CORPORATE DISCLOSURE STATEMENT, RULE 26.1

The intervenor Massachusetts Union of Public Housing Tenants ("MUPHT") is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. MUPHT operates under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and, as it has no stock, no publicly held company owns 10% or more of its stock.

The intervenor Texas Ratepayers' Organization to Save Energy ("Texas ROSE") is a non-profit corporation organized under the laws of the State of Texas. Texas ROSE operates under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and, as it has no stock, no publicly held company owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

As allowed by FRAP 28(i), the Massachusetts Union of Public Housing Tenants ("MUPHT") and Texas Ratepayers' Organization to Save Energy ("Texas ROSE") adopt the Statement of Jurisdiction included in the brief filed by the Natural Resources Defense Council et al. ("Petitioners").[1]

Regarding their own standing, MUPHT and Texas ROSE note that this Court has already granted their motion to intervene as petitioners in this case. July 25, 2002 Order. As parties granted intervenor status, they need not demonstrate standing apart from the standing of the petitioners in these consolidated cases. *Diamond v. Charles*, 476 U.S. 54, 64, 67 (1986)(intervenors may "ride 'piggyback'" on other parties who have standing). To the extent MUPHT and Texas ROSE must independently demonstrate their organizational standing, they have done so through the affidavits submitted with their June 20, 2002 Motion to

[1] The petitioners are the Natural Resources Defense Council; Public Utility Law Project; Consumer Federation of America; and States of California, Connecticut, Maine, New Jersey, Nevada, New York and Vermont. On brief, they are joined by the intervenors State of New Hampshire, State of Rhode Island and Commonwealth of Massachusetts (collectively, Petitioners).

Intervene filed with this court. *See New York State National Organization for Women v. Patakai,* 261 F.3d 156, 163 (2nd Cir. 2001)(NOW has organizational standing to bring suit challenging failure of state agency to timely resolve discrimination complaints; organizational plaintiff has standing to sue on behalf of its members); *Texas Gray Panthers v. Thompson*, 139 F. Supp. 66, 71 (D.D.C. 2001)(plaintiff association, which represents the interests of low income seniors, has organizational standing to challenge agency failure to act, if it shows injury in fact; that injury is "fairly traceable to the defendant's conduct"; and that "injury will be redressed by a favorable decision").

The affidavits of John A. Cooper, for MUPHT, and of Carol Biedrzycki, for Texas ROSE, filed on June 20, 2002 with this Court establish that the actions of the Department of Energy ("DOE") to roll back the Seasonal Energy Efficiency Rating ("SEER") for residential central air conditions from SEER 13 to SEER 12[2] harmed consumers in general, and particularly harmed the many low income members of these two groups. Low income consumers, more than other consumers, benefit from more widespread availability and use of energy efficient air conditioners because they are less able to pay for the electric energy that runs

[2] See 67 Fed. Reg. 36368 - 36409 (May 23, 2002), SPA 205 - 246.

them.[3] The affidavits and record make it perfectly clear that the harm low income consumers will suffer is "fairly traceable to the defendant's [respondent DOE's] conduct," as DOE promulgated the rules in question. There is no question that a favorable decision invalidating DOE's rollback of the SEER 13 standard would remedy the injury identified in the MUPHT and Texas ROSE affidavits.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

MUPHT and Texas ROSE generally adopt the Issues Presented for Review in the brief of the Petitioners, but add one additional issue:

1. Did DOE violate the Administrative Procedure Act by failing to disclose, prior to final promulgation of the SEER 12 air conditioning efficiency standard at issue here, the key economic sources and formulae it primarily relied upon to conclude that previously-promulgated SEER 13 standard would harm low income consumers and should be withdrawn?

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[3] Because of their low incomes, poorer families spend a disproportionate share of their income meeting basic energy needs. See National Consumer Law Center, *Access to Utility Service*, § 7.1.1 (2nd Ed. 2001)(families receiving governmental income assistance spend 25% or more of their income on energy; average family spends three to five percent).

STATEMENT OF THE CASE

MUPHT and Texas ROSE adopt the Statement of the Case in the brief of the Petitioners, adding that MUPHT and Texas ROSE filed their Motion to Intervene on June 20, 2002, and that the Court granted the Motion on July 25, 2002.

STATEMENT OF FACTS

MUPHT and Texas ROSE generally adopt the Petitioners' Statement of Facts. However, they make some additional points below regarding: the context and purposes of the Energy and Policy Conservation Act; the interests of low income consumers in higher air conditioning efficiency standards, as those issues are particularly relevant to the intervenors MUPHT and Texas ROSE;[4] and the

[4] "MUPHT is the oldest statewide association of public housing tenants in the United States" and represents the interests of low income consumers in Massachusetts. Declaration of John A. Cooper in Support of Motion to Intervene (filed June 20, 2002). "Texas ROSE is a statewide non-profit membership organization dedicated to affordable electricity and a healthy environment for residential and low-income consumers." Declaration of Carol Biedrzycki in Support of Motion to Intervene (filed June 20, 2002).

context of DOE's decision to roll back the SEER 13 standard it formally promulgated as a Final Rule on January 22, 2001.[5] ("January 22 Final Rule").

1. EPCA AND OTHER ENERGY CONSERVATION LAWS AND POLICIES

Energy conservation has consistently been an important component of America's domestic and foreign policy since shortly after the Arab Oil Embargo of 1973.[6] In 1975, Congress, shocked by the oil embargo and its effect on the economy, adopted the Energy Policy and Conservation Act ("EPCA"), Pub. L. 94-163, 89 Stat. 871 (1975). Congress noted that "the nation has entered a new era in which energy resources previously abundant, will remain in short supply." H. Rep. No. 94-530, at 1, *reprinted in* 1994 U.S.C.C.A.N. 1763. For the first time, Congress established:

> regulatory programs to bring about measured savings in consumption of energy by improving the efficiency of the products we use . . . .

[5] See 66 Fed. Reg. 7170 - 7200 (Jan. 22, 2001), SPA 144 - 174.

[6] For an overview of the impact of the embargo on America's energy policy, see Energy Information Administration, *25th Anniversary of the 1973 Oil Embargo*, at http://www.eia.doe.gov/emeu/25opec (last modified Mar. 7, 2000).

Id. Congress was alarmed that over the prior two decades the country had slipped from being a significant "net exporter of energy supplies" to a significant importer, threatening the American economy and well-being of its citizens. H. Rep. No. 94-350, at 2-3, 1994 U.S.C.C.A.N., at 1764-1765.

In passing EPCA, Congress intended "to conserve energy supplies through energy conservation programs, and . . . to provide for improved energy efficiency of . . . major appliances . . . ." 42 U.S.C.A. § 6201(4), (5)(West 1995) . While these policies were first adopted more than twenty-five years ago in response to the Arab oil embargo and threat of future embargos, energy conservation remains at least as important today as the country draws closer to another war in the Middle East. The need to conserve energy, including through aggressive implementation of appliance efficiency standards, remains paramount.

The current Administration has publicly emphasized that conservation remains a high priority. Last year, the White House released its National Energy Policy, in a report from the National Energy Policy Group chaired by Vice-President Cheney. The White House, *Reliable, Affordable and Environmentally Sound Energy for America's Future* (May 2001), http://www.whitehouse.gov/energy ("*America's Future*"). As *America's Future* highlights at the outset, "America faces the most serious energy shortage since the

oil embargoes of the 1970s." *Id.* at viii ("Overview"). *America's Future* was written well before the events of September 11 and the country's heightened concerns over the security and reliability of energy supply from the Middle East, but it still notes that America's domestic energy consumption is increasing as supply is falling, and that this is "leaving us ever more reliant on foreign suppliers." *Id.* at x.[7] This is no time to retreat from energy conservation efforts, yet that is exactly what DOE has done, by rolling back the SEER 13 standard to SEER 12.

2. THE INTERESTS OF LOW INCOME CONSUMERS

In promulgating the January 22, 2001 Final Rule that included the SEER 13 standard, DOE concluded that it "will have a net benefit to the nation's consumers of $1 billion" over the period 2006, when manufacturers would first have to comply, through 2030. 66 Fed. Reg. 7171, SPA 145. In the January 22 Final Rule, DOE further noted, in response to comments that low income people could not

[7] *America's Future,* issued May 2001, includes a recommendation that "the President direct the Secretary of Energy to improve the energy efficiency of appliances." *Id.* at 4-11. Two months later, DOE formally withdraw the January 22 Final Rule, with its SEER 13 standard, and proposed a SEER 12 standard that will result in reducing the energy efficiency of central air conditioners. 66 Fed. Reg. 38822, 38830 (July 25, 2001), SPA 179, 187.

afford to purchase more efficient air conditioners, that it had "examined the impact on low income consumers, and found them to benefit overall." 66 Fed. Reg. 7175, SPA 149.

Throughout the DOE rulemaking proceedings, numerous parties submitted written comments and oral testimony on whether a SEER 13 standard would help or harm low income customers. Those that maintained SEER 13 was beneficial for low income consumers included federal and government agencies, consumer groups and environmental organizations.[8] See, for example, JA 6990 - 6997, B0006598 - B0006605 (Oct. 19, 2001 Letter and appended Comments of the Environmental Protection Agency: air conditioning use occurs during summer peak loads and therefore drives up costs for all consumers; low income consumers will benefit from lower electricity costs if air conditioners are more efficient; most low income households are renters and will not pay the capital costs of more efficient air conditioning); JA 7005 - 7024, B0006613 - 6632 (Oct. 19, 2001 Comments of New York and Massachusetts Attorneys General: SEER 13 will

[8] Notably, not a single low income or consumer group supported SEER12; all strongly supported SEER 13.

reduce electricity prices for all consumers because inefficient air conditioners increase usage on peak summer days; low income households are renters, do not purchase central air conditioners but will bear higher energy bills if SEER 13 is not adopted); JA 7035 - 70394, B0006643 - 6648 (Oct. 19, 2001Comments of the Alliance to Save Energy: a SEER standard lower than 13 will increase electricity prices for all consumers, including low income households that do not have air conditioning); JA 6432 - 6435, B0006078 - 6081 (Sept. 13, 2001 Comments of Northeast Energy Efficiency Partnerships: DOE's analysis ignores the fact that reducing air conditioning usage on peak summer days will lower overall electric rates, benefitting the millions of low income households who do not have air conditioning; low income renters who have central air conditioning do not pay the capital costs of central air conditioners yet reap the energy savings); JA 6438 - 6455, B0006084 - 6101 (Sept. 10, 2001 Comments of Texas ROSE: "low-income Texans have much to gain from raising the standard [to SEER 13] as quickly as possible"); JA 6772 - 6778, B0006380 -6386 (Oct. 2, 2001 Comments of four dozen consumer, health and environmental organizations and others: DOE's own estimates show that SEER 13 equipment will cost only $122 more than SEER 12; low income households will be harmed by roll back to SEER 12; SEER 12 units consume more energy); JA 6395 - 6396, B0006041 - 6042 (Sept. 13, 2001

Comments of Consumer Federation of America: the energy savings from SEER 13 unit will quickly pay back any increase in initial purchase cost); JA 6315 - 6318, B0005969 - 5972 (Comments of Environmental Ministries of California: low income households are disproportionately renters; if DOE does not move to SEER 13, landlords will purchase the less efficient units because capital costs are lower, yet tenants will bear the higher operating costs through their electric bills).

By contrast, those who asserted that SEER 13 would be harmful to low income households included air conditioning manufacturers, their trade association (the Air-Conditioning and Refrigerating Institute), and elected officials from states in which air conditioners are manufactured. The corporate and organizational parties who argued that SEER 13 would harm low income consumers simply do not represent the interests of low income people. Their true interest is in rolling back the SEER 13 standard that would have imposed higher costs on manufacturers and potentially cut into manufacturer profits.[9]

[9] In withdrawing the SEER 13 Final Rule and replacing it with a SEER 12 standard, DOE paid close heed to manufacturers' arguments regarding higher costs and profit impacts. 67 Fed. Reg. 36387 - 36389 (May 23, 2002), SPA 224 - 226.

Congress has long recognized that low income families have unique burdens in meeting their energy needs and that energy conservation is especially valuable to those who struggle to pay their bills. The homes and apartments in which low income families reside are less energy-efficient than the average dwelling, and, thus, there are programs apart from EPCA's appliance efficiency standards that focus on the energy conservation needs of low income families. In 1976, Congress adopted the Energy Conservation in Existing Buildings Act, Pub. L. 94-385, Title IV, 90 Stat. 1150 - 1158, codified at 42 U.S.C.A. §§ 6851 - 6873 (West 1995 & Supp. 2002) and created the federal weatherization program for low income families.[10] The law notes the connection between the "energy inefficient" homes in which low income people reside and "the Nation's [continued] dependence on imported energy supplies," 42 U.S.C.A. § 6861(a). Millions of low income families still live in poorly insulated and inefficient homes, making it harder and more expensive to keep these homes cool in warm weather.[11] Thus, low income people have more to gain than others from higher equipment efficiency standards.

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[10] DOE operates the low income weatherization program. 42 U.S.C.A. §§ 6862(1), 6863(a).

[11] See October 18, 2001 Letter of Emily Achtenberg, JA 6848 - 6849, B0006456 - 6457 (low income people tend to live in older, poorly insulated homes and will therefore reap larger than average savings from use of more efficient air conditioners).

JA 6783 - 6785, B0006391 - 6393 (Oct. 18, 2001 Comments of Consumer Federation of America). Raising air conditioning efficiency standards is not only required by EPCA , 42 U.S.C.A. § 6295(o), but consistent with the federal weatherization program's goal of helping low income families meet their energy needs.

3. DOE'S ROLLBACK OF THE SEER 13 STANDARD

As noted above, on January 22, 2001, DOE formally promulgated and published in the federal register a "Final Rule" that included "revised energy conservation standards for central air conditions and heat pumps." 66 Fed. Reg. 7170, SPA 146. The Final Rule "essentially raise[d] the energy efficiency standards to SEER 13 for new central air conditioners." *Id.* The air conditioning efficiency standard had not been revised since nine years earlier, in 1992, and DOE had been looking at making revisions for more than seven years, starting with the release of an Advance Notice of Proposed Rulemaking on September 8, 1993. 66 Fed. Reg. 7172 (Jan. 22, 2002), SPA 148. The January 22 Final Rule was the result of careful and lengthy deliberation, and relied upon extensive comments, submissions and analysis from a broad range of interested parties. All parties, including air conditioning manufacturers and their trade association, had an ample

opportunity to present their views to DOE. 66 Fed. Reg. 7172, 7174 - 7184 (Jan. 22, 2001), SPA 146, 148 - 158. ("Background" of proceeding and "Discussion of Comments").

The stated effective date for the Final Rule was February 21, 2001. Nowhere in the thirty pages of the Federal Register in which DOE discussed this Final Rule did it suggest or imply that the new SEER 13 standard was subject to delay, revision or withdrawal in the time between when it was published in the Federal Register and when it would become effective. DOE did not intend that the one-month delay in the Final Rule taking effect would allow it to reconsider any of the legal or factual issues relating to promulgation of the SEER 13 standard, but rather the delay was intended to comply with the requirements of 5 U.S.C.A. § 553(d)(West 1996)(the "required publication or service of a substantive rule shall

be made not less than 30 days before its effective date . . . .")[12]

Thus, there is little doubt that the SEER 13 "energy efficiency standards"(66 Fed. Reg. 7170, SPA 146) were meant by DOE to be the type of "standard" referred to in 42 U.S.C.A. 6295(o), that is, a standard that cannot be amended "to increase the maximum allowable energy use . . . of a covered product." *Id.* As of

[12] While MUPHT and Texas ROSE rely on and adopt the legal arguments of the Petitioners that DOE's repeated delay of the effective date of the January 22, 2001 Final Rule violated various provisions of the Administrative Procedure Act, 5 U.S.C.A. §§ 551- 559, 701 -706, and do not make any separate legal argument on this point, they note that this and other circuits have found that the minimum 30-day period under § 553(d) is not meant to allow agencies to revisit formally promulgated rules and delay or withdraw them, but only intended to "give affected parties time to adjust their behavior before the final rule takes effect." *Cal-Almond, Inc. v. United States Dep't of Agriculture*, 14 F.3d 429, 442 (9th Cir. 1993), citing *Riverhead Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir.), *cert. denied* 506 U.S. 999 (1992); see also *National Ass'n of Indep. Television Producers and Distributors v. FCC*, 502 F.2d 249 (2nd Cir. 1974)(30-day period meant to provide parties with reasonable time to comply).

January 22, 2001, it appeared that DOE had finally brought closure to a seven-year process to adopt a new air conditioning standard and belatedly complied with the mandate of 42 U.S.C.A . § 6295(d)(3)(A)(West 1995)(DOE to adopt new standard "no later than January 1, 1994").

But in January 2001 a new Administration took office. On January 24, 2001, two days after DOE published the SEER 13 Final Rule, the newly-designated Assistant to the President and Chief of Staff Andrew H. Card, Jr. issued a "Memorandum for the Heads and Acting Heads of Executive Departments and Agencies" which, *inter alia*, instructed those agencies as follows:

> With respect to regulations that have been published in the OFR [sic - "Federal Register"] but have not taken effect, temporarily postpone the effective date of the regulations for 60 days . . . .

66 Fed. Reg. 7702 (Jan. 24, 2001), SPA 175. On its face, the Chief of Staff's Memorandum excluded "any regulations promulgated pursuant to statutory . . . deadlines." *Id.* Nothing in the Memorandum suggests that the Chief of Staff intended it to apply to the January 22, 2002 Final Rule regarding SEER 13. To the contrary, the just-quoted exclusion clearly applies to the January 22 Final Rule because it was promulgated pursuant to the statutory deadline imposed by 42 U.S.C.A. § 6295(d)(3)(A)("The Secretary shall publish a final rule no later than January 1, 1994 to determine whether the standards [previously set under §

6295(d)(1)] . . . should be amended.").[13]

DOE, however, interpreted the Chief of Staff's Memorandum as a mandate to delay the effective date of the January 22 Final Rule. 66 Fed. Reg. 8745 (Feb. 2, 2001), SPA 176, B0005554 ("Final Rule; postponement of effective date and reconsideration"). Before promulgating the January 22 Final Rule, DOE was under political pressure from elected officials in states where air conditioners are manufactured not to promulgate a SEER 13 standard; afterwards, it was under similar pressure to roll the standard back to SEER 12. JA 5524 - 5525, B0004844 - 4845 (December 22, 2000 Letter of Tom Harkin, noting impact on "our manufacturers" in Iowa); JA 5720 - 5721, B0005552 - 5553 (Jan. 29, 2001 Letter of Senators Cochrane, Grassley, and Lott, noting impact on manufacturers and urging DOE to "discuss this rule with the Air Conditioning and Refrigeration Institute," the industry's trade association and lobbying arm); JA 5535 - 5536, B0004855 - 4856 (January 4, 2001 Letter of Sen. Thad Cochrane, noting the impact on "our manufacturers" in Mississippi); JA 5537, B0004857 (January 4,

[13] While DOE was seven years late in complying with this statutory mandate, that does not vitiate the fact that DOE's rule was promulgated pursuant to a statutory deadline.

2001 Letter of Rep. Bennie Thompson, noting "negative impact" on a manufacturer located in Grenada, Mississippi). These highly similar and obviously orchestrated letters had their impact once a new Secretary of Energy was appointed. Shortly after the Chief of Staff's Memorandum was issued, DOE delayed the effective date of the January 22 Final Rule (66 Fed. Reg. 8745 (Feb. 2, 2001), SPA 176, B0005554). Ultimately, DOE proposed withdrawing the SEER 13 Final Rule, 66 Fed. Reg. 38822 (July 25, 2001), SPA 179 and adopted a SEER 12 standard. 67 Fed. Reg. 36368 (May 23, 2002), SPA 205. Clearly, DOE responded to the Chief of Staff's Memorandum and the influence of elected officials. As argued below, however, DOE's decision to roll back the SEER 13 standard violated the Administrative Procedure Act, especially to the extent that DOE relied on the purported finding that SEER 13 would harm low income consumers.

SUMMARY OF ARGUMENT

On January 22, 2001, DOE formally promulgated a Final Rule adopting a SEER 13 efficiency standard for central air conditioners, updating and revising the pre-existing SEER 10 standard originally adopted almost a decade earlier. By promulgating the SEER 13 standard, DOE mandated that central air conditioners become more energy efficient by 30%. As part of the comment on the January 22 Final Rule, DOE specifically found that low income households would "benefit overall" from a SEER 13 standard.

On July 25, 2001, DOE proposed withdrawing the formally promulgated and final SEER 13 standard. It also proposed adopting a lower, less energy-efficient SEER 12 standard. After extensive proceedings that allowed for oral comments and written submissions, DOE on May 23, 2002 formally withdrew SEER 13 and finally adopted SEER 12. Both in its comments on the July 25 proposed rule and the May 23 final rule, DOE substantially relied on alleged harmful impacts on low income people for completely reversing its prior position. Such a reversal of agency position, occurring concomitantly with a change in Administration, renders the agency's action suspect under the Administrative Procedure Act ("APA"). DOE's new-found position that SEER 13 would hurt low income families was little more than a pretext.

In response DOE's July 25, 2001 notice that it proposed to withdraw SEER 13 and adopt SEER 12, consumer and low income groups, government agencies, a major air conditioning manufacturer and others submitted extensive and consistent comments and analyses demonstrating that SEER 13 would benefit low income households. However, in the comments to the May 23, 2002 Final Rule, DOE re-affirmed its position that SEER 13 would harm low income households. DOE illegally relied upon, mis-cited and misapplied certain economic literature that it disclosed for the first time in its discussion of the May 23 Final Rule. By failing to reference or disclose these economic source materials prior to publication of the May 23 Final Rule, DOE greatly prejudiced the rights of the public and the commenting parties who supported SEER 13. While the scope of review of agency rulemaking is generally narrow, in this case DOE's rulemaking proceedings violated the APA.

The administrative record developed prior to May 23, 2002 fully and overwhelmingly supported DOE's original promulgation of the SEER 13 standard. In order to rebut this record and justify its withdrawal of the SEER 13 standard, DOE relied on extra-record material which it did not disclose at any point during the process of reviewing and revising the pre-existing SEER 10 standard. Only with publication of the May 23, 2002 Final Rule did DOE let the public and

commenting parties know that it was relying on economic literature from which it concluded, erroneously, that SEER 13 would allegedly impact the cost of low income rental housing and, thus, allegedly not benefit low income households. DOE has no agency expertise in issues regarding the cost of low income rental housing and its belatedly-adopted views on this issue should be given no deference as a matter of law. DOE's last-minute efforts to find justification for its reversal of position on SEER 13 violate fundamental rules of agency openness and fairness, substantially prejudiced the rights of parties supporting SEER 13, and must be struck down as violating the APA.

ARGUMENT

I. DOE VIOLATED THE APA IN BASING THE MAY 23 FINAL RULE ON A FINDING THAT LOW INCOME CONSUMERS WOULD BE DISPROPORTIONATELY HARMED BY ADOPTION OF SEER 13

A. Standard of Review[14]

On July 25, 2001, when DOE announced that it was proposing to withdraw

[14] MUPHT and Texas ROSE generally adopt the Petitioners' discussion of the standard of review applicable to claims under the Administrative Procedure Act, but add some additional points herein.

the January 22 Final Rule adopting SEER 13, it noted for the first time its concern about "the disparity in impacts [of SEER 13] between low-income and typical consumers." DOE believed that "increases in first cost" that arise from "more stringent efficiency standards" are "felt more sharply by lower income consumers." "Supplemental proposed rule; proposed withdrawal of final rule," 66 Fed. Reg.38828, SPA 185 (July 25, 2001)("July 25 Proposed Rule"). DOE completely reversed its earlier finding that "low income consumers [will] . . . benefit overall" from adoption of SEER 13. Such a reversal should cause this Court to more carefully scrutinize the overall validity of the SEER 12 standard than would otherwise be the case. *See, e.g., Motor Vehicle Manufacturers Ass'n of the U.S., Inc. v. State Farm Mutual Ins. Co.,* 463 U.S. 29, 42 (1983)("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis beyond that which may be required when an agency does not act in the first instance.")

On May 23, 2002, when DOE formally withdrew the January 22 (SEER 13) Final Rule and adopted the SEER 12 standard, DOE again voiced its concern about low income consumers, offering this concern as one of the primary reasons for withdrawing SEER 13:

> As explained in the July 25 SNOPR (66 FR 38828) DOE believed that in issuing the January 22 Final Rule, the previous Administration had given inadequate consideration to the fraction of consumers, and especially low income consumers, who would incur significant increases in life cycle cost

as a result of the SEER 13 standard.

May 23 Final Rule, 67 Fed. Reg. 36376, SPA 213 ("Basis for DOE's Decision to Withdraw the January 22, 2001 Final Rule" - "Policy Issues").

MUPHT and Texas ROSE argue below that DOE's belatedly-voiced concern about low income consumers is nothing more than a pretext for the fact that a new Administration was much more receptive to the arguments of the air conditioning industry but constrained by 42 U.S.C.A. § 6295(o)(1)(the "anti-backsliding" provision) in its ability to withdraw the SEER 13 standard. The current DOE was grasping for arguments it could use for rolling back SEER 13, without violating § 6295(o)(1). From the current DOE's perspective, appearing to champion the interests of low income consumers was an attractive basis for rolling back the SEER 13 standard. However, as argued below, DOE's belated reversal regarding low income impacts runs contrary to the overwhelming evidence before the agency. Rather, DOE's newly-adopted position on low income impacts is based on technical data that was outside the record, not disclosed to the public or commenting parties, generally not accessible to the public, and not in fact supportive of its conclusions.[15] Thus, DOE's actions were

[15] DOE's reversal of its conclusions about low income impacts and its penchant to ignore extensive record evidence contrary to its pre-ordained decision to roll back the SEER 13 standard are part of a larger pattern of APA violations

highly prejudicial to the proponents of SEER 13 and to the integrity of the administrative process. DOE's conclusions about the impacts of SEER 12 and SEER 13 on low income people violated the APA.

> The Administrative Procedure Act ("APA"), requires agencies, *inter alia*:
>
> to give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments, with or without opportunity for oral presentation.

5 U.S.C.A. § 553(c)(West 1996). The APA then provides:

> After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

Id. These two provisions require agencies to disclose key data and assumptions relied upon in proposing and adopting a rule, so that parties may have a fair opportunity to "participate in the rule making," *see, e.g., United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 249 (2nd Cir. 1977)("the failure to disclose to interested persons the factual material upon which the agency was relying vitiates the element of fairness which is essential to any kind of administrative action"), and to offer a basis for a final rule that is not contrary to

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addressed more fully in Petitioners' brief. MUPHT/Texas ROSE adopt those arguments here.

the record, *Sierra Club v. U.S. Army Corps of Engineers*, 772 F.2d 1043, 1051 (2nd Cir. 1975)("an agency's action is held to be arbitrary and capricious when it . . . offers an explanation contrary to the evidence before it")("*Sierra Club*").

As is so often noted in connection with court challenges of agency rulemaking , "the scope of judicial review is narrow." *Reyblatt v. U. S. Nuclear Regulatory Commission*, 105 F.3d 715, 722 (D.C. Cir. 1997). However, agency action will be held to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C.A. § 706(2)(A)(West. 1996), where it can be shown, as it will be below, that the agency relied on studies and data that "were not disclosed throughout the proceeding," thus preventing parties "from making relevant comment" and interfering with the statutory mandate for the agency "to take into account all relevant factors in making its determination." *National Black Media Coalition v. FCC*, 791 F. 2d 1016, 1023 - 1024 (2nd Cir. 1986); *accord, United States v. Nova Scotia Food Products Corp.*, 568 F.2d 1977 (2nd Cir. 1977). Agency rulemaking action will also be held to violate the APA when it is contrary to the record, *Sierra Club, supra,* and based on pretext. The fact that a new Administration has taken office is not sufficient grounds for reversing prior agency positions or making findings contrary to the agency record. *See, e.g., Motor Vehicle Manufacturers Ass'n of the U.S., Inc. v. State Farm Mutual Ins. Co.*, 463

U.S. 29, 59, n. * (1983)(Rehnquist, J., concurring)("new administration may not choose not to enforce laws of which it does not approve")("*State Farm*").

B. DOE Violated the APA by Making a Decision Contrary to the Record Before It and By Relying on Inapposite, Extra-Record Sources Which It Failed to Disclose to Parties.

In promulgating the SEER 12 standard on May 23, 2002 (67 Fed. Reg. 36368, SPA 205 ("May 23 Final Rule")), DOE focused its discussion of the "Impact of Consumers" primarily on the impact on low income consumers. 67 Fed. Reg. 36379 - 81, SPA 216 - 218. The current DOE apparently does not question that the majority of consumers would derive substantial benefits from the SEER 13 standard previously promulgated in the January 22 Final Rule. See July 25 Proposed Rule, 66 Fed. Reg. 38828, SPA 185 (61 percent of consumers would benefit from a SEER 13 standard). DOE instead relies on the canard that low income people will be disproportionately harmed by the adoption of SEER 13, as a pretext to roll the standard back to SEER 12.[16] MUPHT, whose members solely consist of low income persons; Texas ROSE, an organization consisting of a

[16] MUPHT and Texas ROSE adopt the arguments of the Petitioners that this rollback violates the so-called "anti-backsliding" provisions of EPCA, 42 U.S.C.A. § 6295(o)(1).

broad income range of members that represents low income interests;[17] and numerous other parties submitted written and oral comments to DOE demonstrating that low income people would benefit from the adoption of SEER 13. Several commenters further testified that low income consumers could benefit more than the typical consumer, due to the fact that low income households rarely incur the initial capital cost of central air conditioning but reap the energy savings if they live in dwellings where central air conditioning has been previously installed. Additional commenters, including the Environmental Protection Agency (JA 6995 - 6996, B0006603 - 66044) further pointed out that wider use of more efficient air conditioners will reduce usage on peak summer days and thus reduce electricity prices for all customers, even those, like many low income households, who do not have central air conditioners in their homes. MUPHT and Texas ROSE summarize the record evidence demonstrating that low income consumers would benefit from SEER 13 in heading B.1, *infra.*

[17] See Declarations of John A. Cooper and Carol Biedrzycki filed June 20, 2002 with this Court.

To rebut this evidence, DOE did not rely on anything in the record. Rather, in the May 23 Final Rule, after the record had closed, DOE relied upon (and, in one case, mis-cited) four economics sources which had not been mentioned by any party during the many years of proceedings before the agency. One of the sources is either seriously mis-cited or does not exist.[18] A second source has nothing to do with the impacts on low income housing costs of more efficient air conditioners,

[18] See 67 Fed. Reg. 36380, SPA 217, n. 11 ("Footnote 11"). DOE refers to "Pindykck, R. and D. Rubinfeld, Microeconomic Theory, 2001." "Pindykck" is misspelled; Robert S. "Pindyck" of the Massachusetts Institute of Technology is the author of many economics treatises, but there is no publication authored by him with the title "Microeconomic Theory" listed in the 2001/2002 edition of Books in Print. Nor is there a book with this author and title that can be located at any of the thousands of major university and other libraries whose electronic catalogs are accessible via most research libaries. There are many treatises entitled "Microeconomic Theory," but none by Pindyck.

despite DOE's references to it.[19] Two other source are, respectively, thirty and twenty years old; highly inaccessible to the public; and, in large part, inapposite.[20]

In light of the record demonstrating that SEER 13 would not harm low income households, and the extra-record nature and questionable relevance of the sources DOE relied on to rebut this record, DOE's decision to base its roll back of the SEER 13 standard on adverse low income impacts was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," within the meaning of 5 U.S.C.A. § 706(2), as detailed below. This Court should set aside the SEER 12 standard in the May 23 Final Rule and declare that the SEER 13 standard in the January 22 Final Rule is valid.

1. The Record Fully Supports the Adoption of SEER 13 As Benefitting Low Income Consumers

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[19] See SPA 217, Footnote 11. DOE correctly cited "Microeconomics" as a treatise authored by "Pindykck" [sic - "Pindyck"], but the treatise does not address issues germane to DOE's rulemaking. See discussion, B.1, *infra.*

[20] See SPA 217, Footnote 11, the references to "The Supply of Rental Housing" (1971) and "The Determinants of Housing Demand" (1982).

DOE properly noted in its discussion of the May 23 Final Rule that numerous parties, including the intervenors MUPHT and Texas ROSE, various states and state agencies, recognized energy efficiency experts, a major utility company, and a major manufacturer of air conditioners, all testified that SEER 13 would not harm low income consumers. May 23 Final Rule, 67 Fed. Reg. 36380, SPA 217.[21]

[21] The comments referenced by DOE came from the American Council for an Energy Efficient Economy ("ACEEE"), JA 7059 - 7073, B0006667 - 6681; the Appliance Awareness Standards Project ("ASAP"), JA 6772 - 6780, B006380 - 6388; Austin Energy, a municipal utility, JA 6769 - 6771, B0006377 - 6379; Consumer Federation of America ("CFA"), JA 6395 - 6396, B0006041 - 6042; JA 6783 - 6785, B0006391 - 6393; Northeast Energy Efficiency Partnerships, JA 6432

- 6435, B0006078 - 6081; State of Vermont, JA 6944 - 6948, B0006552 - 6556; Goodman Global Holdings, the nation's second largest air conditioning manufacturer, JA 6414 - 6416, B0006060 - 6062; JA 6959 - 6963, B0006567 - 6958; the Alliance to Save Energy ("ASE"), JA 7035 - 7040, B0006643 - 6648; California Energy Commission, JA 6940 - 6941, B0006548 - 6549; Natural Resources Defense Council ("NRDC"), JA 6425 - 6431, B0006071 - 6077, JA 6798 - 6830, B0006406 - 6438; Environmental Ministries of Southern California, JA 6315 - 6318, B0005969 - 5972; Texas ROSE, JA 6438 - 6455, B0006084 - 6101, JA 6858 - 6859, B0006466 - 6467; National Consumer Law Center/MUPHT, JA 6417 - 6421, B0006063 - 6067, JA 6844 - 6855, B0006452 - 6463; National Grid, JA 6422 - 6424, B0006068 - 6070; Texas Natural Resource Commission, JA 6462 - 6474, B0006108 - 6120; the Environmental Protection Agency ("EPA"), JA 6990 - 6997, B0006598 - 6605, and two other parties.

This broad range of parties consistently made five key points in support of SEER 13 and its beneficial impact on low income consumers. DOE itself agreed with some of these points, but not others, as discussed below. Its disagreements, however, are founded on extra-record documents that result in substantive violations of the APA, as argued in B. 2., *infra.*

First, low income households are disproportionately renters, not owners, and thus do not incur the capital costs of installing central air conditioning. Only landlords pay for the costs of installing central air conditioning in rental units. Thus, low income households actually bear less of the "first cost" (July 25 Proposed Rule, 66 Fed. Reg. 38828, col. 2, SPA 185) burden of moving to SEER 13 than non-low income consumers. Parties variously made this point as follows:

> The majority of low-income households rent their homes, far more frequently than non-low-income households. Nationally, 67% of all households in America own their homes. Yet homeownership rates among non-white households, which have much lower incomes, are around 45%, 20 points below the overall rate of ownership.
>
> To choose Massachusetts as one example where income-stratified ownership characteristics are readily available, only 59% of all households own their own homes, somewhat less than the national rate. But among households earning less than 30% of median income, the home ownership rate plummets to 28%.

National Consumer Law Center Comments on behalf of MUPHT (Oct. 2, 2001), JA 6417 - 6418, B0006063 - 6064.

The federal Environmental Protection Agency in its October 10, 2001 comments (JA 6996, B0006604)("EPA Comments") similarly noted:

> Also related to distributional equities and according to the RECS [Residential Energy Consumption Survey] data, among households below the poverty level, about 60% rent their housing units. This is in contrast to 27% of above poverty level households that rent (See Exhibit 2). Therefore, low-income consumers, or those defined as "poor" in TSD [Technical Support Document] Table 10.1, are not the ones to buy a central A/C or heat pump product, but they would be the one [sic] to pay the electric bill (or likely face increased rents if utilities were included in the rent) for the use of that product. Instituting a higher minimum efficiency standard will actually ensure that low-income consumers have lower utility bills, providing a benefit to this population.

Related to this point that low income households rarely buy central air conditioning, National Grid, the largest utility in New England, noted:

> [I]t is rare for low-income consumers [in New England] to have either central air conditioning or heat pump systems . . . .Since low-income consumers typically do not have the equipment in question, additional burdens will not be created . . . . We therefore disagree with the DOE [about the negative impact on low income consumers] . . . . We feel those effects will be negligible.

JA 6422 - 6423, B0006068 - 6069; see also EPA Comments, JA 7000, B0006608 (46% of all households, but only 25% of low income households, have central air conditioning, based on DOE's RECS data).

Texas ROSE's Executive Director Carol Biedrzycki, who has three decades of experience in energy conservation and working with low income families, testified that 60% of low income Texans rent their homes, and that even those who

are "[l]ow-income homeowners have little or no disposable income to purchase new, central air conditioning units." JA 6450, B0006096 (Sept. 10, 2001 Comments).

DOE essentially agrees with this first point, acknowledging that "roughly half of low income households are renters."[22] 67 Fed. Reg. 36380, SPA 217. It no longer asserts, as it did in the July 25 Proposed Rule, that low income families will be unduly burdened by bearing the "first cost" of air conditioning units produced under a SEER 13 standard. DOE implicitly concedes that low income consumers are less likely to bear "first cost" (SPA 185) of central air conditioning than other consumers. Instead, DOE prejudicially and illegally relies on extra-record sources to conclude that landlords will fully pass on to their tenants the incremental cost of more efficient air conditioners, as discussed more fully in B.2, *infra.*

[22] DOE drew this conclusion from the fact that "49.8 percent of low-income households with central air conditioning or heat pumps are renters." 67 Fed. Reg. 36380, SPA 217. However, this is a skewed sample since central air conditioning is far more prevalent among owners than renters. The percentage of low-income people who rent, rather than own, is higher, closer to the 60% figure attested to by EPA, Texas ROSE, and MUPHT.

The second point the SEER 13 proponents made was that landlords will not or cannot pass through to their tenants the slightly higher initial purchase costs of SEER 13 units. The cost difference of moving from the current SEER 10 standard to SEER 13 is $335, spread over the 18 year useful life of the units. 66 Fed. Reg. 7171, SPA 145, “Estimated Price Increase" of $335 for "Split system air conditioner."[23] The cost of moving to SEER 12 from the current SEER 10 standard is $213, again spread out over the 18 year useful life of the units. 67 Fed. Reg. 36377, SPA 214, “Estimated Price Increase” of $213 for “Split system air conditioner.” Thus, the cost difference per household of DOE’s initial position of adopting SEER 13 (January 22 Final Rule) and its rollback position of adopting SEER 12 (May 23 Final Rule) is only $122 ($335 - $213). Considering that the typical unit lasts 18.4 years (SPA 145, 214), this incremental cost is almost trivial.

To address the question of whether landlords will choose to or be able to pass this cost through to tenants, MUPHT submitted the expert opinion of Emily P. Achtenberg, a “housing consultant with more than 30 years’ experience in affordable housing preservation and development.” As Ms. Achtenberg noted, she has:

assisted non-profit, resident, and government organizations in acquiring and

[23] All parties agree that this is the most common system installed.

> preserving more than 3,000 affordable units threatened with expiring use restrictions and/or subsidy contracts. In this capacity I am extremely familiar with the costs of developing and operating housing for low income families and individuals.

Achtenberg letter, JA 6848, B0006456. In offering her opinion on "whether an increase in the SEER central air conditioning standard from SEER 10 to SEER 13 would have an impact on housing costs for low income people," Ms. Achtenberg accepted without question that the SEER 13 units would cost approximately $340 more than SEER 10 units. *Id.*[24] Ms. Achtenberg concluded that:

> moving from SEER 10 to SEER 13 will have no measurable, detrimental impact on housing costs for low income people and could benefit low income households if savings in operating costs are considered . . . . Such a small cost [e.g., the higher cost of SEER 13 units] is unlikely to affect rents in any market.

[24] There was extensive evidence in the DOE record that DOE had previously over-estimated the cost of increasing the SEER standard, and that its current estimate was similarly overstated. MUPHT and Texas ROSE adopt the Petitioners' arguments on this issue of capital costs. However, to be conservative in her opinion, Ms. Achtenberg simply accepted DOE's estimate.

JA 6849, B0006457. No other party, on either side of the SEER 12/SEER 13 debate, offered expert opinion on the ability of landlords to pass through incremental air conditioning capital costs to tenants.[25] Only after the record had long closed in this case and only when it actually published the May 23 Final Rule did DOE attempt to rebut this point by relying on various economic sources that were are inapposite and, in part, mis-cited. 67 Fed. Reg. 36380, n. 11, SPA 217. As DOE has no expertise in housing policy or the factors that impact housing costs, its late-voiced opinions should be given no weight. *See, e.g. Murphy Exploration and Production Co. v. U.S. Dep't of the Interior*, 252 F.3d 473, 480 (D.C.Cir. 2001) (See argument B.2, *infra.*)

Third, the record demonstrates that low income households, whether renters or owners, reap direct, economic benefits of increasing the SEER standard. Those who actually own or use air conditioners will consume less energy and have lower utility bills. DOE does not question this, and in fact itself assumes significant

[25] However, other parties agreed with Ms. Achtenberg's conclusion. See, for example, September 13, 2001 Comments of NRDC, JA 6434, B0006080 ("many low income consumers are renters in areas where rental rates have little if anything to do with the cost of providing housing").

"Annual Utility Bill Savings" that more than pay back any higher costs of purchasing more efficient equipment. 67 Fed. Reg. 36377, SPA 214, Table 2, "Implications of the New Standards for the Average Consumer" (a SEER 12 "Split system air conditioner" has "Annual Utility Bill Savings" of $31 per year, thus paying back the higher "Estimated [purchase cost] Price Increase" of $213 in 7 years, well before the unit's 18.4 year useful life expires); 66 Fed. Reg. 7171, SPA 145, Table 1.2, "Implications of the New Standards for the Average Consumer" (a SEER 13 "Split system air conditioner" has "Annual Utility Bill Savings" of $42 per year, thus paying back the higher "Estimated [purchase cost] Price Increase" of $335 in 8 years, well before the unit's 18.4 year useful life expires). Overall, the energy savings of both SEER 12 and SEER 13 units make economic sense, as the long-term savings outweigh the costs.

Fourth, the record shows that to the extent that low income households purchase or use central air conditioning, this occurs almost exclusively in warm states where DOE's own analysis shows SEER 13 makes sense, due to much higher use of air conditioning and, therefore, much higher annual utility bill savings. National Grid, the New England based utility, made the point that low income people in colder states very rarely have central air conditioning, due to their limited incomes, the high cost of purchasing such units, and the limited usage

of air conditioning in cool climates. September 13, 2001 Comments, JA 6422 - 6423, B0006068 - 6069. See also September 13, 2001 Comments of Consumer Federation of America, JA 6396, B0006042 ("those [low income families] that have central air are more likely to live in very warm summer climates where air conditioning is virtually a necessity"); September 10, 2001 Comments of Texas ROSE, JA 6450, B0006096 (even in Texas, low income households "comprise a very small share of the market for central air conditioning units . . . [m]any low income Texans have no air conditioning"). Again, DOE does not fundamentally disagree with this point.

Fifth, commenters emphasized that rolling back the SEER 13 standard to SEER 12 actually hurts low income renters, who comprise approximately 60% of all low income households (JA 6996, B0006604).[26] Renters face the problem that their landlords have every incentive to purchase less expensive, less efficient units, saddling the tenants with higher annual electric bills, year and year out for the 15 to 20 year useful life of the units. Only government regulatory action can address the disincentives landlords have to investing in energy-efficient units. October 19, 2001 Comments of the New York and Massachusetts Attorneys General, JA 7021,

[26] See also JA 6962, B0006570 ("The Census Bureau has determined that most low income families with central air conditioning rent their homes.")

B0006629 ("This is a particularly acute problem in large urban areas . . . where many residents live in multi-family housing"); October 18, 2001 Comments of Consumer Federation of America, JA 6784, B0006392 ("In the case of rental housing, it is likely that landlords will underinvest when it comes to installing a new air conditioner and choose the least expensive and less efficient model.") Again, DOE did not rebut or disagree with this point.

Given these several arguments, the extensive record supporting these arguments, and DOE's limited disagreement, the current DOE should have found, as the prior DOE had found, that low income consumers would "benefit overall" from SEER 13. January 22 Final Rule (66 Fed. Reg. 7175, col. 1), SPA 150. However, it instead largely based its decision to withdraw the SEER 13 standard and adopt the SEER 12 standard on the negative impacts on low income households. 67 Fed. Reg. 36376, 36380 (May 23, 2002), SPA 213, 217. DOE's decisions violated the APA.

2. There is No Adequate Record Support for DOE's Conclusion That SEER 13 Disproportionately Harms Low Income Consumers, and Its Conclusions Violate the APA

In the May 23 Final Rule, DOE references virtually all of the comments MUPHT and Texas ROSE cite above in support of the SEER 13 standard. 67 Fed. Reg. 36380, SPA 217. DOE also references contrary comments that urged DOE to

consider the adverse impacts on low income consumers. *Id.*, citing comments of York International, Trane Company, Rheem Manufacturing, Carrier Corporation, ARI, Southern Company, Edison Electric Institute, and the Mercatus Center. The first four of these commenters are major air conditioning manufacturers, while the fifth (ARI) is the industry's trade association and lobbying arm. It would be "arbitrary" and "capricious" (5 U.S.C.A. § 706(2)(a)) for DOE to give much weight to these comments, as they come from parties who are not concerned about the interests of low income consumers, but with the regulatory burdens and cost impacts that a SEER 13 standard would impose. See 67 Fed. Reg. 36386 (May 23, 2002), SPA 223 (discussion of "Impact on Manufacturers," including "Cumulative Regulatory Burden" and "Financial Burden"). In fact, DOE appears to have given these comments little weight in determining the impact on "Low Income Consumers," 67 Fed. Reg. 36380, SPA 217. Similarly, the comments of Southern Company, a major electric utility, Edison Electric Institute, a utility industry trade association, and Mercatus Center, a promoter of free markets, should be and apparently were given little weight.

In the May 23 Final Rule, DOE for the first time in its nine-year effort to revise the air conditioning efficiency standard:

> examined existing literature on the economics of rental markets to determine whether any previous analyses might help resolve the disagreements on this

issue [of low income burdens and benefits].

67 Fed. Reg. 36380, SPA 217. This statement is notable for several reasons. First, it clearly acknowledges that the advocates of SEER 13 had raised serious issues that the DOE had to "resolve." Agencies are required "to respond in a reasoned manner to those [comments] that raise significant problems." *Reyblatt v. U. S. Nuclear Regulatory Commission*, 105 F.3d 715, 722 (D.C. Cir. 1997). Second, the statement acknowledges that DOE was for the first time considering economics literature that it had not mentioned in the proceeding before and that other parties had not brought forward. Third, the statement demonstrates that DOE "resolved" the disagreements by resort to the literature of housing economics, an area far afield from DOE's expertise. As such, its conclusions should be given little deference by this Court. *See, e.g., Murphy Exploration and Production Co. v. United States Dep't of the Interior*, 252 F.3d 473, 480 (D.C.Cir. 2001)("if an agency has promulgated a regulation outside the scope of its specialized knowledge, courts will not defer to it"; noting the "general principle that an agency's regulations deserve no deference where they proceed neither from a congressional delegation nor from agency expertise")("*Murphy*").

DOE then cites four economics sources:

> Pindykck, R. and D. Rubinfeld, Microeconomic Theory, 2001 . . . Pindykck, R. and D. Rubinfeld, Microeconomics, 2001 Prentice Hall (citing de Leeuw,

> F. and N. Ekanen, "The Supply of Rental Housing," AER Vol. 61, 1971, pp. 806 - 817) . . . [and] Hanushek, E.A. and J.M. Quigley, "The Determinants of Housing Demand" , Research in Urban Economics, Vol. 2, 1982, pp. 221-242.

67 Fed. Reg. 36380, SPA 217, n. 11 ("Footnote 11"). There are several legal and factual flaws with DOE's critical reliance on these sources for reaching the conclusions that landlords will pass the higher costs of SEER 13 through to their tenants and that SEER 13 should therefore be withdrawn and replaced with SEER12.

Legally, the APA does not allow an agency free license, *ex post facto*, to draw on any realm of social science literature, especially literature outside the realm of the agency's expertise, in order to justify the agency's rulemaking decisions. Courts have voided agency decisions that rely on previously undisclosed information, as the Court should do here.

In *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1018 (2nd Cir. 1986)("*National Black Media*"),

> studies and maps relied upon by the FCC in its report and order were not exposed to public comment, so that the Commission cannot be said to have considered all the relevant factors in making its decision.

The court held that the FCC's "order must therefore be overturned as arbitrary and capricious." *Id.* The court noted that these maps and studies "were not disclosed throughout the proceeding and thus parties had no opportunity to comment on their

methodology or conclusions." *Id.* at 1023. This latter point is particularly germane here, where the conclusions DOE drew were especially prejudicial to the Petitioners and intervenors MUPHT and Texas ROSE, and the previously undisclosed sources either do not exist or do not clearly support DOE's conclusions. MUPHT and Texas ROSE, having relied on the expert opinion of Emily Achtenberg regarding the lack of any negative impact on low income housing tenants (JA 6848, B0006456), would have welcomed the "opportunity to comment on [the] methodology or conclusions" of DOE's cited sources, *id.* As in *National Black Media Coalition*, it is the case here that the agency's:

> non-disclosure thus prevented petitioners and perhaps others from making relevant comments . . . . The FCC did not comply with the notice provision of the Administrative Procedure Act . . . . [T]he Commission's action must be set aside.

Id. at 1023 -1024.

Similarly, in *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2nd Cir. 1977), this Court was presented with a challenge to agency action that was premised in large part on factual material not disclosed to the commenting parties and the public. The Court:

> recognize[d] that an agency may resort to it own expertise outside the record in an informal rulemaking proceeding . . . [but] when the pertinent research material is readily available and the agency has no special expertise on the precise parameters involved, there is [no] reason to conceal the scientific data relied upon from the interested parties.

Id. at 241. While the precise facts of *Nova Scotia* differ from the present facts, it is notable that in both cases the agencies in question were relying on highly technical data that commenters had not had a chance to review and respond to. What the Court there said about scientific research and debate is as true of the economic research and debate at issue here:

> Scientific research is sometimes rejected for *diverse inadequacies* of methodology; and statistical results are sometimes rebutted because of a lack of adequate gathering technique or of *supportable extrapolation.* Such is the stuff of scientific debate.

Id. at 252 (emphasis added).

DOE's citations to the economic literature suffer from "diverse inadequacies" and were extrapolated to apply to circumstances (decisions about potential housing cost impacts of improved air conditioning efficiency) far beyond the literature's intended scope. DOE's reliance on the economic literature were extremely prejudicial because the agency used this literature as the basis for re-affirming its erroneous conclusion that SEER 13 would harm low income consumers.

To begin with, the first citation to "Pindykck [sic], R. and D. Rubinfeld, Microeconomic Theory, 2001," misspells the first author's name[27] and references a

[27] Robert S. Pindyck is a professor of economics and finance at the

title he did not author. While many treatises bear the title "Microeconomic Theory," including one authored by Professor Samuelson, the treatise cited by DOE is not in Books in Print or at major urban research and university libraries.[28]

Massachusetts Institute of Technology.

[28] See n. 18, *supra*. It is of course possible DOE intended to refer to "Microeconomic Theory" by another author, or to another title authored by Pindyck.

The second treatise cited by DOE, "Pindykck [sic], R. and D. Rubinfeld, Microeconomics, 2001" is in print and available at large libraries and bookstores. DOE's citation of this Pindyck treatise makes it clear that DOE is referring to and relying upon the portion that cites "de Leeuw, F. and N. Ekanen, 'The Supply of Rental Housing' , AER, Vol. 61, 1971, pp. 806-807." Footnote 11. The de Leeuw article is cited in a section of Pindyck's *Microeconomics* treatise entitled "Example 8.5 The Long Run Supply of Housing."[29] Not surprisingly, a review of this section demonstrates that it has nothing to say in particular about landlords passing through higher air conditioning equipment costs to tenants. Quite surprisingly, however, the section has little to do with landlord's generally passing along cost increases to tenants. Rather, "The Long-Run Supply of Housing" section addresses the extent to which increases in housing prices will result in increases in the "supply" (amount of) housing produced.[30] Thus, Pindyck notes the obvious:

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[29] MUPHT and Texas ROSE will provide a copy of "Example 8.5 The Long Run Supply of Housing" to the Court, if so requested, as the cited treatise is not available at many libraries.

[30] Economists refer to this as the "elasticity of supply," a term quoted in Footnote 11 ("supply elasticity"). Pindyck defines elasticity as the "[p]ercentage change in one variable resulting from a 1-percent change in another." Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* 666 (Prentice Hall 5th ed. 2001). In Example 8.5, Pindyck is discussing the change in housing supply (e.g., housing production) that would result if housing prices increase, or the "supply elasticity."

that if "the price of housing services were to rise in one area of the country, the quantity of services could increase substantially," particularly in rural areas where "land is not scarce" and new housing could profitably be built as prices rose. Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* 282 (Prentice Hall 5th ed. 2001). Citing the de Leeuw article referenced by DOE in Footnote 11, Pindyck also notes that the same might not be true in dense urban areas. As prices in urban areas rise, housing developers face strict "local zoning laws" and the extreme scarcity of "urban land on which rental housing" can be built. Thus, in urban areas, supply is not as "elastic," meaning that a 1% increase in price will generate less than a 1% increase in supply. *Id.* at 283.

MUPHT and Texas ROSE summarize Pindyck's discussion of supply elasticity not because it is germane to DOE's conclusion that landlords will pass along higher air conditioning purchase costs to their tenants, but to show the opposite: that this source in fact does not address the impact of rising landlord costs on tenant rents. DOE's reliance on Pindyck is completely inapposite and misplaced, and unfairly prejudiced the right of parties who supported SEER 13 to participate in a fair and open rulemaking proceeding. DOE, with the advent of a change in Administration and under political pressure from states that manufacture air conditioners, decided to roll back the SEER 13 standard to SEER 12. Perhaps

DOE thought that basing the rollback on purported protection of low income consumers would buttress its legal position. But the inconsistencies between DOE's initial and current position on low income impacts (as well as so many other issues regarding the SEER 12/SEER 13 debate) should cause this Court to give DOE little, if any, deference. *See Callaway v. Commissioner*, 231 F.3d 106, 132 (2nd Cir. 2000)("the consistency of an agency's interpretations" will affect the amount of deference due). Here, DOE's findings and conclusions regarding the benefits of SEER 13 were highly inconsistent and the circumstances surrounding its change of position highly suspect.[31] This is a clear case for finding that the agency's views were tainted by considerations far outside the ambit that the APA allows an agency.

[31] It bear noting again that in the January 22 Final Rule, DOE found that low income consumers would "benefit overall" from adoption of SEER 13 (66 Fed. Reg. 7175, col. 1, SPA 150) but that with a change of Administration and no change in the record before it, DOE then found that SEER 13 would disproportionately harm low income consumers "because increases in first cost are felt more sharply by lower income consumers" (July 25 Proposed Rule, 66 Fed. Reg. 38828, col. 2).

MUPHT and Texas ROSE will briefly address the other two sources that DOE cites and that purportedly support DOE's conclusion that landlords will pass on the costs of more efficient air conditioners to their tenants. 67 Fed. Reg. 36380, n. 11 & col. 3, SPA 217. The de Leeuw and Ekanem article was published more than thirty years ago, in the 1971 American Economic Review.[32] The focus of the article was to determine whether "housing allowances" and "housing subsidy programs" would "drive up rents" by placing more purchasing power into the hands of low income households Frank de Leeuw & Nkanta F. Ekanem, *The Supply of Rental Housing*, 61 American Economic Review 806 (1971)("*The Supply of Housing*"). The authors' primary focus was not whether rising costs (for air conditioning or any other building-related cost) would cause landlords to raise their tenant's rents, but whether greater demand in the form of greater purchasing power among poor households would drive up rental prices. The authors make this clear not only in the introductory paragraph just cited, but in their conclusion as well:

> [T]he implication of this study would seem to be that programs to increase the demand for housing [e.g., housing assistance and housing voucher programs] would in part serve to drive up rents.

[32] DOE cites this as "AER." Footnote 11. MUPHT and Texas ROSE will provide a copy of this article to the Court, if so requested, as it is available only at major university and research libraries due to its vintage and obscurity.

Id. at 815.[33]

[33] *The Supply of Housing*, however is the source of DOE's statement that the supply elasticity for "long-run housing supply [is] 0.3 to 0.7," SPA 217. Similarly, the Hanushek and Quigley article is the source of DOE's statement that housing demand elasticities range from -0.1 to -1.0 (SPA 217). Like *The Supply of Housing*, however, this article primarily addresses "government subsidies" of various kinds that have been developed to help poor people obtain housing. Eric A. Hanushek and John M. Quigley, *The Determinant of Housing Demand*, 2 Research in Urban Economics 221 (1982).

All of the parties that supported SEER 13 are prejudiced by DOE's reliance on these newly-found extra-record sources. *See National Black Media, supra,* 791 F.2d at 1023 - 1024. DOE simply copied numerical values for supply and demand elasticities from these articles and, apparently, then inserted these values into the "Pass-Thru [sic]-Fraction" formulae contained in its discussion of low income impacts. 67 Fed. Reg. 36380, col. 3, SPA 217.[34] DOE nowhere explains where it derived the demand or supply version of the "Pass-Thru-Formula" and none of the cited articles contains any similar formula. Using these formulae, DOE concludes that some "landlords may actually pass on *more than 100 percent* of these [increased air conditioning purchase] costs" to their tenants, although others will pass on as little as "23 percent" of these costs. *Id.* (emphasis added). The formulae have no basis whatsoever in the record or in the sources DOE cites. As already noted, a court should give DOE no deference on this point because it possesses no expertise in the areas of low income housing supply and demand.[35] DOE notes

[34] That is, DOE used the "supply elasticities" it "found in Pindykck [sic]" and the "demand elasticities found in Hanushek" and used those values to calculate pass through fractions ranging from "23 percent to 121 percent." 66 Fed. Reg. 36380, col. 3 & n. 11, SPA 217.

[35] The de Leeuw article notes that the Department of Housing and Urban Development funded "the research and studies forming the basis for this publication," and, arguably, HUD is an agency that possesses the type of expertise in low income housing supply and demand to which a court would defer. *The*

that if landlords pass on less than 100 percent of the higher costs "renters are much more likely to benefit." *Id.* Possessing no expertise in this area and unable to draw any conclusions from the inapposite studies it referred to after the rulemaking closed, DOE reaffirmed its pre-ordained conclusion regarding the "likely effects of central air conditioning and heat-pump standards on low-income renters." 66 Fed. Reg. 36382, SPA 219. While it had before it the very current opinion of an expert who had worked in the field of low income housing for thirty years (October 18, 2001 Comments of Emily Achtenberg, JA 6843, B0006456), it instead muddied the record with last-minute references to twenty- and thirty-year old articles and mis-citation of and mis-reliance upon other economic treatises.

DOE's actions in basing its withdrawal of the SEER 13 standard and adoption of the SEER 12 standard on allegedly adverse impacts of SEER 13 on low income households are "arbitrary, capricious [and] an abuse of discretion." 5 U.S.C.A. § 706(2)(A). DOE is not free to rely on extra-record sources that it failed to disclose during the comment period and that it misused to draw conclusions nowhere contained in those sources. *United States v. Nova Scotia, supra,* 568 F.2d 240, at 249*; National Black Media Coalition, supra*, 791 F.2d 1016, at 1022-1024.

Supply of Housing, supra, 61 American Economic Review 806. DOE possesses no such expertise and is due no deference.

Such conduct is particularly suspect where the agency has changed course not in connection with any newly discovered information or studies but with a change in Administration. *State Farm, supra*, 463 U.S. 29, at 59 n.*. DOE's low income findings are entitled to little deference and should be rejected by this Court. *Murphy, supra*, 252 F.3d 473, at 480.

II. CONCLUSION

Petitioners - Intervenors MUPHT and Texas ROSE respectfully ask this Court to declare that the SEER 13 Final Rule promulgated January 22, 2001 was lawfully promulgated and shall take effect; further declare that the SEER 12 Final Rule promulgated May 23, 2002 is null and void and may not take effect; and order such other relief as the Court deems proper and in the interest of justice in this matter.

Respectfully submitted,
MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS
TEXAS RATEPAYERS' ORGANIZATION TO SAVE ENERGY

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are 11,892 words in the brief.