours of electricity and save billions in costs for families over a 30-year period were close to being finalized.⁴ In 2017, however, the new Secretary of Energy pulled the plug on the process, killing the new efficiency standards on portable air conditioners and other products.

Fortunately, Congress ensured that there was a private right of action to enforce compliance and remedy any lawbreaking by the Secretary.⁵ In 2019, a court found in favor of a coalition of state attorneys general, consumer groups, and energy efficiency advocates, ruling that the Department

² See Michael Carliner, REDUCING ENERGY COSTS IN RENTAL HOUSING, RESEARCH BRIEF 12-2, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY (Dec. 2013),

https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_carliner_research_brief.pdf. Carliner describes the issue with “split incentives” between renters and landlords where the person offering a property for rent has few incentives to spend more upfront to equip the property with energy efficient products if they are not responsible for covering its energy expenses.

³ See Ariel Drehobl & Lauren Ross, LIFTING THE HIGH ENERGY BURDEN IN AMERICA'S LARGEST CITIES: HOW ENERGY EFFICIENCY CAN IMPROVE LOW INCOME AND UNDERSERVED COMMUNITIES, AMERICAN COUNCIL FOR ENERGY EFFICIENCY (Apr. 2016), https://assets.ctfassets.net/ntcn17ss1ow9/1UEmqh5159cFaHMqVwHqMy/e81368fa10d39bbb4b114262aace5be2/Lifting_the_High_Energy_Burden_0.pdf.

⁴ See Final Rule, Energy Conservation Program: Test Procedures for Portable Air Conditioners, 81 Fed. Reg. 35,242 (June 1, 2016) (codified at 10 C.F.R. Parts 429 and 430); see also Proposed Rule, Energy Labeling Rule, 81 Fed. Reg. 62,681, (Sep. 12, 2016) (to be codified at 16 C.F.R Part 305).

⁵ 42 U.S.C. § 6305.

of Energy's termination of the proceeding was unlawful. The court ordered that the rule be finalized.⁶

This year, advocates notified the Department of Energy and the FTC that the government was again unlawfully stalling updates of energy efficiency standards, a delay that is leading to billions of dollars in additional energy burden and enormous amounts of carbon emissions.⁷ In October, these organizations sued the government again for its disregard for the law.⁸

Given their substantial benefits, the Department of Energy should update and raise efficiency standards, and the FTC should continue to quickly implement them through the EnergyGuide program.

Opportunities for Additional FTC Action

Given the financial impact on American families, as well as broader public policy goals to reduce carbon emissions and promote environmentally friendly innovation, the FTC should seize opportunities to reduce residential consumers' burdensome energy costs. In addition to working with the Department of Energy on promoting energy efficiency through higher standards and labeling, the FTC can take a number of steps to protect consumers:

(1) Protect energy consumers from unlawful cramming and slamming.

For years, state regulators and consumer advocates have been battling unscrupulous energy suppliers that employ deceptive marketing practices to entice consumers to switch from their local distribution company's services.⁹ Some of these players engage in "cramming," where they push undisclosed fees on to customer bills. Consumers have also complained that these companies offered them teaser rates to lock them into a long-term contract and later significantly increased their rates.¹⁰

⁶ See Press Release, Natural Resources Defense Council, NRDC & Other Environmental and Consumer Groups, 11 States & NYC Sue Over Stalled Efficiency Standards (June 13, 2017); see also *Nat. Res. Def. Council, Inc. v. Perry*, 302 F. Supp. 3d 1094 (N.D. Cal. 2018), aff'd sub nom. *Nat. Res. Def. Council, Inc. v. James R. Perry*, 940 F.3d 1072 (9th Cir. 2019); *Nat. Res. Def. Council, Inc. v. James R. Perry*, 940 F.3d 1072 (9th Cir. 2019).

⁷ Press Release, EarthJustice, DOE Inaction Will Cost Consumers at Least \$22 Billion and Spew at Least 80 Million Tons of Carbon into the Air (Aug. 10, 2020), <https://earthjustice.org/news/press/2020/doe-inaction-will-cost-consumers-at-least-22-billion-and-spew-at-least-80-million-tons-of-carbon-into-the-air>.

⁸ Compl. for Declaratory and Injunctive Relief, *NRDC et al. v. Dan Brouillette et al.*, 20-cv-9127 (S.D.N.Y. Oct. 30, 2020).

⁹ See, e.g., Susan M. Baldwin & Sarah M. Bosley, MARYLAND'S RESIDENTIAL ELECTRIC AND GAS SUPPLY MARKETS: WHERE DO WE GO FROM HERE?, MARYLAND OFFICE OF THE PEOPLE'S COUNSEL, at 4-5 (Nov. 2018) (describing deceptive representations to consumers to entice them to switch from their current service provider during the 2013-2014 polar vortex), <http://www.opc.maryland.gov/Portals/0/Publications/reports/APPRISE%20Where%20do%20we%20go%20from%20Here.pdf?ver=2019-09-11-075024-040>; Press Release, Greater Boston legal Services, Greater Boston Legal Services Sues SFE Energy For Deceptive Practices in Door to Door Sales of Residential Gas and Electric Services (Apr. 12, 2019) (announcing a class action lawsuit alleging misleading promises of lower costs to trick low-income households of color into enrolling in high-cost contracts), <https://www.gbls.org/rafael-fuentes-v-sfe-energy-massachusetts-inc>; Jim Donovan, *NJ Sues Third-Party Energy Suppliers For Defrauding Customers*, CBS PHILLY (June 4, 2014) (announcing an enforcement action against five competitive energy suppliers alleging they made deceptive claims), <https://philadelphia.cbslocal.com/2014/06/04/nj-sues-third-party-energy-suppliers-for-defrauding-customers/>; Eileen Faust, *Pa. AG files complaints against 5 electric suppliers for price spikes*, THE MERCURY (June 20, 2014) (announcing an enforcement action against five third-party energy suppliers who promised consumers low energy rates during telemarketing calls and later spiked their prices), https://www.pottsmmerc.com/news/pa-ag-files-complaints-against-5-electric-suppliers-for-price-spikes/article_ea800b93-a560-5f00-bc52-1de315386283.html.

¹⁰ *Id.* See also Elisabeth Leamy, *Should you switch electricity suppliers? Maybe — but do your homework first.*, WASH. POST (June 12, 2018), https://www.washingtonpost.com/lifestyle/home/should-you-switch-electricity-suppliers-maybe--but-do-your-homework-first/2018/06/11/d0493df8-683a-11e8-9e38-24e693b38637_story.html.

Others complain about “slamming,” where customers are switched over to a different energy supplier without their knowledge or consent, often at the hands of third-party marketers.¹¹ Once consumers are enrolled, these companies charge consumers additional fees or make it difficult and expensive for them to cancel their contracts.¹² While state regulators have cracked down on some of these companies, many have crossed state lines to engage in similar wrongdoing.

As noted above, a court found that the Department of Energy failed to adhere to Congressional directives in the energy labeling context. Unfortunately, the FTC has also ignored the new authorities granted by Congress in 2005 to issue rules addressing unfair or deceptive practices like slamming and cramming.¹³ At a minimum, given the Commission’s experience with cramming and slamming in other contexts,¹⁴ the FTC should consider whether it should codify widely accepted policy and precedent with respect to these practices, which can increase compliance without imposing any new requirements and ensure that bad actors cannot hope from state to state to perpetrate the same scams.

(2) Deter greenwashing and deceptive environmental claims.

Studies have shown that, when it comes to choosing energy suppliers and household appliances, many consumers are willing to pay a premium for environmentally friendly options, and energy efficiency claims are material to their decision to purchase.¹⁵ In the case of energy consumption, consumers must often take the information sellers provide at face value, as they lack the resources to verify the accuracy of their statements independently.

¹¹ See, e.g., Baldwin & Bosley, *supra* note 10, at 4-5; Donovan, *supra* note 10 (describing how Starion and Viridian’s sales representatives misrepresented their relationship with the local public utility to get consumers to switch suppliers without their knowledge); Jennifer Bosco, COMPETING TO OVERCHARGE CONSUMERS: THE COMPETITIVE ELECTRIC SUPPLIER MARKET IN MASSACHUSETTS, NAT. CONSUMER L. CENTER, at 9-10 (Apr. 2018) (describing complaints related to door-to-door marketing and switching customers to a different provider without the customer’s authorization), <https://www.nclc.org/images/pdf/pr-reports/competitive-energy-supply-report.pdf>; Press Release, PUC Urges Consumers to be Conscious of Utility Account Security with Telemarketing Sales Calls, Encourages Continual Review of Bill Statements and Online Account Activity, Pa. Pub. Utility Comm’n (July 11, 2019) (warning consumers about “aggressive” or “intimidating sales calls” where telemarketers calling on behalf third-party energy suppliers pose as representatives from a public utility and threaten to terminate their services if consumers do not switch to a new plan), <https://www.puc.pa.gov/press-release/by-id/4234>; Andrew Maykuth, *Beware of switching scams by electric telemarketers using ‘super high-pressure tactics,’ PUC warns*, THE PHILADELPHIA INQUIRER (July 16, 2019) (warning consumers about slamming and high-pressure marketing tactics by telemarketers pretending to be affiliated with the government or the local utility), <https://www.inquirer.com/business/energy/pennsylvania-puc-harassing-threatening-electricity-telemarketers-20190716.html>.

¹² See Bosco, *id* at 18 (asserting that high cancellation fees “can effectively trap [consumers] in a contract for expensive electricity supply for the entire term of the contract”); Baldwin & Bosley, *supra* note 10, at 25-30; Scott Dance, *Companies promise Maryland residents free electricity, but lock them into expensive contracts, advocate says*, BALTIMORE SUN (Dec. 3, 2019), <https://www.baltimoresun.com/business/bs-bz-energy-supplier-complaints-20191203-bghwu6ornbbyvioiiw6uh4g7jy-story.html>.

¹³ 42 U.S.C. § 16471.

¹⁴ The Commission has repeatedly condemned “cramming,” particularly in the context of mobile phone carriers. See Press Release, T-Mobile to Pay At Least \$90 Million, Including Full Consumer Refunds To Settle FTC Mobile Cramming Case, Fed. Trade Comm’n (Dec. 19, 2014), <https://www.ftc.gov/news-events/press-releases/2014/12/t-mobile-pay-least-90-million-including-full-consumer-refunds>; Press Release, AT&T to Pay \$80 Million to FTC for Consumer Refunds in Mobile Cramming Case, Fed. Trade Comm’n (Oct. 8, 2014), <https://www.ftc.gov/news-events/press-releases/2014/10/att-pay-80-million-ftc-consumer-refunds-mobile-cramming-case>.

¹⁵ See Abel Gustafson et al., *Who is willing to pay more for renewable energy?*, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION (Jul. 16, 2019), <https://climatecommunication.yale.edu/publications/who-is-willing-to-pay-more-for-renewable-energy/>; Joseph Chang & Al Greenwood, *Consumers willing to pay more for sustainable products – Accenture*, ICIS (June 4, 2019), <https://www.icis.com/explore/resources/news/2019/06/04/10374331/consumers-willing-to-pay-more-for-sustainable-products-accenture>.

When companies make false or misleading energy efficiency claims about their products or services, it not only hurts these consumers financially but also increases the environmental impact consumers sought to lessen. It also harms innovation, since it makes it more difficult for legitimate, environmentally friendly products to compete with sellers who engage in deception.

The FTC has clear authority to take enforcement actions against entities that make misleading energy efficiency and environmental claims. Last year, the Commission obtained a significant judgment against Truly Organic, which falsely claimed its products met USDA organic guidelines.¹⁶ In 2016, the FTC challenged Volkswagen for making false claims about “clean diesels.”¹⁷ And in 2015, the Commission also halted ECM BioFilms’ unsubstantiated claims about the biodegradability of their plastic products.¹⁸

The Commission can promote innovation and deterrence by triggering penalties, restitution, and damages for unlawful environmental claims. The FTC can restate elements of the FTC Green Guides into a rule, without imposing any new requirements.¹⁹ The agency can also trigger greater sanctions using the FTC’s Penalty Offense Authority, when companies have knowledge about a past Commission order that declared an environmental marketing practice to be unfair or deceptive, as in the case of ECM BioFilms.²⁰

(3) Condemn anticompetitive mergers and conduct in the energy sector.

Anticompetitive mergers and conduct by energy companies can increase costs for consumers and reduce innovation when it comes to energy efficiency. The FTC plays a key role in maintaining competition and increasing innovation in energy markets, so that companies cannot excessively squeeze household energy budgets. Earlier this year, the Commission successfully blocked an energy company joint venture that would likely have increased prices for many families.²¹

In the natural gas industry, the Commission has taken action to promote affordable access to energy that is cleaner than other fossil fuels.²² The FTC has also explored competition and

¹⁶ I have previously advocated that the Commission should restate longstanding legal precedent, such as false affiliation with or certification by government agencies, into a Section 18 rule. Truly Organic’s alleged conduct would have violated this rule. See Statement of Commissioner Rohit Chopra Regarding the Report to Congress on Protecting Older Consumers, Comm’n File No. P144400 (Oct. 19, 2020), <https://www.ftc.gov/public-statements/2020/10/statement-commissioner-rohit-chopra-regarding-report-congress-protecting>.

¹⁷ Press Release, Volkswagen to Spend up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles, Fed. Trade Comm’n (June 28, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating>.

¹⁸ Press Release, Fed. Trade Comm’n, FTC Concludes ECM BioFilms Made False, Misleading, and Unsubstantiated Claims About the Biodegradability of Plastic Products Treated with Its Additive (Oct. 19, 2020), <https://www.ftc.gov/news-events/press-releases/2015/10/ftc-concludes-ecm-biofilms-made-false-misleading-unsubstantiated>.

¹⁹ See Statement of Commissioner Rohit Chopra Regarding the Report to Congress on Protecting Older Consumers, Comm’n File No. P144400 (Oct. 19, 2020), <https://www.ftc.gov/public-statements/2020/10/statement-commissioner-rohit-chopra-regarding-report-congress-protecting>.

²⁰ Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act’s Penalty Offense Authority* (Oct. 29, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256. Particularly given challenges to the FTC’s 13(b) authority, incorporating a penalty offense strategy can safeguard the Commission’s ability to seek strong remedies against lawbreakers.

²¹ Press Release, Fed. Trade Comm’n, Statement of FTC Bureau of Competition Director Ian Conner on Peabody Energy Corporation and Arch Coal’s Abandonment of Their Proposed Joint Venture (Sep. 29, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/statement-ftc-bureau-competition-director-ian-conner-peabody>.

²² For example, the FTC ordered Kinder Morgan, one of the largest U.S. transporters of natural gas and other energy products, to divest pipelines and other assets to resolve charges that Kinder Morgan’s \$38 billion acquisition of El Paso Corporation would harm competition. Decision and Order, *In the Matter of Kinder Morgan, Inc.*, Comm’n File No. 121-0014, Docket No. C-4355 (June 12, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/06/120614kindermorgando.pdf>. See FTC Website, Oil and Gas Cases, for a complete listing of FTC competition enforcement matters and other activities in the energy industry. *Oil*

consumer protection issues on solar energy markets.²³ Given excessive energy burden on residential consumers, as well as the climate crisis, the FTC should target its enforcement and policymaking so that incumbents cannot use their power to overcharge families or choke off innovation.

Conclusion

The implementation of the portable air conditioning EnergyGuide labeling rule may seem small, but it will pay significant dividends. Given the burden of energy costs on American families and the increased desire by consumers to make choices that reduce carbon emissions, the Department of Energy should adhere to its Congressional mandate to increase energy efficiency on additional products. At the same time, the FTC can and must continue to build upon today's action by using all of its legal authorities to combat practices that harm consumers, distort competition, and undermine national goals on energy independence and climate change.

I want to thank public commenters for their input and all of the individuals who made this rule a reality.

and Gas, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/mergers-competition/oil-gas> (last visited on December 11, 2020).

²³ *Something New Under the Sun: Competition & Consumer Protection Issues in Solar Energy*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/events-calendar/2016/06/something-new-under-sun-competition-consumer-protection-issues>, (last visited on Dec. 10, 2020).