

**Comments of the National Consumer Law Center,  
Consumer Federation of America, Massachusetts Energy Consumers Alliance,  
Massachusetts Union of Public Housing Tenants, National Association of State Community  
Service Programs, Ohio Partners for Affordable Energy, People's Power & Light of Rhode  
Island, Public Utility Law Project, Salt Lake Community Action Program, Texas Legal  
Services Center, Texas Ratepayers' Organization to Save Energy, The Energy Project, The  
Utility Reform Network, and Virginia Citizens Consumer Council**

**RE: ENERGY CONSERVATION STANDARDS FOR  
RESIDENTIAL FURNACES AND BOILERS**

**Docket No. EE-RM/STD-01-350/RIN 1904-AA78**

**Submitted January 12, 2007**

**I. INTRODUCTION**

**A. Overview of Interest in this Rulemaking**

The National Consumer Law Center ("NCLC"), Consumer Federation of America ("CFA"), Massachusetts Energy Consumers Alliance ("Mass Energy"), Massachusetts Union of Public Housing Tenants ("MUPHT"), National Association for State Community Service Programs ("NASCS"), Ohio Partners for Affordable Energy ("OPAE"), People's Power & Light of Rhode Island, Public Utility Law Project (PULP"), Salt Lake City Community Action Program ("SLCAP"), Texas Legal Services Center ("TLSC"), Texas Ratepayers' Organization to Save Energy ("Texas ROSE"), The Energy Project ("TEP"), The Utility Reform Network ("TURN"), and Virginia Citizens Consumer Council ("VCCC") [collectively referred to as "Consumer Groups" in these comments] appreciate the opportunity that the Department of Energy ("DOE") has provided for interested parties to submit comments on the Notice of Proposed Rulemaking ("NOPR") for residential furnaces and boilers published in the October 6, 2006 Federal Register (71 Fed. Reg. 59204). These groups, whose missions and interests will be described below, all urge the Department to reconsider its decision to set an AFUE standard of 80% for non-weatherized gas furnaces. Notably, the many groups who jointly support these comments include a wide range of national and state organizations with significant geographic diversity, including organizations from both colder states (MassEnergy, MUPHT, PULP, OPAE) and warm states (TLSC, Texas ROSE, TURN and VCCC). They include groups with a narrower focus on the interests of low-income energy consumers (e.g., NCLC, MUPHT, PULP) and groups that focus on the interests of all consumers across the country (e.g., CFA) or of a variety of incomes (e.g., Mass Energy, OPAE, VCCC). There is strong agreement among the many signers of these comments that setting a standard of 90% AFUE for colder, more northern states is both good for the environment and good for consumers' pocketbooks, not only in the colder states where heating consumption is higher but also throughout the country.

The Consumer Groups note that the current standard for furnaces of 78% AFUE was set by Congress in EPCA (as amended), 42 U.S.C. § 6295(f)(1), and has been in effect, without revision, since 1992. DOE's proposed increase to 80% AFUE represents a trivial increase even

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in warmer states and a literally meaningless increase in the many colder states where virtually all units shipped already meet or exceed the 80% standard. Consumers have been waiting far too long for DOE to take any action to increase furnace efficiency standards, yet DOE adds insult to injury by delaying the effect date of this almost-meaningless increase until 8 years from now, January 1, 2015. 71 Fed. Reg. 59204. It is unconscionable that consumers have to wait 23 years for a new efficiency standard to take effect — much less one that provides little or no improvement.

As time has passed in this proceeding, the need for DOE to take a more aggressive stance on AFUE standards has only become clearer. Energy prices remain very high. When NCLC, MUPHT and CFA submitted comments in the earlier ANOPR phase of this proceeding, they noted with concern that wholesale oil prices had recently been just under \$52 per barrel, an 85% increase from the prior year.<sup>1</sup> As of January 11, 2007, the wholesale price for light crude is again near \$52 per barrel, but prices exceeded \$70 per barrel as recently as August 2006. And while residential natural gas prices have dropped substantially recently, the residential retail price for October 2006 (the most recent month reported by EIA) was still higher than at any time prior to June 2004, higher than several of the reported monthly prices since June 2004, and 50% to 60% higher than prices from five years ago (winter of 2001-02).<sup>2</sup>

Rising home energy prices are causing real hardship. In a 2004 survey of utility companies performed by the National Regulatory Research Institute (“NRRI”), 11 states that kept data on accounts in arrears reported that 9% to 32% of their residential electric accounts were in arrears, and that 10% to 34% of their residential gas accounts were in arrears.<sup>3</sup> In addition, more families are being terminated from their utility service.<sup>4</sup> More families are going

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<sup>1</sup> NCLC/MUPHT/CFA Comments, p. 1 (Nov. 10, 2004).

<sup>2</sup> See, Energy Information Administration, “U.S. Natural Gas Residential Price,” <http://tonto.eia.doe.gov/dnav/ng/hist/n3010us3m.htm>.

<sup>3</sup> See, NRRI, “Survey - Nonpayment of Energy Bills by Low-Income Customers” (June 2005), available at <http://www.nrri.ohio-state.edu/ConsumerAffairs/E-Nopay-LowIncome/>. In Table 3 of the Survey, Florida is reported to have 9% (416,000) of its electric accounts in arrears and Colorado is reported to have 32% (25,040) of its electric accounts in arrears. In Table 5, Colorado is reported to have 10% (20,534) of its gas accounts in arrears, and California is reported to have 34% (1,730,000) of its gas accounts in arrears. Note that not all of the utilities in the states that participated in the NRRI survey report arrearage data, and the numbers just cited therefore reflect only those utilities that do report.

<sup>4</sup> For example, Rhode Island, with a little over 400,000 households, had more than 6,000 households living without either gas or electricity for 6 of the 13 months, September 2003 to September 2004 (inclusive). During the preceding year, the number of R.I. customers without utility service never exceeded 6,000. Among a dozen states that participated in the NRRI Survey (see n. 3), the percentage of customers whose service had been terminated in the prior year generally ranged from 3% to 10%, depending on the state. NRRI Survey, Tables 4 & 6.

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without heat, or going without medicine or food in order to pay for heat, with particularly adverse consequences for children and seniors.<sup>5</sup> Any reasonable way to reduce home heating bills will result in families being warmer, healthier and safer.

The Consumer Groups believe that DOE made a legal error, and an ill-advised policy choice, when it determined that it does not have the legal authority to specify geographically-differentiated standards for non-weatherized gas furnaces, which would allow consumers in colder climates to benefit from the higher standards that are unquestionably economically justified in those states.

### **B. Description of the Consumer Groups**

National Consumer Law Center (“NCLC”), founded in 1969, is a nonprofit organization specializing in consumer and energy issues on behalf of low-income people. NCLC has helped utilities, regulatory commissions and advocates design low-income energy efficiency and affordability programs. NCLC also provides legal representation to MUPHT and TexasROSE (groups described more fully below) regarding residential appliance efficiency standards.

Consumer Federation of America (“CFA”) is a nonprofit association of approximately 300 consumer groups, representing more than 50 million Americans, that was established in 1968 to advance the consumer interest through research, education and advocacy.

Massachusetts Energy Consumers Alliance (“Mass Energy”) is a non-profit organization that both advocates and acts in the marketplace on behalf of consumers and the environment. Mass Energy has offered discount heating oil since 1982 and now serve 10,000 households. Mass Energy also offers green electricity options and solar energy services.

Massachusetts Union of Public Housing Tenants (“MUPHT”) is the oldest statewide

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<sup>5</sup> A study by Roger Colton for the National Low-Income Energy Consortium, “Paid But Unaffordable: The Consequences of Energy Poverty in Missouri” (May 2004) documents the extent to which low-income households go without essential medical treatment or skip meals in order to pay their utility bills. Also see Child Health Impact Working Group, “Unhealthy Consequences: Energy Costs and Child Health” (Nov. 2006), available at <http://www.mlpforchildren.org/chia.aspx>, which found that “non-medical factors, such as energy costs, profoundly influence child health and well-being.”

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association of public housing tenants in the United States, incorporated in 1971. MUPHT is formally recognized by the Massachusetts Department of Housing and Community Development as representing public housing tenants in Massachusetts, and has partnered with the federal Department of Housing and Urban Development on a broad range of housing issues.

National Association for State Community Service Programs (“NASCS”) is a professional association for state administrators of the federal Department of Health and Human Services (HHS) Community Services Block Grant (CSBG) program and DOE’s Weatherization Assistance Program (WAP). Many NASCS members also administer HHS’s Low Income Home Energy Assistance Program (LIHEAP) and the Department of Housing and Urban Development’s Community Development Block Grant (CDBG) program. NASCS is charged with advocating and enhancing the leadership role of states in preventing and reducing poverty.

Ohio Partners for Affordable Energy (“OPAE”) is a nonprofit membership organization created to advocate for affordable energy policies for moderate and low-income Ohioans. More than sixty member OPAE agencies provide essential energy services (including bill payment assistance, weatherization and energy efficiency) and housing services to over 500,000 Ohio households annually.

People’s Power & Light is Rhode Island’s non-profit energy consumers’ alliance. The organization is dedicated to energy that is affordable, safe, and clean for Rhode Island’s families. It promotes energy efficiency, renewable energy, cooperative purchasing, consumer education, and consumer advocacy.

Public Utility Law Project of New York, Inc. (“PULP”) is a non-profit organization representing the energy and telecommunications interests of low income consumers in New York State. Since 1977 PULP has furthered the rights of needy New Yorkers regarding affordability, consumer protection and universal service.

Salt Lake Community Action Program (“SLCAP”) is a non-profit community based organization that works with low-income people to find solutions to the challenges they face both through provision of direct services and advocacy. Advocates work within the community for sustainable systems change, addressing issues including housing, social welfare, health care, and affordable energy.

Texas Legal Services Center (“TLSC”) is a statewide Legal Aid program that represents low-income Texans in securing equitable access to energy efficiency programs and affordable utility rates.

Texas Ratepayers’ Organization to Save Energy (“Texas ROSE”) is a statewide membership organization dedicated to securing affordable electricity and a healthy environment. The stated goals of Texas ROSE include promoting energy conservation and making sure that energy supplies are affordable for low-income consumers and renters.

The Energy Project (“TEP”) is a partnership between the Washington State Department

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of Community Trade and Economic Development and the Washington State Community Action Partnership. TEP works to provide funds and program designs that will help low-income households maintain access to home energy services they can afford.

The Utility Reform Network (“TURN”) is a non-profit consumer advocacy organization with over 20,000 members in California. TURN represents California’s residential and small commercial utility customers and advocates for affordable and sustainable energy services at the California Public Utilities Commission and state legislature.

Virginia Citizens Consumer Council (“VCCC”) is a statewide grassroots consumer education and advocacy organization.

## II. LOW-INCOME FAMILIES BEAR AN EXTRAORDINARY BURDEN IN PAYING THEIR HOME HEATING BILLS

Low-income households bear an extraordinary burden in paying their home heating bills. In 2006, Economic Opportunity Studies (“EOS”) estimated that households whose incomes are at or below the federal poverty guideline would be paying 25% of their entire annual income on household energy bills.<sup>6</sup> A slightly earlier study completed by EOS showed that “the total annual energy bills of the low income [home heating] fuel oil users have grown . . . about 56%” between 1997 and 2004, when comparing those total annual bills to average household income.<sup>7</sup>

A study by Consumer Federation of America also showed sharp increases in expenditures for home energy, from 1998-2000 to 2004.<sup>8</sup> CFA estimated that heating expenditures for low-income households increased 40%, from \$531 in 1998-2000 to \$741 in 2004.<sup>9</sup> The Department of Energy’s most recent Short-Term Energy Outlook (“STEO”) projects that household’s will spend an average of \$873 this winter on their heating bills.<sup>10</sup>

Investments in improving the efficiency of home heating systems pay off for low-income

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<sup>6</sup> Dr. Meg Power, “FY 2006 Energy Bills Forecast: The Impact on Low-Income Consumers” (EOS, Feb. 2006), available at [www.opportunitystudies.org/repository/File/weatherization/outlook-feb-06.pdf](http://www.opportunitystudies.org/repository/File/weatherization/outlook-feb-06.pdf).

<sup>7</sup> Dr. Meg Power, “Low-Income Consumers’ Energy Bills and Energy Savings in 2003 and FY 2004” (EOS, 2004) (“Energy Bills and Energy Savings”).

<sup>8</sup> Mark Cooper, “Rising Energy Prices Strain Household Budgets and the Economy, for Most Americans” (CFA, Sept. 2004).

<sup>9</sup> Both the CFA and Economic Opportunity Studies reports note that low-income households, on average, use far less energy than middle- or upper-income households and that all households saw their energy bills jump sharply over the past few years.

<sup>10</sup> The STEO is available at <http://www.eia.doe.gov/emeu/steo/pub/contents.html>.

households. As one recent study reports, low-income households whose homes have been weatherized spent \$325 (gas-heated homes) to \$350 (for oil- or propane-heated homes) less for their annual energy bills than homes that were not weatherized.<sup>11</sup> Increasing the efficiency standards for residential furnaces and boilers can also yield significant savings, especially in low-income homes where the typical system is, on average, older and far less likely to be performing even at its rated efficiency.

Increases in residential energy prices are not being met by increases in federal funding for either the federal Low-Income Home Energy Assistance Program (“LIHEAP”) or the Weatherization Assistance Program (“WAP”).<sup>12</sup> Funding for LIHEAP hovered between \$1.8 billion and \$2 billion from FY 1981 to FY 1987, and again from FY 2000 to 2005.<sup>13</sup> While FY 2006 LIHEAP funding increased to an unprecedented \$3 billion, it has declined in FY 2007 back to just under \$2 billion, with the result that many households will be receiving substantially smaller LIHEAP grants this winter than last. Adjusted for inflation in energy prices, LIHEAP funding has been eroded 30% to 40% from its levels in the 1980s.<sup>14</sup> Nationally, average home heating oil prices reached \$2.41 per gallon during the week of January 4, 2007, up 40% just since NCLC filed its comments on the ANOPR in November 2004 and more than double the price from 2002.<sup>15</sup> Investments in more efficient furnaces and boilers make more economic sense than ever.

### III. DOE’S “WAP” AND STATE/UTILITY ENERGY EFFICIENCY PROGRAMS WILL BENEFIT FROM ADOPTING HIGHER STANDARDS

Many low-income homeowners and tenants receive assistance in weatherizing their homes and replacing inoperative or inefficient heating systems from DOE’s Weatherization Assistance Program (“WAP”); from states setting aside a portion of their LIHEAP funding for weatherization and home heating repair and replacement;<sup>16</sup> and from utility-funded low-income energy efficiency programs. WAP alone reaches approximately 100,000 households annually

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<sup>11</sup> Energy Bills and Energy Savings (n. 7, *supra*).

<sup>12</sup> LIHEAP is authorized by 42 U.S.C. §§ 8621 *et seq.* WAP, a DOE program, is authorized by 42 U.S.C. § 6861 *et seq.*

<sup>13</sup> NCLC, “Access to Utility Service” (3<sup>rd</sup> Ed. 2004 & 2006 Supp.), App. D.5, “LIHEAP Profile.” Between FY 1988 and FY 1999, LIHEAP funding ranged from \$1.1 billion to \$1.7 billion.

<sup>14</sup> Calculated by NCLC, using the actual appropriations history (n. 13, *supra*) and the Bureau of Labor Statistics - C.P.I. for oil and natural gas prices as the price inflator.

<sup>15</sup> EIA, “This Week in Petroleum” (January 4, 2007).

<sup>16</sup> Under 42 U.S.C. § 8624(k), states can set aside up to 15% of their LIHEAP funds for “weatherization or other energy-related home repair.” A majority of states do so.

and is funded at over \$200 million annually. Tens of thousands of additional households are served by the utility-funded programs and by the LIHEAP set-asides.

Many WAP and LIHEAP grantees and utility programs install high-efficiency units whenever funds allow and where technically possible. Program operators, however, find that they are often paying a hefty premium price for doing so because they are installing more efficient units than the typical unit installed by consumers in their area. While highly-efficient units (e.g., 90% AFUE for condensing gas-fired furnaces) are widely available, they can command a premium price because they are seen as providing the valuable feature of lower fuel consumption. Many WAP program operators expect that prices of these units would decline if DOE raised the efficiency standards because more units would be produced at the higher efficiency levels and there would be more competition in attracting the business of consumers who install high-efficiency units.<sup>17</sup> These program operators also see additional advantages that would result from having more local contractors who would have more experience in installing high-efficiency units, as one of the key challenges for WAP grantees across the country is to find competent, qualified contractors to install high-efficiency heating systems in low-income homes. By raising the furnace and boiler standards, DOE will be providing a significant benefit to one of its own programs, WAP, and to comparable state- and utility-funded programs across the country.

#### **IV. DOE IGNORES THE SPLIT INCENTIVES BETWEEN OWNERS AND TENANTS OF RENTAL PROPERTIES, TO THE DETRIMENT OF THOSE RENTERS**

In rental properties, tenants generally have no legal right to replace the existing heating system, nor in practice does any property owner expect tenants to replace furnaces.<sup>18</sup> Property owners almost always make the decisions as to when to replace a furnace and what type of furnace to install. But because tenants in most circumstances pay the heating bills, they bear whatever higher costs result from an owner's decision to install a lower, rather than higher, efficiency furnace. The incentives as to what type of unit to install are therefore split based on the tenure type. Owner-occupants have the incentive to weigh the initial purchase cost of a lower-efficiency furnace against the long-term operating costs that increase as the unit's efficiency decreases. Owners of rental property, however, see only the incentive of lower purchase costs because the operating costs are generally borne by the tenants.

This "split incentive" problem is particularly acute for low-income tenants because they can least afford to pay the higher energy bills that result from installation of lower efficiency

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<sup>17</sup> This statement is based on conversations the Consumer Groups have had with various state and local agencies that install high-efficiency systems in low-income homes and with the president of a major gas distribution company in Massachusetts.

<sup>18</sup> There may be some very rare exceptions, for example, if a property owner rents a one-family house under a long term lease and the owner lowers the asked-for rent in exchange for the long-term lessee agreeing to pay for certain needed repairs.

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units, and their landlords are least inclined to make energy efficiency investments. The barriers that low-income families face in obtaining energy-efficient living space are alluded to in the authorizing legislation that created DOE's WAP, both in its initial findings and the mandate to ensure that the benefits from any weatherization work flow through to renters:

Congress finds that -

(1) a fast, cost-effective, and environmentally sound way to prevent future energy shortages in the United States while reducing the Nation's dependence on imported energy supplies, is to encourage and facilitate, through major programs, the implementation of energy conservation . . . with respect to dwelling units;

(2) existing efforts to encourage and facilitate such measures are inadequate because -

(A) *many dwellings owned or occupied by low-income persons are energy inefficient;*

(B) *low-income persons can least afford to make the modifications necessary to provide for energy efficient equipment in such dwellings . . . .*

[42 U.S.C. § 6861(a) (emphasis added)]

. . . .

(5) *In any case in which a dwelling consists of a rental unit or rental units, the State . . . shall ensure that -*

(A) *the benefits of weatherization assistance in connection with such rental units, including where the tenants pay for their energy through their rent, will accrue primarily to the low-income tenants residing in such units . . .*

[42 U.S.C. § 6863(b)(5) (emphasis added)].<sup>19</sup>

Curiously, DOE not only fails to address in the NOPR the split-incentive problem, it excluded renter households from its "Consumer Sub-Group Analysis."<sup>20</sup> DOE should be taking a more aggressive regulatory approach than the pure cost-benefit analysis for owner-occupants alone might suggest, because the rental market is clearly flawed and does not send appropriate price signals to all players in that market. By adopting only an 80% AFUE standard for

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<sup>19</sup> See also 10 C.F.R. 440.22 (2006) (DOE-WAP rules regarding weatherization of low-income rental properties).

<sup>20</sup> See TSD, Ch. 11.2.1, p. 11-1: "The Department applied an additional criterion to select [from the Residential Energy Consumption Survey data] only those low-income households who own their home, since renters do not purchase furnaces." While it may make sense to exclude rental housing if one wants to compare an owner's initial purchase costs to that owner's future operating costs to determine the payback period, nowhere did DOE consider the adverse impacts on low-income tenants arising from the split-incentive problem. Looked at in its entirety, DOE treats low-income renters for analytical purposes as if they do not exist.



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furnaces, DOE is condemning untold thousands of low-income renters, for decades to come, to living in units with economically inefficient heating systems. DOE's own analysis shows that a 90% AFUE standard either provides a net benefit or no adverse impact for fully 80% of the households in 31 northern states.<sup>21</sup> By adopting an 80% standard, DOE will lead untold thousands of property owners to choose energy-inefficient furnaces, due to the owner's incentive to choose the lowest efficiency unit that the law allows and the lack of economic signals for the owner to consider operating costs.

There is no question that low-income households are disproportionately represented in rental housing. According to the 2000 U.S. Census, median income in owner occupied housing was \$51,323, almost double the median income in rental housing of \$27,362. According to the 2001 Residential Energy Consumption Survey ("RECS"), only 4.6% of owner-occupants were below the Federal Poverty Level ("FPL"), while fully one-quarter (25.8%) of renters had incomes at or below the FPL. DOE's failure to consider the split incentive problem will place a heavy financial burden on the backs of low-income people, as they will be forced to live with less efficient units for the full useful life of the many 80% efficiency units that will be installed as a result of the NOPR.

### **V. DOE SHOULD ADOPT A 90% AFUE STANDARD FOR NON-WEATHERIZED GAS FURNACES, AT LEAST IN NORTHERN STATES**

DOE has proposed an 80% AFUE standard for non-weatherized gas furnaces (71 Fed. Reg. 59206) and rejected the comments of a wide variety of parties to adopt 90% AFUE as either the nationwide standard or, alternatively, the standard that should apply in northern states.<sup>22</sup>

The Consumer Groups are well aware that DOE does not think a nationwide standard of 90% AFUE is supported by its regional impact analysis. They do not take a strong position that the 90% standard should be mandated for every state, although they question whether DOE's own analysis appropriately considers (i) likely future energy price increases that would make the 90% standard even more economically attractive; (ii) the environmental benefits of reduced carbon emissions; (iii) the economic benefit to all U.S. consumers, not just those who would install higher efficiency units as a direct result of a 90% standard, from the dampening effect on prices of a higher standard;<sup>23</sup> and (iv) the importance of addressing the market imperfection of

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<sup>21</sup> TSD, Table 11.3.5 (AEO 2006). NCLC believes that DOE's analysis overstates the allegedly adverse impact of a 90% standard in 19 southern states (Table 11.3.6.), and cites 11.3.5 as somewhat of a "worst case" in terms of the expected benefits in northern states.

<sup>22</sup> DOE defined "Northern (Cold-climate) states" to include 31 states and "Southern (Warm-climate) states" to include 19 states and the District of Columbia, "assum[ing] that most households in the northern states would be above 5,000 heating degree days (HDD)." TSD, Ch. 11.3.1, p. 11-6. For purposes of this portion of their comments, the Consumer Groups accept this definition, but do not necessarily agree that the 19 Southern states would not derive a net life-cycle benefit from adoption of a higher AFUE standard than 80%.

<sup>23</sup> See, e.g., Ryan Wisner, Mark Bolinger, & Matt St. Clair, "Easing the Natural Gas

“split incentives” discussed above. Therefore, the Consumer Groups are certainly not endorsing the 80% standard for southern states.

However, the Consumer Groups very strongly encourage DOE to adopt the 90% AFUE standard at least for the northern states, and, if DOE does so, to provide a reasonably simple process for any southern state that believes the higher standard makes economic sense in its state to obtain a waiver of the 80% standard. DOE’s own regional impact analysis shows that only 20% of northern households would face net costs from the 90% standard, using the 2006 AEO. TSD, Ch. 11.3.4, Table 11.3.5. The Consumer Groups believe that DOE’s analysis tends to be fairly conservative, so that the findings displayed in Table 11.3.5 are reasonably robust. To the extent that DOE does not adopt 90% AFUE nationally, it should do so in the northern states.

## **VI. DOE COMMITTED LEGAL ERROR IN DECIDING THAT IT IS BARRED FROM ADOPTING A “TWO-TIERED” AFUE STANDARD FOR FURNACES**

In the October 6, 2006 NOPR, DOE addressed “numerous comments” from parties that urged the Department to set “separate furnace and boiler standards for different regions of the country.” 71 Fed. Reg. 59209. In particular, many commenters urged DOE, if it were unwilling to adopt a nationwide standard of 90% AFUE for non-weatherized gas furnaces, to at least set that higher standard for gas furnaces in northern states, by reference to average annual heating degree days (HDD) or other climate-related benchmark.<sup>24</sup> Without reaching the merits of these comments, DOE determined that it does not have the legal authority to adopt this “two-tiered” approach for non-weatherized gas furnaces.

There is no question but that very significant energy savings and emissions reductions hinge on deciding this legal issue. The savings that will be lost by not adopting the proposed two-tiered standard will directly and substantially affect those consumers who will have less efficient furnaces installed, with a particularly unjust and onerous burden falling on tenants who have no choice about the furnaces their property owners install. But this will also affect all residential and commercial users of natural gas because national demand for gas will be significantly higher. Despite the importance of this issue, DOE provided nothing more than this non-existent legal analysis to buttress its conclusion: As discussed in the 2004 ANOPR, the Department has determined that EPCA<sup>25</sup> does not authorize DOE to set regional energy conservation standards; instead, the Department can only establish national standards.

*Id.*

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Crisis: Reducing Natural Gas Prices Through Increased Deployment of Renewable Energy and Energy Efficiency” (Lawrence Berkeley National Laboratory, LBNL-56756, Jan. 2005).

<sup>24</sup> See, for example, the Nov. 10, 2004 comments of NCLC/CFA/MUPHT, pp. 7-9.

<sup>25</sup> “EPCA” refers to the Energy Policy and Conservation Act, Pub. L. No. 94-163, which has since been amended on numerous occasions.

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But the “2004 ANOPR” itself is largely devoid of legal reasoning:<sup>26</sup>

The Department recognizes that regional climatic effects may be important in the assessment of proposed energy efficiency standards for heating equipment because the energy demand and financial impacts to consumers can vary significantly with variations in climate. The life-cycle cost analysis considers regional impacts. However, DOE believes that the Act does not authorize the adoption of regional standards. See 42 U.S.C. 6291(6)(A).

69 Fed. Reg. 45425 (July 29, 2004).

It is difficult to rebut this legal argument that is little more than *ipse dixit*<sup>27</sup> as DOE has not disclosed to the public the thinking that may lie behind the mere citation of section 6291(6)(A). However, DOE’s conclusion is contradicted by a federal statute (1 U.S.C. § 1); undermined by U.S. Supreme Court precedent; contrary to prior DOE statements regarding its authority under EPCA; and contrary to the very purposes of EPCA, as explained below.

DOE’s legal analysis rests entirely on a reference to 42 U.S.C. § 6291(6)(A), the definition of “energy conservation standard”:

a performance standard which prescribes a minimum level of energy efficiency or a maximum quantity of energy use, or, in the case of showerheads, faucets, water closets, and urinals, water use, for a covered product, determined in accordance with test procedures prescribed in section 6293 of this title . . .

DOE perhaps reached the conclusion that it cannot set two standards for non-weatherized furnaces, one of 90% in colder states and a lower standard in warmer states, because this definition uses the word “standard”, not “standards”. At the outset of this analysis, it is important to note that in the substantive section of EPCA addressing “standards for furnaces,” 42 U.S.C. § 6295, and in contrast to the definition section that DOE solely relies on, Congress used the word “standards” in a context that referred only to a single, specific sub-category of furnaces, those “which are designed solely for installation in mobile homes” (42 U.S.C. § 6295(f)(2)).

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<sup>26</sup> DOE has had a notably dismal history of interpreting and implementing EPCA. See, e.g., *NRDC v. Abraham*, 355 F. 179 (2d Cir. 2004) (court finds that DOE violated the “antibacksliding” provision contained in 42 U.S.C. §6295(o)(1) and that agency’s interpretation of statute not entitled to *Chevron* deference); *NRDC v. Herrington*, 768 F.2d 1355, 1364 (D.C.Cir.1985) (finding, *inter alia*, “that in important respects DOE’s determinations are unsupported by substantial evidence and are contrary to law”). Most recently, DOE entered into a consent decree which commits DOE to publish a final appliance efficiency standard for 22 products by deadlines listed in that decree, arising from its delays in updating and adopting standards. *State of New York et al. v. Bodman/NRDC et al. v. Bodman*, Nos. 05 Civ. 7807/7808 (JES) (S.D.N.Y. Nov. 6, 2006).

<sup>27</sup> Latin for “he himself said it.”

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Congress there mandated:

The Secretary shall publish a final rule no later than January 1, 1992, to determine whether the standards established by paragraph (2) [42 U.S.C. § 6295(f)(2)] for mobile home furnaces should be amended.

42 U.S.C. § 6295(f)(3)(A) [emphasis added].

The varying use by Congress of the singular “standard” in § 6291(6)(A), and the plural “standards” in § 6295(f)(3)(A), which section refers only to the distinct sub-class of mobile home furnaces, makes it clear that Congress did not intend to exclude the plural when it used the singular, nor to exclude the singular when it used the plural.<sup>28</sup> Put another way, it is clear that when Congress enacted EPCA, it was not directly contemplating whether DOE would be prohibited from adopting geographically-distinct standards for furnaces, and that it used singular and plural terms somewhat interchangeably. Since Congress did not express any clear intent on this issue, DOE has the discretion to adopt the two-tiered standard urged by so many commenters.

The Consumer Groups’ interpretation of DOE’s authority under EPCA is reinforced by DOE’s own prior statements regarding its authority under EPCA, published in the Federal Register in the context of the recent central air conditioning rulemaking. In that docket, DOE had considered “including a requirement for a new standard based on a system’s energy efficiency ratio (EER) *in addition to* its seasonal energy efficiency ratio,” but some commenters had argued that DOE was “not permitted to adopt a[n additional] standard other than SEER.” 66 Fed. Reg. 7170, 7182 (Jan. 22, 2001) (italics and bracketed material added). In this instance, DOE expressed no difficulty in reaching the conclusion “that EPCA permits adoption of an EER standard” in addition to the SEER standard. 66 Fed. Reg. 7183. It is difficult to reconcile the ease with which DOE concluded that it could have imposed two standards, SEER and EER, *on a particular air conditioning unit installed at a particular location*, with the legal obstacles DOE now finds to imposing geographically-differentiated standards for furnaces, especially where DOE itself “recognizes that regional climatic effects may be important in the assessment of proposed energy efficiency standards for heating equipment.” 69 Fed. Reg. 45425 (July 29, 2004).

The Consumer Groups’ interpretation of EPCA’s varying use of the words “standard” and “standards” is largely mandated by federal law. The very first section of the entire United States Code provides that:

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<sup>28</sup> Under DOE’s implicit legal reasoning, the agency would arguably be required to adopt multiple “standards” for mobile home furnaces because Congress used the plural term.

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[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise —

words importing the singular *include and apply to several persons, parties or things . . .* (emphasis added).

1 U.S.C. § 1. Case law interpreting this statute only reinforces the conclusion that the definition of “energy conservation standard” does not preclude DOE from adopting two standards for residential furnaces.

In *Toy Manufacturers of America, Inc. v. Consumer Product Safety Commission*, 630 F.2d 70 (2<sup>nd</sup> Cir. 1980) (“TMA v. CPSC”), TMA challenged industry-wide regulations promulgated by CPSC regarding toys intended for use by children under age 3 that presented choking or ingestion hazards. TMA challenged the regulations on the grounds, *inter alia*, that the “regulation sets forth a generic standard that purports to be applicable to a wide range of products” [underline added], whereas the authorizing statute allegedly granted the agency the authority to promulgate regulations only on a case-by-case basis for an individual “toy” or “article”. TMA v. CPSC, 630 F.2d at 73. The Appeal Court disagreed, noting:

As CPSC correctly indicates, however, TMA’s statutory language argument could be nullified by reference to 1 U.S.C. s 1, which provides in relevant part that “(i)n determining the meaning of any Act of Congress, unless the context indicates otherwise words importing the singular include and apply to several persons, parties, or things . . . .”

*Id.* at 74. The Court went on to note that nothing in the relevant authorizing act:

limits the use of its banning procedures to situations involving only individual products, nor does the entire general thrust of the FHSA [the authorizing act] suggest that, in the Act’s enforcement, application of the typical rule of statutory construction set forth in 1 U.S.C. s 1 would be inappropriate.

*Id.*<sup>29</sup> Thus, in TMA v. CPSC, the Court, relying in part on 1 U.S.C. § 1, found that a statute which spoke of a “toy” or “article” in the singular could be applied by the implementing agency to all “toys” or “articles” in a rulemaking proceeding that affected an entire industry. Here, DOE should find that the singular use of the word “standard” in section 6291(6)(A) allows the agency to adopt “standards” for a covered product. Where DOE reads the word “standard” as imposing a cap that limits DOE to adopting no more than one standard per product, EPCA in its entirety should be read as setting a floor that requires DOE, at a minimum, to set a standard for each “covered product” discretely listed in 42 U.S.C. § 6292(a)(1) - (18), without inhibiting DOE’s ability to set standards for other products<sup>30</sup> or to set up geographically-differentiated standards for a product where to do so best carries out Congressional intent.

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<sup>29</sup> See also *Application of Foster*, 52 C.C.P.A. 1808, 343 F.2d 980, 988, n. 9(1965)

<sup>30</sup> As clearly provided in § 6262(a)(19).

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Just as the court in *TMA v. CPSC* “proceed[ed] to examine the legislative history” of the relevant authorizing statute in that case so as not to mechanically or inappropriately apply 1 U.S.C. § 1 in a manner contrary to Congressional intent (630 F. 2d at 74), so is it important here to consider the Congressional intent behind EPCA to determine whether Congress meant to tie DOE’s hands and prohibit it from adopting two geographically-distinct standards for a product such as gas furnaces where the utility and cost-effectiveness of the product varies so significantly by region.

There is nothing in the legislative history of EPCA and subsequent amendments that suggests anything other than that Congress, in authorizing DOE<sup>31</sup> to adopt appliance efficiency standards, wished DOE to be aggressive in attaining the maximum energy efficiency savings that were economically feasible. The very first paragraph of House Report 94-340 states that “(t)his legislation is directed to the attainment of the collective goals of increasing domestic supply [and] conserving and managing energy demand.” H.R. Rep. No. 94-340, at 1, *reprinted in* 1975 U.S.C.C.A.N. 1763. In the same introductory section, the Report notes that the “bill would also establish regulatory programs to bring about measured savings in consumption of energy by improving the efficiency of the products we use . . . .” *Id.* To the extent that the Report discusses the appliance efficiency standards provisions in more detail, it emphasizes the goal of “prescrib[ing] energy efficiency improvements designed to achieve 25% aggregate improvement in the efficiency of all major energy consuming appliances by 1980,” 1975 U.S.C.C.A.N. 1779.<sup>32</sup> Even at this early date, and well before Congress itself directly established specific numerical standards,<sup>33</sup> Congress noted that provisions of the law regarding “energy efficiency improvement targets” were “not intended to be a limitation of the Secretary’s authority to prescribe energy efficiency standards,” *id.* at 1861. It is thus very troubling, and contrary to Congressional intent, that DOE reads the definition of “energy conservation standard” to limit its authority to adopt a two-tiered furnace standard that would achieve economically-justified energy savings.

DOE’s cramped interpretation of the definition “energy conservation standard” also draws no support from the amendments made to EPCA by the National Energy Conservation Policy Act (“NECPA”),<sup>34</sup> Pub. L. No. 95-619, and little support from the amendments made by

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<sup>31</sup> At the time EPCA was adopted, energy efficiency standards were entrusted not to DOE but to a predecessor agency, the Federal Energy Administration (“FEA”). Pub. L. No. 94-163, § 3 (def. of “Administrator”), §§ 321 ff.

<sup>32</sup> In the final legislation, DOE (then, FEA) was directed to “prescribe . . . energy efficiency targets” that would improve the efficiency of the covered products by “not less than 20 percent.” Pub. L. No. 94-163, § 325(a)(1).

<sup>33</sup> *See* Pub. L. No. 100-12, § 5 (setting standards for a range of products).

<sup>34</sup> To the extent there is relevant discussion of the appliance efficiency standards provisions of NECPA in the legislative history, it is noteworthy that the Conference Report highlighted the “priority [that] must be given to nine types of appliances,” including “furnaces.” H. Conf. Rep. No. 95-1751, at 114, *reprinted in* 1978 U.S.C.C.A.N. 8158-8159.

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the National Appliance Energy Conservation Act of 1987 (“NAECA”), Pub. L. No. 100-12. The legislative history of NAECA makes it abundantly clear that the definition of “energy conservation standard” is nothing more than a definition, and certainly not intended to limit the authority that DOE may have to achieve greater energy efficiency savings by adopting geographically-differentiated standards. S. Rep. No. 100-6, p. 6, *reprinted in* 1987 U.S.C.C.A.N. 57. And while NAECA was in part a Congressional response to the overturning by the Court of Appeals of the “no-standard” standards<sup>35</sup> and the potential Balkanization of efficiency standards as states sought waivers of federal preemption,<sup>36</sup> DOE would gravely misread this law if it finds any support in NAECA for rejecting its inherent authority to adopt a two-tiered standard. If anything, DOE’s dual approach of rejecting this authority yet encouraging states to file waivers that would allow the adopting of 90% AFUE in colder states<sup>37</sup> only leads to the very Balkanization that concerned both manufacturers and Congress at the time NAECA was adopted.

In addition to federal law (1 U.S.C. § 1); the legislative history of EPCA, NECPA, and NAECA; and DOE’s own statements in the air conditioning rulemaking that it could have imposed two distinct standards on the same appliance — there is one other source which undermines DOE’s legal conclusion that it does not have the authority to adopt a two-tiered standard, and that is the Supreme Court. In *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) (“*Chevron*”), the Court had to address the authority of the Environmental Protection Agency (“EPA”) to regulate pollution from “new or modified major stationary sources” through a permit process and, more specifically, to decide whether EPA had the authority to determine the geographic level at which the regulations would apply. *Id.*, 467 U.S., at 840.<sup>38</sup> EPA had issued a regulation including a plant-wide definition of “stationary source” which would allow “an existing plant that contains several pollution-emitting devices” or sources to “install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant,” a so-called “bubble concept.” *Id.* The case clearly stands for the proposition that use by Congress of a term in the singular (i.e., “building, structure, facility or installation” in *Chevron*; “standard” here) does not on its own preclude the implementing agency from determining the geographic level at which the law applies, especially where, as here, it is fair to say the statutory language “is not dispositive” nor “precisely directed

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<sup>35</sup> See *NRDC v. Herrington*, 768 F. 2d 1355 (D.C. Cir. 1985).

<sup>36</sup> S. Rep. No. 100-6, pp. 3-4, *reprinted in* 1987 U.S.C.C.A.N. 54-55.

<sup>37</sup> 71 Fed. Reg. 59209 (“However, the Department notes that EPCA allows states to seek . . . a waiver of federal preemption of state or local energy conservation standards. . . .In the context of residential furnaces and boilers, where regional climatic effects can have a significant impact on whether a specified energy conservation standard would be technologically feasible and economically justified in that region, such regional climatic effects will be important in DOE’s assessment of whether there are ‘unusual and compelling state interests’ for state energy conservation standards”).

<sup>38</sup> The relevant authorizing statute, 42 U.S.C. § 7502(b)(6) has since been amended. The then-extant version may be found in Pub. L. No. 95-95, § 129(b), 91 Stat. 747.

to the question” at hand and the “legislative history . . . is unilluminating.” 467 U.S., at 860-862.

Within the context of EPCA/NEPCA/NAECA, where the statute and legislative history simply do not speak clearly to the precise question, DOE somehow finds its hands tied. But the Supreme Court has made it clear that the lack of clarity in an authorizing statute in fact provides the agency with authority to fill in any gaps left by Congress:

The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.

467 U.S., at 843-844 (internal quotations and citations omitted). Under *Chevron*, DOE clearly has the authority to fill in the details that Congress simply did not directly contemplate — whether the agency could adopt a two-tiered standard for a product, where the benefits of owning and operating that product vary so significantly by climate region. This is particularly true where, as here, “the regulatory scheme is technical and complex” and where the “decision involve[s] reconciling conflicting policies.” *Id.*, at 865.

DOE’s conclusion that it cannot adopt a two-tiered standard thus runs afoul of Supreme Court precedent; runs counter to the provisions of federal law as embodied in 1 U.S.C. § 1; is contrary to DOE’s own conclusion in the air conditioning rulemaking that it can impose two standards on one product; and undermines one of the central purposes of EPCA — to implement efficiency standards “which the Secretary determines are technologically feasible and economically justified,” 42 U.S.C. § 6295(o)(2)(A). DOE should reverse its position as announced in the NOPR and find that it has the authority to adopt a two-tiered standard for non-weatherized gas furnaces. It should set that standard at 90% AFUE for northern states, defined by reference to average number of heating degree days or other reasonable means.

**VII. IF DOE DOES NOT ADOPT 90% AFUE, IT SHOULD MAKE GOOD ON ITS REPRESENTATIONS TO CONSIDER CLIMATIC CONDITIONS AND OTHER IDENTIFIED FACTORS FAVORABLY IN REVIEWING WAIVER REQUESTS**

DOE rejects the authority it clearly has under EPCA, as amended, to adopt a two-tiered standard, 71 Fed. Reg. 59209. But it then generally describes the process by which waivers may be sought and emphasizes certain facts relevant to this docket that, by DOE’s own read of the law, should make it easier for northern states to obtain waivers. For example, DOE notes:

It appears to the Department that in the context of residential furnaces and boilers, where regional climatic effects can have significant impact on whether a specified energy conservation standard would be technologically feasible and economically justified in that region, such regional climatic effects will be important in DOE’s assessment of whether there are “unusual and compelling state and local energy interests” for state



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*energy conservation standards. States having higher-than-average, population-weighted heating degree days (HDDs) based on long-term National Oceanographic and Atmospheric Administration data would seem to have the best prospects for demonstrating “unusual and compelling” interests to support a waiver of preemption in the particular circumstances presented here.*

71 Fed. Reg. 59209 (emphasis added).

On the face of it, these quoted DOE comments, as well as other comments DOE made about how it might apply the waiver rules in the context of a state’s request to implement a 90% AFUE standard<sup>39</sup>, all suggest that a Northern state — particularly one which has a higher-than-average number of HDDs; that already has a high saturation of 90% AFUE units and whose manufacturing suppliers would have less of a burden in shipping more 90% units to that state; that applied to DOE in conjunction with contiguous states; and that had already tried various incentives to increase the penetration of high-efficiency units in its state — could reasonably expect that its waiver request would be viewed quite favorably. Without making any commitments that any specific state waiver request would be approved, this is in fact the road map that DOE has provided, apparently as a salve to the many commenters who have forcefully urged DOE to adopt a two-tiered standard.

The concern of the Consumer Groups is that DOE’s guidance may turn out to be no more helpful than Brer Fox’s setting out of the “tar baby” for Brer Rabbit to find,<sup>40</sup> with states getting stuck in the waiver process and having no briar patch to escape to.<sup>41</sup> It is already possible to discern the outlines of how DOE’s apparent road map for obtaining waivers will become a trap for the unwary. First, DOE’s road map calls for data that may be extremely difficult if not impossible for states to obtain, including the current “efficiencies of shipments to that [petitioning] state;” detailed information about the sales made by “small and large manufacturers” into that state; and quantifying the extent to which any “subsidies and/or incentives, such as tax rebates or purchase price rebates . . . have not worked.” 71 Fed. Reg. 59210. Second, DOE identifies as relevant and apparently helpful factors the “saturation of homes with products that already meet those higher standards” and “the extent to which manufacturers already produce and sell products that would meet the State’s proposed standard,” but it is easy to imagine how DOE could use this information to conclude that the alleged benefits of granting a waiver are actually limited by the extent to which homes already have

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<sup>39</sup> See 71 Fed. Reg. 59210.

<sup>40</sup> Joel Chandler Harris, “The Wonderful Tar Baby” (1881).

<sup>41</sup> The state of Massachusetts, later followed by Vermont and Rhode Island, adopted a law setting 90% AFUE as the standard for gas furnaces. The Massachusetts law requires the state’s energy office to seek a waiver from DOE to implement the 90% standard, if a waiver is legally necessary. Ch. 139 of the Acts of 2005, § 11, *amending* Mass. Gen. Laws ch. 25B, § 5. The Consumer Groups understand that Vermont and Rhode Island would likely join in any waiver petition that Massachusetts files.

high-efficiency units installed. Finally, while DOE “encourages States to coordinate among themselves” and submit “an aggregate petition from multiple States,” it is all too easy to imagine how DOE would turn the joint petition against the petitioners and find that a multi-state petition cannot meet the standard of “establish[ing] by a preponderance of the evidence that such State [singular] regulation is needed to meet unusual and compelling State [singular] or local energy or water interests.” 42 U.S.C. § 6297(d)(1)(b). A DOE that can so easily conclude that the definition of “energy conservation standard” precludes the adoption of two-tiered standards for furnaces could just as easily conclude that a waiver process which calls for a “State” to demonstrate its “unusual” interest creates a high barrier for any group of states that wishes to file a joint waiver petition.

The Consumer Groups would far prefer that DOE adopt the requested two-tiered standard. But to the extent that DOE will not do so, the Consumer Groups hope that DOE will make it much clearer in the comments to the final rule that the road map outlined in the NOPR is not a trap for the unwary, but a genuine road map that DOE will follow in good faith. Specifically, the Consumer Groups ask DOE to clarify that:

1. Petitions filed by more than one state, especially if filed by contiguous or nearby states with similar HDDs, will not be deemed in *per se* violation of the requirement that a petition must demonstrate an “unusual and compelling State or local energy interest.”
2. Petitions coming from states that have already achieved a relatively high penetration of higher-efficiency units, and/or where manufacturers already make available a range of products that meet the higher efficiency standard, will not be viewed unfavorably simply because the percentage of households that could benefit from a higher mandated standard would, by necessity, be a smaller percentage than in states that have had a lower saturation of efficient units.
3. Petitions that do not contain information or data that DOE might prefer to see, such as data on shipments to a state disaggregated by efficiency level and/or manufacturer, will not be viewed unfavorably if the information is proprietary to manufacturers or an industry association, and the manufacturers or association are unwilling to disclose the relevant data. More importantly, DOE should make it clear that it will not require states to provide information that is proprietary or confidential and that states cannot obtain.

## **VIII. CONCLUSION**

The Consumer Groups urge DOE to adopt a standard of 90% AFUE for non-weatherized gas furnaces, at least in northern states; to advance the effective date of any final rules earlier than the proposed January 1, 2015; and to clarify the “road map” for states that may file waiver requests as requested above.

Respectfully submitted,

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Charles Harak, Esq.  
National Consumer Law Center  
77 Summer Street, 10<sup>th</sup> fl.  
Boston, MA 02110  
617 542-8010

[charak@nclc.org](mailto:charak@nclc.org)

On behalf of itself (NCLC) and its clients Massachusetts Union of Public Housing Tenants and Texas Ratepayers' Organization to Save Energy

Also submitted on behalf of the following organizations:<sup>42</sup>

Consumer Federation of America  
Massachusetts Energy Consumers Alliance  
National Association of State Community Service Programs  
Ohio Partners for Affordable Energy  
People's Power & Light of Rhode Island  
Public Utility Law Project  
Salt Lake Community Action Program  
Texas Legal Services Center  
The Energy Project  
The Utility Reform Network  
Virginia Citizens Consumer Council

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<sup>42</sup> NCLC notes that it has received the explicit authorization to sign these comments on behalf of each of the named organizations.