



# Manufactured Housing Association for Regulatory Reform

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## VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

Manufactured Housing Consensus Committee  
C/O Home Innovation Research Labs  
Administering Organization  
400 Prince George's Boulevard  
Upper Marlboro, Maryland 20774

Re: October 26, 2018 HUD Office of Policy Development and Research  
Evaluation of Cost Figures in DOE NODA Packages – Draft Results

Dear Members of the Manufactured Housing Consensus Committee:

The Manufactured Housing Association for Regulatory Reform (MHARR) submits the following comments concerning the October 26, 2018 memorandum of the U.S. Department of Housing and Urban Development's (HUD) Office of Policy Development and Research (PD&R), entitled "Evaluation of Cost Figures Found in Department of Energy's NODA Packages – Draft Results July 2018."

## **I. INTRODUCTION**

At its September 11-13, 2018 meeting, the Manufactured Housing Consensus Committee (MHCC) reviewed a Notice of Data Availability (NODA) and related materials published by the U.S. Department of Energy (DOE) regarding proposed energy standards for federally-regulated manufactured homes.<sup>1</sup> The NODA constitutes, by its own terms, a "re-evaluation" of DOE's approach to manufactured housing energy regulation pursuant to section 413 of the Energy Independence and Security Act of 2007 (EISA) and a "re-examination"<sup>2</sup> of the specific manufactured housing standards, methodologies and underlying data and analytics published by DOE as a proposed rule on June 17, 2016. Pursuant to this review, the MHCC adopted two resolutions -- one objecting to the timing and substance of the NODA, and seeking a re-delegation

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<sup>1</sup> See, 83 Federal Register, No. 150, August 3, 2018, pp. 38073-38080, Notice of Data Availability; Request for Information and related materials, attached hereto as Exhibit 1.

<sup>2</sup> Id. at p. 38075, col.1.

of the entire matter of manufactured housing energy standards back to HUD and the MHCC<sup>3</sup> and a second resolution, requesting HUD PD&R to “submit a document to the MHCC which includes comparable cost figures similar to” the DOE NODA package draft results.<sup>4</sup>

Ostensibly in response to this request, HUD PD&R conveyed a cursory three-page memorandum to the Acting Administrator of the HUD Manufactured Housing Program on October 26, 2018.<sup>5</sup> Inexplicably, this memorandum was not made available to MHCC members, interested parties, or the general public until late-January 2019. Without offering any specific analysis of DOE’s data or assumptions, or details of its own alleged review, the PD&R memorandum nevertheless posits two broad conclusions, stating: (1) that PD&R “does not object” to DOE’s “cost figures;”<sup>6</sup> and (2) that PD&R “*broadly speaking* ... does not object to the methodologies and assumptions used within DOE’s [life-cycle cost analysis] and annualized spreadsheets.”<sup>7</sup> (Emphasis added). These conclusory assertions,<sup>8</sup> however: (1) are not responsive *or even relevant* to the actual data and analysis requested by the MHCC; (2) rely on discredited, illegitimate alleged data and related analytics developed as part of the fundamentally-tainted, sham DOE 2014-2016 “negotiated rulemaking” process (see below); and (3) rely, in part, on assumptions that have since been repudiated by the Trump Administration.<sup>9</sup> For all of these reasons, the October 26, 2018 PD&R “analysis” – like DOE’s NODA and June 17, 2016 proposed rule -- is factually worthless and illegitimate, and, if anything, demonstrates that any additional manufactured housing energy standards, if pursued at all,<sup>10</sup> must be the subject of an entirely new, legitimate and fully-transparent rulemaking process.

## II. PROCEDURAL SUMMARY AND BACKGROUND

As MHARR has extensively detailed in prior comments filed in response to DOE’s original June 2016 Notice of Proposed Rulemaking (NPR) and its 2018 NODA, the substantive proposals and alleged supporting data contained in both DOE actions, are the product of a fundamentally tainted, illegitimate and arguably scandalous DOE “negotiated rulemaking” process. DOE has

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<sup>3</sup> Inexplicably, the full text of this resolution, quoted by MHARR in its contemporaneous written report on the MHCC meeting (see, September 19, 2018 MHARR Washington Update at p. 4), is not included in the “draft” minutes of the meeting – an issue that MHARR intends to address at the upcoming April 30 – May 2, 2019 MHCC meeting.

<sup>4</sup> See, Draft MHCC September 11-13, 2018 Meeting Minutes at pp. 7-8.

<sup>5</sup> See, Exhibit 2, attached hereto.

<sup>6</sup> Id. at p. 1.

<sup>7</sup> Id. at p. 3.

<sup>8</sup> Trump Administration Executive Order 13777 (“Enforcing the Regulatory Reform Agenda”) specifically targets for reconsideration and repeal, “regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are *insufficiently transparent* to meet the standard for reproducibility....” (Emphasis added). See, 82 Federal Register, No. 82, March 1, 2017 at p. 12286.

<sup>9</sup> See, Section III C, infra.

<sup>10</sup> Consistent with the MHCC’s resolution calling on DOE to re-delegate this entire matter to HUD, there is no valid or legitimate basis for the imposition of punitive and discriminatory energy standards on federally-regulated manufactured homes. HUD Code manufactured homes, as demonstrated by MHARR in its August 8, 2016 written comments on DOE’s June 17, 2016 proposed rule and its September 17, 2018 NODA comments (attached hereto as Exhibit 3), are already energy efficient, as demonstrated by U.S. Census Bureau data.

admitted<sup>11</sup> that it initiated this supposed “negotiated rulemaking” in 2014 – some seven years following the enactment of EISA – after a 2011 “draft” DOE manufactured housing energy rule was “impermissibly” (and discriminatorily) leaked to parties in interest<sup>12</sup> (including industry representatives and energy special interests) and DOE was instructed by the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA) to begin its regulatory process for the development of manufactured housing energy standards “anew.”<sup>13</sup>

Instead of “starting-over” with a completely new, legitimate rulemaking and standards development process, however – as shown by multiple documents disclosed by DOE pursuant to the Freedom of Information Act (FOIA) -- DOE, with the support of the Manufactured Housing Institute (MHI)<sup>14</sup> and multiple allied energy special interests,<sup>15</sup> instead orchestrated a highly-truncated, non-substantive, sham “negotiated rulemaking” process to serve as a fig-leaf to satisfy OIRA while simultaneously continuing to pursue the “impermissibly disclosed” 2011 “draft” manufactured housing energy standards rule already developed by DOE. Toward this end, former MHI Regulatory Affairs Vice President Lois Starkey, on March 14, 2014, wrote to DOE, seeking to revive the then-moribund DOE manufactured housing rulemaking process via a negotiated rulemaking with “*a tight meeting schedule*” and “*a minimum of meetings*” (emphasis added) – notwithstanding the complex, highly-technical and price-sensitive nature of the subject matter involved, based on the previously “impermissibly distributed” 2011 “draft NOPR and Technical Support Documents for opening discussion” – *i.e.*, in order to facilitate a whitewash of the 2011 “draft” DOE rule and appear to “begin the [regulatory] process anew,” as directed by OIRA, while, in fact, doing no such thing.

The specific coordination of this sham process between DOE and outside energy special interests is confirmed by a May 21, 2014 email exchange between DOE official John Cymbalsky and then-Natural Resources Defense Council (NRDC) official (and later MHCC member) Robin Roy, also disclosed to MHARR by DOE pursuant to FOIA:

Robin Roy: “[Can] I send you a letter ...? It would be a joint letter in support of [a] working group on manufactured housing with diverse signers from our regular MH discussion group (including industry, consumer interests, EE advocates).”

Cymbalsky: “That would be great to have sooner than later. \*\*\* How much time do you anticipate asking for in terms of negotiating a NOPR?”

Robin Roy: “Short. 2 meetings would be great. But we won’t be specific in the letter.”<sup>16</sup>(Emphasis added).

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<sup>11</sup> See, Exhibit 4, attached hereto – Transcript of August 5, 2014 exchange within the DOE Manufactured Housing Working Group.

<sup>12</sup> *Id.* at p. 56.

<sup>13</sup> *Id.* at p. 57-58.

<sup>14</sup> A representative of the industry’s largest businesses, with the ability to absorb greater, more costly and unnecessary regulation.

<sup>15</sup> See, Exhibit 5, attached hereto.

<sup>16</sup> See, Exhibit 6, attached hereto.

Subsequently, in a May 28, 2014 letter to DOE, MHI, NRDC and other energy special interests again sought a negotiated rulemaking based on “a tight meeting schedule with a minimum of meetings, e.g., 2 two-day meetings” utilizing the 2011 “draft NOPR and Technical Support Documents” as the basis for further discussion. (Emphasis added).<sup>17</sup>

These exchanges resulted in a rushed, truncated and superficial process utilizing a “negotiating” Working Group comprised almost entirely of energy special interests and other intra-industry supporters of DOE energy regulation, including alleged manufactured housing energy “experts” which – as disclosed through FOIA document requests – had previously been paid millions of dollars by DOE for supposed “research” contracts.<sup>18</sup> Cost estimates for the proposed standards, moreover, were developed behind closed doors by a Working Group contractor, based on an undisclosed survey of unidentified manufactured housing producers selected by MHI and conducted in secret, with no indication that any smaller manufacturers were surveyed. Indeed, open cost figures developed by MHARR manufacturers show a retail cost impact of nearly \$6,000.00 for the Term Sheet-based standards, while DOE posited cost impacts of slightly more than \$2,000.00 in its initial June 17, 2016 NOPR. Not surprisingly, given that the DOE rulemaking process was entirely contrived, the final “Term Sheet” assembled by the Working Group was approved with MHARR casting the only negative vote. This huge cost discrepancy, however -- which is highly relevant to lower and moderate-income consumers within the largely price-inelastic manufactured housing market -- is totally ignored by PD&R in its October 26, 2018 memorandum.

While the June 17, 2016 DOE proposed rule – derived from the tainted Working Group Term Sheet -- was subsequently rejected *once again* by OIRA and withdrawn, as a result, by DOE in January 2017,<sup>19</sup> the 2018 NODA, as it expressly acknowledges, is based on the alleged cost “information” developed by the fundamentally illegitimate “negotiated rulemaking” Working Group.<sup>20</sup> Thus, the 2018 NODA derives from and is itself an ultimate product of the fatally-tainted and illegitimate DOE “negotiated rulemaking” process. By referring this matter to HUD PD&R for supposed “analysis,” however, the MHCC has inadvertently invited yet another “whitewash” of this matter, insofar as the so-called PD&R “analysis” is non-responsive to the MHCC’s actual inquiry, is based on a non-transparent methods, assumptions, methodologies and inputs that cannot be legitimately evaluated, and ignores OIRA’s repeated rejection of underlying DOE proposals and the supposed justifications and bases for those proposals. Moreover, given HUD PD&R’s own history of political bias in favor of – and as an *enabler* of -- greater and more costly federal manufactured housing regulation (before being curbed to some degree by MHARR), any analysis produced by PD&R is inherently suspect.

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<sup>17</sup> See, Exhibit 7, attached hereto.

<sup>18</sup> See, MHARR August 8, 2016 comments at pp. 14-17

<sup>19</sup> See, Exhibit 1 at pp. 38074-38075

<sup>20</sup> See, 2018 DOE NODA Packages – Draft Results, at p. 2: “Incremental costs and savings calculations are based on methods and data presented in the 2016 NOPR.”

### III. COMMENTS

#### A. PD&R'S ALLEGED "ANALYSIS" IS NOT RESPONSIVE OR RELEVANT TO THE MHCC'S 2018 DATA REQUEST

The MHCC, in its September 11, 2018 resolution, specifically requested that HUD PD&R develop, and submit to the MHCC, a document including “*comparable cost figures*, similar to” the DOE NODA package draft results.<sup>21</sup> (Emphasis added). The October 26, 2018 PD&R memorandum, however, does no such thing. Instead, without any independent data, transparent, publicly reproducible (or reproduced) analysis, disclosure of sources, methods and inputs, or, apparently, consideration or even *recognition* of the multiple fatal flaws in the alleged data inputs to the tainted and illegitimate DOE “negotiated rulemaking” process identified by MHARR in written comments in the DOE public rulemaking docket, the October 26, 2018 memorandum summarily concludes with the opinion that PD&R “concur[s] with DOE NODA’s “methodology and resulting cost figures.”<sup>22</sup> There is, however, no valid, legitimate, or credible basis offered for that opinion, meaning that the PD&R memorandum not only fails to deliver the independent information requested by the MHCC, but instead illegitimately seeks to buttress the unreliable, unreproducible<sup>23</sup> and ultimately invalid alleged “data” underlying both the June 17, 2016 DOE proposed manufactured housing energy rule and the 2018 DOE NODA. As such, the October 26, 2018 PD&R memorandum is not only factually worthless for purposes of MHCC review, but affirmatively misleading.

First, the MHCC did not request or seek a simplistic, conclusory three-page opinion piece affirming alleged DOE data that MHARR, in previous DOE comments, has already shown is baseless – both under-representing the consumer-level cost of the June 17, 2016 DOE proposed rule and, by necessary implication, the 2018 DOE NODA proposals, while simultaneously overstating the alleged benefits of both proposals. Instead, the MHCC sought and requested independent data and related analysis from PD&R, which was not provided. If PD&R required additional time to perform the functions assigned to it by the MHCC, it should have sought that time, rather than produce and offer to the MHCC a warmed-over rehash of the same illegitimate alleged “data” and “analysis” already produced by DOE.

Second, PD&R states that it “contacted multiple individuals with expertise in manufactured housing related-energy matters.”<sup>24</sup> PD&R, however, does not disclose who those “individuals”

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<sup>21</sup> See, Exhibit 4, attached hereto.

<sup>22</sup> It is important to note again that the DOE NODA Packages – Draft Results document which is the subject of PD&R’s purported “analysis,” specifically states that its “incremental costs and savings calculations are based on methods and data presented in the [DOE August] 2016 [Notice of Proposed rulemaking].” As a result, the 2016 NODA, and its related cost-benefit calculations were based on the same alleged “data” developed as part of the fundamentally-tainted 2014-2016 DOE “negotiated rulemaking” process.

<sup>23</sup> See, Exhibit 2, supra, at p. 3: “PD&R staff was not able to recreate the survey conducted by the [DOE Manufactured Housing] Working Group given the short timeframe provided by the MHCC.” The excuse cited by PD&R, however, is irrelevant and not a valid, lawful, or legitimate basis for proffering an uninformed, factually-vacant opinion on a fundamentally tainted DOE process, based on a warmed-over rehash of the same illegitimate, contrived alleged “data” assembled by DOE.

<sup>24</sup> See, Exhibit 2, hereto, at p. 2.

are, what their qualifications may be, which specific “matters” were addressed, what their business and/or organizational affiliations are, whether they are part of or represent a special interest or special interest group, or whether any of those alleged “individuals” represent smaller industry businesses. One relevant question regarding the “individuals” contacted by HUD PD&R, however, does have a clear and unequivocal answer that is discernible on the public record. HUD PD&R did not bother contacting the one organization representing smaller, independent industry businesses that voted against the recommendations of the DOE Manufactured Housing Working Group (MHWG) and aggressively opposed both the June 17, 2016 DOE proposed rule and the 2018 NODA – i.e., MHARR. This begs the question whether PD&R’s undisclosed alleged inputs were solicited and received solely from proponents of – and active participants in – the sham, contrived “negotiated rulemaking.” Regardless, though, without transparent, legitimate data and/or factual inputs, the PD&R report is unverifiable and useless.

## **B. PD&R’S ALLEGED “ANALYSIS” RELIES ON ILLEGITIMATE DATA AND ANALYTICS FROM DOE’S SHAM “NEGOTIATED RULEMAKING”**

Significantly, DOE’s 2018 NODA admits that its underlying cost-benefit calculations were based on – and derived from – “methods and data presented in” the original June 17, 2016 DOE NOPR.” This, in and of itself, invalidates the NODA proposals and related cost-benefit calculations, and illustrates the need for a completely new rulemaking process to develop energy standards pursuant to EISA section 413 (as expressly directed by OIRA), if indeed, any such standards are developed. As MHARR stated in its September 17, 2018 NODA comments:

“As an initial matter, the threshold inquiry posed by DOE in the August 3, 2018 NODA, is ‘What analytical aspects related to DOE’s June 2016 proposal ... should DOE consider re-examining as part of its of its ongoing consideration of a final rule for manufactured housing?’ \*\*\* MHARR’s simple and straightforward response to this threshold inquiry is that all of the ‘assumptions,’ data and alleged factual predicate underlying the June 2016 proposed rule should not only be ‘re-examined, but should be expressly rejected by DOE, withdrawn, and replaced with valid, legitimate and transparent data developed by and through a valid, legitimate and transparent process. This is particularly the case insofar as DOE’s 2016 draft final rule -- based on the June 2016 proposed rule and the “negotiated rulemaking” process which led to that draft final rule – did ‘not clear’ regulatory review by the OMB Office of Information and Regulatory Affairs and was withdrawn as a result.

“[E]ven if the alleged DOE ‘negotiated rulemaking’ in this matter were not fundamentally and irretrievably tainted – which it was – the data, information and ‘assumptions’ underlying that proceeding, its final Term Sheet and, ultimately, the June 2016 DOE proposed rule, were not produced, obtained or developed pursuant to an open or “transparent” process within the meaning of [Executive Order] EO 13777. Specifically, cost information inputs (apparently still being utilized by DOE in calculating the cost of its proposed energy “packages”) were provided to DOE by the Manufactured Housing Institute (MHI) -- through a now-former Vice President who was a member of the “negotiated rulemaking” Manufactured Housing Working Group (MHWG) -- without those cost inputs, or their source, or

derivation, being disclosed either to other MHWG members, to the Manufactured Housing Consensus Committee (MHCC), or to the public. To the contrary, requests for the full disclosure of such information by MHARR's representative to the MHWG were specifically denied.

“As a result ... none of the data, information, or assumptions utilized or produced by the MHWG or by DOE in developing or supporting the June 2016 proposed rule is legitimate, reliable, or consistent with EO 13777. Accordingly, all of that data should not merely be “reconsidered,” but should be affirmatively rejected ... and replaced (if DOE proceeds with any such standards) with new research, research methods, data and analytics that are fully transparent and fully consistent with Trump Administration regulatory policy.”

PD&R's alleged analysis of the “data” relied-upon by DOE in its 2018 NODA, accordingly, is irrelevant, as is the alleged “data” itself. Insofar as that “data” was developed as part of an illegitimate, contrived DOE “negotiated rulemaking” process, all of that alleged “data” should be discarded and repudiated by DOE, thereby making any analysis of that “data” by HUD PD&R superfluous.

### **C. PD&R'S ALLEGED ANALYSIS RELIES ON DATA ASSUMPTIONS THAT HAVE SINCE BEEN REPUDIATED BY THE TRUMP ADMINISTRATION**

Furthermore, even if the alleged “data” inputs to the DOE “negotiated rulemaking” process and 2018 NODA were not inherently unreliable and part of a sham process, the cost-benefit calculations underlying the June 17, 2016 DOE proposed rule and, by necessary implication, the 2018 NODA, were based, in part, on a “Social Cost of Carbon” construct that was subsequently withdrawn by the Trump Administration.

As MHARR previously noted in July 14, 2017 comments to DOE in response to its May 30, 2017 Request for Information seeking public comment pursuant to EO 13777 and EO 13771 (“Reducing Regulation and Controlling Regulatory Costs”) on DOE rules that are “outdated, ineffective, or excessively burdensome,” the June 17, 2016 DOE proposed rule was based, in substantial part, on cost-benefit information derived from the Obama Administration's so-called “Social Cost of Carbon” (SCC) construct. The SCC construct relied-upon by DOE, however, was later repealed by the Trump Administration through Executive Order 13783 (“Promoting Energy Independence and Economic Growth”), issued on March 28, 2017, which stated that the SCC was being “withdrawn as no longer representative of [federal] government policy.” Given this action, the June 2016 proposed DOE rule, which substantially relies on alleged consumer “benefit” information derived from the SCC, violates Section 3(d)(vi) of EO 13777, which provides for the repeal, replacement, or modification of regulations that “derive from or implement Executive Orders or other presidential directives that have been subsequently rescinded...” And, given the fact that the 2018 DOE NODA Packages – Draft Results document, by express acknowledgment, is premised upon “incremental costs and savings calculations ... based on methods and data presented in the [June] 2016 NOPR,” those calculations – and the resulting NODA “packages” -- likewise contradict and violate EO 13777, and should be rejected.

#### IV. CONCLUSION

For all of the foregoing reasons, the MHCC should reject HUD's October 26, 2018 alleged "analysis" of the DOE NODA, and should reiterate its rejection of both the NODA and the entire DOE process underlying the NODA and the June 17, 2016 DOE proposed rule for manufactured housing energy standards and should further: (1) continue to seek and recommend the re-delegation of manufactured housing energy regulation back to HUD; and (2) if any new manufactured housing energy standards are deemed necessary, ensure an entirely new and legitimate rulemaking process which ensures accurate factual inputs and complete transparency.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Weiss', with a long horizontal flourish extending to the right.

Mark Weiss  
President and CEO

cc: Hon. Brian Montgomery  
Ms. Teresa Payne  
HUD Code Industry Members and Consumers