

01-4102(L)

01-4103(CON), 02-4160(CON), 02-4189(CON), 02-6139(CON)

United States Court of Appeals
for the
Second Circuit

NATURAL RESOURCES DEFENSE COUNCIL, PUBLIC UTILITY LAW PROJECT, STATE OF CONNECTICUT, STATE OF VERMONT, STATE OF MAINE, STATE OF NEW JERSEY, STATE OF NEVADA, STATE OF CALIFORNIA, CONSUMER FEDERATION OF AMERICA & STATE OF NEW YORK,

Petitioners,

-against-

SPENCER ABRAHAM, As Secretary of the United States Department of Energy & UNITED STATES DEPARTMENT OF ENERGY,

Respondents,

(For Continuation of Caption See Inside Cover)

PETITIONS FOR REVIEW OF UNITED STATES
DEPARTMENT OF ENERGY RULES

**BRIEF AMICUS CURIAE OF THE COMPETITIVE ENTERPRISE INSTITUTE,
ENERGY MARKET & POLICY ANALYSIS, INC., CONSUMER ALERT, COMMITTEE
FOR A CONSTRUCTIVE TOMORROW, NATIONAL TAXPAYERS UNION, SMALL
BUSINESS SURVIVAL COMMITTEE, AND THE SENIORS COALITION
IN SUPPORT OF RESPONDENTS**

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- and-

AIR-CONDITIONING & REFRIGERATION INSTITUTE, STATE OF NEW HAMPSHIRE,
TEXAS RATEPAYERS' ORGANIZATION TO SAVE ENERGY, COMMONWEALTH OF
MASSACHUSETTS, MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS,
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, AND
STATE OF RHODE ISLAND,

Intervenors.

INTRODUCTION

The undersigned organizations represent a broad cross-section of public interest groups, and have a cumulative membership in excess of four million. We submit this Brief Amicus Curiae in support of Respondent Department of Energy (DOE).

Several Petitioners and Intervenors in this action claim to represent the interests of consumers, among others, in their attempt to reinstate the more onerous SEER 13 energy conservation standard for central air-conditioners and heat pumps. After reviewing their briefs, however, we would like to bring to this Court's attention several anti-consumer implications of SEER 13 that were not adequately addressed. As will be discussed below, it is the SEER 12 standard now being defended by DOE, and not SEER 13, that better serves the interests of consumers and complies with the applicable statutory requirements.

IDENTITY AND INTERESTS OF AMICI

The Competitive Enterprise Institute (CEI) is a non-profit public interest organization committed to advancing the principles of free markets and limited government and the interests of consumers. CEI has a longstanding interest in bringing to light the potentially deleterious consequences of overly burdensome regulations, which are often neglected by federal agencies in their attempts to adopt a regulatory agenda.¹ CEI has previously participated in DOE appliance conservation standards rulemakings, with a particular emphasis on ensuring that the interests of consumers are adequately represented. In pursuit of these goals, CEI supports Respondent DOE's effort to set the energy conservation standard for central air-conditioners at SEER 12, rather than the SEER 13 level favored by Petitioners.

Energy Market & Policy Analysis, Inc. (EMPA) is a public interest organization focusing on the consumer implications of DOE appliance conservation standards and other energy-related policies. It participated in the administrative proceedings regarding the new standards for central air-

¹ See, e.g., *CEI v. U.S. Department of Transportation*, 856 F.2d 1563 (D.C. Cir. 1988); *CEI v. National Highway Traffic Safety Administration*, 956 F.2d 321 (D.C. Cir. 1992).

conditioners and heat pumps.² EMPA believes that the less stringent SEER 12 standard is preferable to SEER 13.

Consumer Alert, Committee for a Constructive Tomorrow, National Taxpayers Union, Small Business Survival Committee, and the Seniors Coalition are all membership organizations, each representing a segment of the public likely to be affected by air-conditioner standards. These organizations support Respondent DOE, believing SEER 12 to better serve the interests of their members than SEER 13.

SUMMARY OF THE ARGUMENT

Petitioners' challenge is primarily a procedural one, asserting that DOE cannot issue a rule for SEER 12 and must go forward with SEER 13 as published in the Federal Register on January 22, 2001.³ However, this attempt to invalidate the agency reconsideration of the SEER 13 rule would harm consumers by precluding a full consideration of their concerns. This is particularly true given DOE's hurried and haphazard effort to promulgate SEER 13 in the waning days of the previous Administration, a process that limited the opportunity for consumer input.

² JA-6406, JA-6864.

³ 66 Fed. Reg. 7,170 (January 22, 2001), SPA-143.

Substantively, it is equally clear that SEER 13 violates the Energy Policy and Conservation Act, as amended (the Act).⁴ There are several provisions in the Act designed to protect consumers against excessively stringent energy conservation standards for covered appliances. As DOE's own analysis demonstrates, these provisions were violated by the SEER 13 standard, lending further support to the agency's subsequent decision to set the standard at SEER 12, the level originally proposed for central air conditioners. In addition, SEER 12 would preserve greater consumer choice than SEER 13.

ARGUMENT

I. DOE'S RECONSIDERATION OF THE SEER 13 STANDARD SERVED THE INTERESTS OF CONSUMERS

The Act and the related DOE Process Improvement Rule,⁵ are designed to allow for adequate consideration of stakeholder concerns throughout the rulemaking process. For rules affecting the cost and quality of consumer goods, the impact on end users is particularly critical. Here, Petitioners' insistence that DOE is barred from revisiting the SEER 13 rule is not only an incorrect interpretation of the applicable procedural

⁴ 42 U.S.C. §§ 6291 to 6317.

⁵ 10 C.F.R. Part 430, Subpart C, Appendix A.

requirements, but runs counter to the goal of maximizing participation and consideration of all relevant concerns before a rule goes into effect.

Petitioners argue that the SEER 13 standard rule immediately became immune from administrative review upon appearing in the Federal Register. In effect, they wish to nullify DOE's effort to reconsider the SEER 13 standard, and after a thorough analysis of the impacts, change it to SEER 12. This highly strained interpretation of a provision in the Act⁶ (discussed in detail in Respondent DOE's brief) would only serve to deprive interested parties of an important and well-established means of agency review. Indeed, the APA's requirement that final rules not become effective until at least 30 days after publication (extended to 60 days under the Congressional Review Act), and the requirement that agencies give interested persons the right to petition for reconsideration of a rule, would become meaningless under Petitioners' view.⁷

Administrative reconsideration of appliance standards rules is particularly important for consumers, who often lack the resources to undertake litigation in such matters.⁸ It could be the last opportunity for

⁶ 42 U.S.C. § 6295(o)(1).

⁷ 5 U.S.C. § 553(d) and (e); 5 U.S.C. § 801(a)(3)(A).

⁸ It should be noted that one or more of the undersigned organizations would have likely sought reconsideration of the SEER 13 rule, but the need to do so

DOE, either on its own or at request of an interested party, to evaluate the consumer and other implications of a standard before it takes effect.

Reconsideration of the SEER 13 rule for central air conditioners is especially critical, given the history of this rulemaking. On October 5, 2000, DOE published its Notice of Proposed Rulemaking (NOPR).⁹ At the time, DOE proposed to tighten the energy conservation standards for central air-conditioners by 20 percent, from the current SEER 10 to SEER 12.¹⁰ The 60-day comment period provided was shorter than the 75 days provided for under the Process Improvement Rule (§ 4(e)(2)). At some point towards the end of the 60-day comment period, DOE apparently chose to adopt the more stringent SEER 13. DOE's last-minute additions to the record to shore up the case for SEER 13 came at a November 16, 2000 public hearing, shortly before the close of the comment period on December 4, 2000,¹¹ and DOE refused to extend the comment period.¹² The rule was published on

was obviated both by the Air-Conditioning and Refrigeration Institute's petition for reconsideration and by the current Administration's actions.

⁹ 65 Fed. Reg. 59,590 (October 5, 2000), JA-3816.

¹⁰ *Id.*, at 59,591, JA-3818.

¹¹ EMPA, one of the undersigned organizations, submitted comments in response to the October 5th NOPR. (JA-6406). However, these comments focused on SEER 12 as originally proposed, and not SEER 13. EMPA also commented during the reconsideration process. (JA-6864).

¹² JA-3954, 4123-24, 4636, 5195.

January 22, 2001, the very last day the previous Administration could publish a rule in the Federal Register.¹³

We do not address whether this accelerated process technically complied with the law. However, it clearly constrained the opportunity for interested stakeholders to comment on SEER 13 and its supporting analysis prior to publication as a final rule. For this reason, Petitioners' insistence on no post-publication administrative review is especially troubling, in that it would further limit consideration of consumer impacts. Indeed, the record clearly shows a much more thorough agency analysis of the relative merits of SEER 13 versus SEER 12 *after* the SEER 13 rule than before it.

For these reasons, we believe DOE's subsequent decision to reconsider the SEER 13 rule and issue the SEER 12 rule was in full compliance with the applicable procedural requirements, and was in the best interests of consumers.

II. SEER 13 VIOLATES THE CONSUMER PROTECTIONS IN THE ACT

The Act does not allow DOE to simply set the most stringent energy conservation standards that are technologically feasible; such standards must

¹³ 66 Fed. Reg. 7,170 (January 22, 2001), SPA-143.

also be economically justified.¹⁴ Economic justification is substantially a consumer protection, assuring that standards are not set at levels so strict that they harm those purchasing and using these appliances. This involves weighing the benefits to consumers, in the form of energy savings, against the costs, in the form of a higher purchase price, operating costs, compromised product features, performance, and/or reliability.¹⁵ These costs typically grow larger with higher minimum efficiency levels, and at some point outweigh the marginal increase in energy savings.

Notwithstanding DOE's stated conclusions in its SEER 13 final rule, the agency's own evidence demonstrates that SEER 13 is not economically justified.¹⁶

A. The Costs of the SEER 13 Standard Outweigh the Benefits For Many Consumers

A commonsense definition of economic justification would preclude any standard that hurts more consumers than it helps. Not surprisingly, in the history of the Act, all of the nearly thirty appliance standards promulgated by DOE were determined to provide net savings for a majority of owners. The SEER 13 standard is the first exception.

¹⁴ 42 U.S.C. § 6295(o)(2)(A).

¹⁵ 42 U.S.C. § 6295(o)(2)(B).

¹⁶ 66 Fed. Reg. at 7,170-71, SPA-143-44.

Under one set of assumptions for split system air conditioners (the most common product category affected by this rule), DOE indicates that 58 percent of consumers incur significant (greater than 2 percent) added costs of a new SEER 13 system over the life of the system, while only 25 percent would receive significant savings.¹⁷ Even under the analysis most favorable to SEER 13, the percentage of significant net losers for this product outstrips net gainers, 39 to 34 percent, with the remaining 27 percent at plus or minus 2%, which DOE considers not significant.¹⁸

DOE's projections of the impact on low income households are even more troubling. For every analysis and every product category, the agency concedes that the portion of consumers who would not significantly benefit is even greater for low income households.¹⁹ For example, DOE's analysis showing that a SEER 13 split system air conditioner that would impose significant net costs on 58 percent of consumers overall found that it would do so for 69 percent of low income consumers, while significantly benefiting only 17 percent.²⁰ Under the analysis more favorable to SEER 13, 50

¹⁷ 66 Fed. Reg. at 7,188, Table V.14, SPA-162.

¹⁸ Id., Table V.13, SPA-162.

¹⁹ Id., at 7,189, Tables V.15, V.16, SPA-163.

²⁰ Id., Table V.16, SPA-163.

percent of low income consumers for this product would suffer significant net costs, and only 26 percent would experience significant net savings.²¹

In addition, the higher costs may force some low income homeowners to forgo the purchase of a new system, either by doing without air-conditioning, opting for cheaper but less energy efficient window units, or undertaking potentially costly short-term repairs necessary to keep older systems operational.

In response to concerns about the adverse impact on low income households, several Petitioners and their supporting Intervenors have asserted that DOE should effectively ignore this consumer subgroup because they primarily rent, rather than own, their residences. This speculation fails for several reasons. First, DOE statistics show that only half of low income households with central air-conditioners are renters.²² Second, for those who do rent, DOE's analysis strongly suggests that the higher cost of SEER 13 will have an adverse effect on lease terms.²³ Finally, SEER 13 and other costly regulations may have the unintended consequence of acting as a further barrier for low income persons aspiring to own a home. For these

²¹ Id., Table V.15, SPA-163.

²² 67 Fed. Reg. 36,368, 36,380 (May 23, 2002), SPA-217.

²³ Id., at 36,380-81, SPA-217-18.

reasons, DOE should be sensitive to the impacts on low income households when determining economic justification.

Though the impact on senior citizens was not specifically addressed by DOE, the evidence suggests that the adverse effects on this consumer subgroup would also be serious. Many seniors are on fixed incomes, and thus are more affected by product cost increases. Furthermore, given the substantially higher first cost of a SEER 13 air-conditioner, and the relatively modest marginal energy savings, the so-called payback period (the time period required to own and operate a regulated appliance in order to earn back the higher cost in the form of energy savings) is unusually long, and considerably longer than for SEER 12.²⁴ To require senior citizens to undertake the additional expense of SEER 13 systems, even though the payback period for this investment may exceed their expected lifetimes, demonstrates particular insensitivity to this subgroup.

In sum, DOE's January 22, 2001 SEER 13 rule tried to enact a standard that its own analysis identified as being detrimental to many if not most consumers and disproportionately so for low income households (and

²⁴ 66 Fed. Reg. at 7,195, Table V.27, SPA-169 (Trial Standard 2 equates to SEER 12 and Trial Standard 4 equates to SEER 13). Beyond seniors, long payback periods burden many other consumers, such as first time home buyers who are unlikely to hold onto their starter homes long enough to benefit from SEER 13.

likely so for seniors as well). As such, the SEER 13 standard is a clear violation of the economic justification requirement, and DOE's subsequent decision to issue SEER 12 both complies with the law and protects the interests of consumers.

B. SEER 13 Would Compromise Product Quality

In addition to preventing unjustifiably expensive appliance standards, the Act is also designed to ensure that such standards do not burden consumers with reduced product choice, features, performance or reliability. Not only is “any lessening of the utility or the performance of the covered products” one of the non-cost factors to be considered in determining economic justification, but a separate provision in the statute explicitly forbids DOE from setting a standard shown to “result in the unavailability . . . of performance characteristics (including reliability), features, sizes, capacities, and volumes”²⁵ Here, DOE had ample reason to believe that SEER 13 would have such adverse impacts on consumers.

Comments submitted to the agency demonstrated that, among other qualitative deficiencies, SEER 13 air conditioners and heat pumps would

²⁵ 42 U.S.C. §§ 6295(o)(2)(B)(i)(IV) and 6295(o)(4).

require larger components than would SEER 12 systems, and thus might reduce (or render prohibitively expensive) the models available for certain space-constrained residences.²⁶ A SEER 13 standard would also increase installation costs, such as the additional task of taking down walls or expanding closets to accommodate the larger components.²⁷

In its January 22, 2001 SEER 13 rule, DOE acknowledged these concerns but defended its assumption that product choice and installation costs would remain constant, by asserting that “manufacturers will have the incentive under new standards to reduce the size of 13 SEER equipment using various approaches at their disposal.”²⁸ But there were well-documented concerns on this point, and DOE was correct subsequently to incorporate these concerns in its decision to adopt SEER 12.²⁹

The Department of Justice’s (DOJ) determination as to the impact on competition serves to buttress these concerns. DOJ’s April 5, 2001 analysis of SEER 13 found numerous competitiveness problems, including the viability of manufacturers of products designed for manufactured housing and other space-constrained environments. While acknowledging the

²⁶ See, e.g., JA-6789-90, 6966-67.

²⁷ *Id.*

²⁸ 66 Fed. Reg. at 7,180, SPA-143.

²⁹ 67 Fed. Reg. at 36,382, SPA-219

exception in the rule for certain types of niche products, DOJ nonetheless concluded that “the exception does not eliminate the difficulties for manufacturers of standard equipment who could not make equipment that complied with the 13 SEER standard and still fit into space-constrained sites.”³⁰ The U.S. Small Business Administration agreed with these concerns.³¹

Although DOJ’s analysis focused on the competitive impact on manufacturers, these conclusions, if true, would mean that the SEER 13 standard would deprive some consumers of the product characteristics they need.

As with the costs, the adverse impact of SEER 13 on product choice and quality would disproportionately burden low income and senior households. For example, both groups tend to live in smaller residences for which reduced product availability (and higher installation costs) would be a problem.

³⁰ 67 Fed. Reg. 36,407 (April 5, 2001 letter from John M. Nannes, Acting Assistant Attorney General, to Eric J. Fygi, Acting General Counsel, Department of Energy). JA-5857.

³¹ May 4, 2001 letter from Susan M. Walthal, Chief Counsel for Advocacy, U.S. Small Business Administration, to The Honorable Spencer Abraham, Secretary of Energy (JA-5925).

DOE cited other qualitative problems with SEER 13 systems, including “a possible reduction in the ability of the product to dehumidify,” as additional reasons to reconsider the standard.³²

Since these qualitative deficiencies with SEER 13 systems are considerably less pronounced in SEER 12, we believe the change to SEER 12 is appropriate under the Act.

III. IN PROMULGATING SEER 13, INADEQUATE CONSIDERATION WAS GIVEN TO NON-REGULATORY APPROACHES THAT WOULD SERVE THE PURPOSES OF THE ACT WHILE PRESERVING CONSUMER CHOICE

In addition to the Act’s provisions protecting consumers against excessively strict standards, DOE’s Process Improvement Rule also obligates the agency to consider non-regulatory approaches to achieving the goals of greater appliance efficiency. Consideration of alternatives to strict standards is particularly important if “highly efficient products can obtain a significant market share but less efficient products cannot be eliminated altogether because, for instance, of unacceptable adverse impacts on a significant subgroup of consumers.”³³ In setting the SEER 13 standard, DOE failed to consider non-regulatory approaches that could achieve most

³² 66 Fed. Reg. 38,822, 38,835 (July 25, 2001). SPA-192.

³³ 10 CFR, Part 430, Subpart C, Appendix A, § 12(b).

of benefits possible from this stringent standard without burdening consumer subgroups with its detrimental effects.

The previously discussed adverse effects of SEER 13 on low income and senior citizen households (pages 9-11, above) are reason enough to consider non-regulatory approaches. One other significant adversely affected subgroup is geographically based -- those consumers living in Northern states where air-conditioning is not used enough for SEER 13 to be a good investment. Though the Act does not require that a standard benefit 100 percent of the public, SEER 13 stands out as benefiting only a minority of consumers. For this reason, it makes sense to set a more reasonable standard rather than to force SEER 13 on everyone.

It is worth noting that federal standards are merely a minimum. Indeed, a few SEER 13 models are currently available for those consumers who want them. Given the significant subgroups likely to be harmed by SEER 13, consumers would be better served if the standard were set at SEER 12. SEER 12 is itself a stringent new efficiency level, representing a 20 percent increase over the existing one. In addition, a SEER 12 standard would in no way impede the efforts of those who wish to and are able to manufacture, sell, and buy models more efficient than SEER 12.

Several governmental programs (the federal labeling requirements, the Energy Star program, as well as similar state and utility-sponsored programs promoting and/or subsidizing the purchase of high efficiency models) could educate and encourage consumers to consider SEER 13 models. These non-regulatory approaches could target the relatively few consumers likely to benefit from SEER 13, while leaving the more desirable SEER 12 option open for the rest. There is no reason to believe that SEER 13 models cannot, through non-regulatory approaches, obtain a significant market share among those likely to benefit from them.

CONCLUSION

The Act requires a balanced approach to setting appliance standards, in which the benefits of increased efficiency are weighed against the costs. This precludes burdening the public with excessively stringent standards, such as SEER 13.

Procedurally, DOE was well within its rights to reconsider the problematic SEER 13 standard shortly after it was published. Substantively, the agency, consistent with the Act's consumer protections, properly issued the SEER 12 standard. For the great majority of consumers,

the SEER 12 standard is preferable to SEER 13. Thus, DOE's actions should be upheld by this Court.

Respectfully submitted,

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