IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, *Plaintiff*, vs. U.S. DEPARTMENT OF ENERGY, *Defendant*.	Case No. 17-cv-6989

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S (1) CROSS-MOTION FOR SUMMARY JUDGMENT AND (2) OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Javier M. Guzman (*pro hac vice*)
Jeffrey B. Dubner (JD4545)
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
(202) 448-9090
jguzman@democracyforward.org
jdubner@democracyforward.org

Attorneys for Plaintiff

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INTRODUCTION

The Department of Energy ("DOE" or the "Department") spent nearly a decade modernizing and strengthening energy efficiency standards for central air conditioners, engaging in a lengthy negotiated rulemaking and a robust notice-and-comment period. Then, after the final piece of that rulemaking, the "Test Procedures Rule," had become effective, DOE indefinitely delayed portions of it without notice or an opportunity to comment, and without any reasoned explanation. The Department purported to act under 5 U.S.C. § 705, which allows it to postpone the effective date of a rule pending judicial review when "justice so requires." But a valid 705 stay requires notice and comment and a reasoned explanation, and must be issued before the stayed rule becomes effective. DOE's "Delay Rule" failed all of these requirements. It was a quintessential example of arbitrary and capricious decisionmaking and must be vacated.

The Department's Motion to Dismiss or for Summary Judgment only reinforces these failings. DOE claims the stay was based on a desire to "ensure that all manufacturers would be on equal footing with JCI [Johnson Controls Inc.]," a manufacturer that challenged the Test Procedures Rule in the Seventh Circuit and had received an individual waiver. Def.'s Mot., ECF No. 30, at 5. But as DOE acknowledges, JCI was "the only entity that at that time was manufacturing the particular type of central air conditioning products" at issue, *id.* at 4—and as the administrative record shows, *all other manufacturers* that weighed in urged DOE *not* to stay the Test Procedures Rule, because doing so would favor one manufacturer to the detriment of a level playing field. The supposed basis for the agency's action is therefore contrary to the record. Given the unsustainable reasoning in the Delay Rule itself, DOE resorts to novel arguments that agency stays under section 705 are unreviewable or that posting a notice of a rule online is as good as publication in the Federal Register. None of these novel arguments has any merit.

DOE's motion should therefore be denied, and summary judgment should be awarded to Plaintiff, vacating the Delay Rule.

BACKGROUND

I. Regulatory History Leading Up to the Test Procedures Rule

The Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6201 *et seq.*, authorizes DOE to adopt energy conservation standards for consumer products and set test procedures by which manufacturers certify their products' compliance with applicable standards. EPCA requires DOE to periodically review and strengthen its energy conservation standards, *id.* § 6295, and to review and amend its test procedures to "more accurately" measure a covered product's energy efficiency, *id.* § 6293(b)(1)(A).

Carrying out that obligation, DOE conducted several years of rulemaking proceedings in 2008 to update and strengthen the energy efficiency standards and test procedures for central air conditioners and heat pumps.[1] This extensive process resulted in final rules in 2011 and 2016 to refine the regulations related to central air conditioners and heat pumps.[2]

A significant part of these proceedings—including "proposals and comments from three separate rulemakings, two guidance documents, and two working groups," 81 Fed. Reg. at 36,994—dealt with "split systems," air-conditioning systems that consist of an outdoor unit and an indoor unit. *See generally id.* at 36,996 (defining "split systems"). When an outdoor unit breaks down, it is often possible to replace that unit with an "unmatched" outdoor unit, without replacing the existing indoor components. Until 2016, however, DOE did not have a clear

[1] *See* Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps, 76 Fed. Reg. 37,408. 37,419-22 (June 27, 2011) (describing history of rulemaking and negotiated agreement).
[2] *See* 76 Fed. Reg. 37,408; Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps; Final Rule, 81 Fed. Reg. 36,992 (June 8, 2016).

process for testing and certifying unmatched outdoor units. *See* Dep't of Energy, Enforcement Policy Statement: Split-System Central Air Conditioners Without HSVC (Dec. 16, 2015), https://www.energy.gov/sites/prod/files/2015/12/f27/Enforcement%20Policy-CAC%202015_0.pdf (acknowledging that many split systems "cannot be tested in accordance with the DOE test procedure"). This led to widespread noncompliance, particularly for "dry-shipped" units—that is, unmatched outdoor units that are shipped separately from the refrigerant needed to operate them. *Id.* The 2016 Rule redesigned the test procedures to require dry-shipped outdoor units to be paired for certification purposes with an indoor unit representative of the older, less-efficient indoor units they are typically paired with in practice. *See* 81 Fed. Reg. at 37,008-09.

After DOE issued the 2016 rule, JCI began marketing a new type of unmatched outdoor unit that shipped with one refrigerant, R-407C, but was compatible with a different refrigerant, R-22—a hydrofluorocarbon ("HCFC") with one of the "highest ozone depletion potentials of all HCFCs," which the EPA has been phasing out. EPA, "Phaseout of Class II Ozone-Depleting Substances," https://www.epa.gov/ods-phaseout/phaseout-class-ii-ozone-depleting-substances; *see also* AR 102. The EPA had banned the sale and distribution of new systems designed to use R-22, but JCI's new outdoor units could operate as replacement R-22 units without complying with *either* the ban on R-22–equipped units *or* DOE's test procedures for unmatched units shipped without their intended refrigerant. *See* 81 Fed. Reg. at 81170.

On August 24, 2016, DOE published a Supplemental Notice of Proposed Rulemaking to close this loophole.[3] The 2016 SNOPR proposed to require all unmatched outdoor units that are compatible with R-22 to be certified through the same test procedures as units shipped with R-

[3] Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps, 81 Fed. Reg. 58,164 (Aug. 24, 2016) ("2016 SNOPR").

22, even if they shipped with a different refrigerant. *See* 81 Fed. Reg. at 58,171. After considering comments from JCI and other industry participants, as well as NRDC and other efficiency, environmental, and consumer groups, DOE published the Test Procedures Rule on January 5, 2017. AR 350-515. As proposed in the 2016 SNOPR, the Test Procedures Rule required that units compatible with R-22—in practice, only JCI's R-407C units—be tested the same way as unmatched outdoor R-22 units themselves. AR 358. The effective date for the Test Procedures Rule was February 6, 2017, with a compliance deadline of July 5, 2017. AR 350.

II. DOE Delays the Test Procedures Rule Twice, Opposed by All But One Manufacturer

On January 20, 2017, the White House Chief of Staff directed agencies to "temporarily postpone" the effective date of all regulations that had not yet become effective, "as permitted by applicable law." *See* Memo. from Reince Priebus to Heads of Exec. Dep'ts & Agencies (Jan. 20, 2017), https://www.whitehouse.gov/presidential-actions/memorandum-heads-executive-departments-agencies/. On February 2, 2017, without notice or opportunity to comment, DOE published a final rule purporting to postpone the Test Procedures Rule's effective date by 60 days. AR 349 (the "February Final Rule"). The sole basis for this delay was "to give DOE officials the opportunity for further review and consideration of new regulations" in light of the Preibus memo. *Id.*

The February 2 delay—and the prospect DOE might delay the Test Procedures Rule again—came to the attention of industry participants who opposed any delay. One manufacturer of central air conditioners, Lennox International ("Lennox"), sent a letter to DOE on March 17, 2017, explaining that the Test Procedures Rule "was crafted during a negotiated rulemaking ... with broad stakeholder involvement" and "has broad industry support, because it makes many improvements to the test procedure." AR 320. Lennox cautioned that "[i]f this negotiated

outcome is delayed or overturned, industry will either be subject to the existing inferior test procedure or will be at the mercy of yet another federal rulemaking." AR 321.

Nonetheless, on March 21, 2017, again without any advance notice or opportunity to comment, DOE published another final rule purporting to further postpone the Test Procedures Rule's effective date, this time to July 5, 2017, the rule's original compliance date. AR 348 (the "March Final Rule").[4] The sole basis for this delay was to provide the Secretary of DOE more time "for further review and consideration of new regulations." AR 348.

Two days later, the Air-Conditioning, Heating, and Refrigeration Institute ("AHRI"), an industry trade association representing more than 300 manufacturers of air conditioners and related equipment, weighed in to support the Test Procedures Rule. AR 322. AHRI explicitly stated that it "is not seeking to delay or rescind the ACTP rule." *Id.*

On April 12, 2017, Lennox expanded on the reasons the Test Procedures Rule should be "implemented without further delay" in a detailed 12-page letter. AR 324-25. Lennox noted that "JCI is in the unique position in the industry of [seeking to certify] products with R-407C refrigerants in residential applications." AR 324. It then provided several arguments against further delay in subjecting those products to the updated test procedures, explaining both the Test Procedures Rule's lawfulness and the negative impacts of a delay on consumers, industry, and energy efficiency. AR 324-35. JCI responded on May 22, disagreeing with Lennox's arguments. AR 336-42. Lennox replied to these assertions a month later in a June 28 letter. AR 343-46.

[4] The March Final Rule originally listed an incorrect date for the original compliance date, but was subsequently corrected. *See* AR 347. For purposes of this Memorandum, NRDC will refer to the effective date set by the March Final Rule as July 5, 2017.

III. JCI Petitions for Review in the Seventh Circuit and Privately Petitions DOE for an Extension, Waiver, or Stay

Meanwhile, JCI petitioned for review of the Test Procedures Rule in the Seventh Circuit and sent three non-public submissions to DOE, asking for individual relief.

First, on March 3, 2017, JCI filed a petition for review in the Seventh Circuit. AR 107-08. The same day, JCI confidentially petitioned DOE for a 180-day extension under 42 U.S.C. § 6293(c)(3). AR 98-103. JCI asserted that it would experience a "substantial hardship" because some of its R-407C units would be unable to obtain certification under the new test procedures and that the R-407C provisions of the Test Procedures Rule violated EPCA. AR 100-01.

Second, on April 6, 2017, JCI sent another confidential petition to DOE, this time for a waiver from two provisions of the Test Procedures Rule under 10 C.F.R. § 430.27. AR 90-95. JCI asserted that applying the provisions would be "so unrepresentative of [its R-407C units'] true energy consumption characteristics as to provide materially inaccurate comparative data." AR 90. It also acknowledged that it was "not aware of any other manufacturer of residential split-system central air conditioners, or components of residential split-system central air conditioners, approved for use with R-407C." AR 86.

On April 28, 2017, the Seventh Circuit suspending all briefing on JCI's petition for review so that the parties could conduct mediated settlement discussions. AR 315-17.

Third, on May 31, 2017, JCI requested that DOE issue an administrative stay under section 705 pending the resolution of the Seventh Circuit case. AR 68-73. It acknowledged that in "reviewing an application for stay" the four factors considered in any request for injunctive relief "must be balanced against one another." AR 69. If it did not receive relief within a week, JCI claimed, it would "file a request for judicial stay with the Seventh Circuit … in order to give the Court sufficient time to act on that request before the July 5th compliance deadline." AR 73.

DOE granted JCI's March 3 request for a 180-day extension on June 2, 2017. AR 66-67. Accordingly, on June 6, JCI asked DOE to hold its request for a stay in abeyance. AR 64-65.

Lennox challenged the 180-day extension in federal district court in Texas on June 29, 2017, simultaneously moving for an emergency stay. AR 6. In its motion, Lennox explained that it was "not ask[ing] to be held to a less-accurate testing and representations requirement" than provided by the Test Procedures Rule, but rather "that JCI not be given the unique ability to rely on misleading test data for six months while Lennox and others in the industry are governed by regulations that protect consumers." AR 42. The court denied Lennox's motion on June 30, 2017, finding that Lennox's alleged injuries would not be irreparable. *See* Order, *Lennox Int'l Inc. v. DOE*, No. 17-cv-1723, ECF No. 16 (N.D. Tex. June 30, 2017). In light of this defeat, Lennox voluntarily dismissed its case on July 17, 2017. Notice of Dismissal, *id.*, ECF No. 22 (N.D. Tex. July 17, 2017).

IV. With No Request for Relief Before It, DOE Indefinitely Stays the Test Procedures Rule

As the twice-rescheduled July 5 effective date approached, nobody in the industry was asking DOE to stay the Test Procedures Rule. JCI had withdrawn its request for a stay, AHRI had weighed in against a delay, and Lennox had explicitly disavowed the idea of levelling down the test procedures to hold all manufacturers to the same low standard as JCI.

Nonetheless, on July 12, 2017, DOE filed a blanket, open-ended stay of the Test Procedures Rule's R-407C provisions with the Office of the Federal Register ("OFR"). SAR 1-2[5] (the "Delay Rule"). DOE's explanation, in its entirety, read as follows:

[5] "SAR" refers to the Supplemental Administrative Record, attached as Exhibit A to Plaintiff's Motion to Supplement the Administrative Record. It consists of the Federal Register notice Energy Conservation Program: Test Procedures for Central Air Conditioning and Heat Pumps, 82 Fed. Reg. 32227 (July 13, 2017).

> DOE has determined that, during the pendency of the lawsuit brought by JCI, it is in the interests of justice to postpone the effectiveness of the [R-407C provisions]. DOE has determined to postpone the effectivenes [sic] of these provisions based on JCI's submissions to DOE that raise concerns about significant potential impacts on JCI, and further to ensure all manufacturers of central air conditioners and heat pumps have the same relief granted to JCI.

SAR 2.

Although the Delay Rule was not filed with OFR until July 12 or published until July 13, it asserts that it was "[i]ssued" on July 3, 2017. *Id.* DOE submitted an unpublished version of the stay to the district court hearing Lennox's suit on July 3, 2017 and, according to DOE, a contractor posted that version on a DOE website the same day. *See* Def.'s Mot. at 6.[6]

STANDARD OF REVIEW

Under the Administrative Procedure Act ("APA"), a court must set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or is "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). In reviewing whether an agency action is "arbitrary, capricious, [or] an abuse of discretion," the court evaluates whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). An agency action is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* If the administrative record does not contain a

[6] As discussed *infra* p. 20, DOE has not presented admissible evidence that the rule was posted on the website on July 3.

reasoned analysis, the court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* A "conclusory statement … falls well short of the APA's 'requirement that an agency provide reasoned explanation for its action.'" *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 430 (E.D.N.Y. 2018) (quoting *FCC v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 516 (2009)).

When alleging that an agency action is "without observance of procedure required by law" or "otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), (D), "plaintiffs' burden in establishing a procedural violation is to show that the circumstances triggering the procedural requirement exist, and that the required procedures have not been followed." *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir. 1985), *abrogated on other grounds as stated in Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015).

ARGUMENT

I. DOE Violated the APA in Issuing the Delay Rule

A. Section 705 Stays Are Not Committed to Agency Discretion by Law

Before addressing the reasons the Delay Rule must be invalidated, the Court must dispose of DOE's argument that no court can consider the Delay Rule, or any other stay issued by an agency under section 705, at all. DOE maintains that 705 stays are "committed to agency discretion by law" and are therefore unreviewable under 5 U.S.C. § 701(a)(2). This is a novel argument; no court has ever held a 705 stay unreviewable, as far as DOE's brief or NRDC's research reveals. To the contrary, several courts have reviewed 705 stays without hesitation as to their ability to do so.[7] DOE's bold argument contradicts bedrock principles of administrative law and must be rejected.

[7] *See Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324 (D.C. Cir. Jan. 19, 1996); *California v. BLM*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017); *Becerra v. U.S. Dep't of*

"There is a strong presumption favoring judicial review of administrative action." *Salazar v. King*, 822 F.3d 61, 75 (2d Cir. 2016). The exception for agency action "committed to agency discretion" is a "very narrow exception" to this presumption, applicable only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). When in doubt, courts "adopt[] the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995).

The Department argues that the requisite finding for a 705 stay—that "justice so requires"—is one of the rare instances where the presumption of reviewability is overcome. But courts routinely review agency action under statutes involving similar standards. For example, in *Rombough v. FAA*, 594 F.2d 893 (2d Cir. 1979), the Second Circuit found that a statute allowing the administrator of the Federal Aviation Administration to "grant exemptions … if he finds that such action would be in the public interest" was not "an action committed to the unlimited discretion of the agency and thus beyond the scope of judicial review" even though it "incorporate[d] the term 'may' and the public interest standard." *Id.* at 895 (quoting 42 U.S.C. § 1421(c) (1970)). Similarly, most courts faced with a dispute over a finding that a contract is in the "best interests" of the Government have held the finding to be judicially reviewable. *See Alion Sci. & Tech. Corp. v. United States*, 69 Fed. Cl. 14, 22-23 (2005) (collecting cases).

As DOE acknowledges, the D.C. Circuit found that nearly indistinguishable language ("if it finds it to be in the interest of justice") provided a judicially administrable standard in *Dickson*

Interior, 276 F. Supp. 3d 953 (N.D. Cal. 2017); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11 (D.D.C. 2012) ("*Sierra Club II*").

v. Secretary of Defense, 68 F.3d 1396, 1404 (D.C. Cir. 1995). *See* Def.'s Mot. at 11. DOE attempts to distinguish *Dickson* because it "was limited to the military context," as opposed to section 705's "broad application." *Id.* at 12. This turns conventional principles of agency discretion on their head. Typically, the involvement of "foreign affairs, the military," or similar areas of national security concern weighs *against* a finding of reviewability, not vice versa. *Dugan v. Ramsay*, 727 F.2d 192, 195 (1st Cir. 1984) (Breyer, J.); *see also, e.g.*, *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) ("When it comes to matters touching on national security … the presumption of review runs aground." (internal quotation marks omitted)).[8]

DOE's suggestion that section 705 must be unreviewable because it has "broad application," Def.'s Mot. at 12, is similarly backward. Section 705's government-wide application counsels *for* finding it reviewable, as a contrary rule would take a wide swath of agency action out of the courts, contrary to the APA's purpose and practice. DOE does not cite, and Plaintiff has not found, *any* case holding that a portion of the APA *itself* is not subject to judicial review. The few cases that have found an agency's discretion to be so broad as to be unreviewable have all involved authority granted to a particular agency under an organic statute, not the basic rules of agency procedure laid out in the APA. Indeed, a finding that those rules of the road were so amorphous as to trigger section 701(a)(2) would conflict with the general purpose of the APA to routinize agency procedure and review.

DOE's reliance on *Target Training International v. Lee*, 1 F. Supp. 3d 927 (N.D. Iowa 2014), as its principal case shows just how far its novel argument is from any relevant precedent.

[8] *Webster v. Doe*, 486 U.S. 592 (1988), is readily distinguishable. *Webster*, which involved the CIA Director's decision to terminate an employee under the National Security Act of 1947, is the quintessential case where national security concerns tipped the scales in favor of unreviewability.

Target Training considered a Patent and Trademark Organization ("PTO") regulation allowing the PTO to waive certain requirements "[i]n an extraordinary situation, when justice requires." *Id.* at 939. The court focused on the *first* half of the regulatory standard, "extraordinary situation," and found that without any "statutory, regulatory, or case-law definition," it did not "establish a meaningful standard by which to measure the PTO's future exercise of discretion." *Id.* at 946-47. The "when justice requires" clause stated "only a hortatory purpose," in the court's view. *Id.* at 947. Moreover, the context of the phrase—a *regulatory* standard set by the PTO itself that governed only its ability to waive "requirements imposed only by regulations, not by statute" in a particular patent application process, *id.* at 939—did not suggest any analogous standards, as a "settled course of adjudication" might provide, *id.* at 947.

Here, by contrast, the basic issue covered in section 705 is a familiar one to courts: whether the relevant interests warrant a stay. As the legislative history of the APA makes clear, the purpose of the agency's authority under section 705 is "to prevent irreparable injury or afford parties an adequate judicial remedy." Administrative Procedure Act, Pub. L. 1944–46, S. Doc. 248 at 277 (1946). This is fundamentally the same consideration courts address in every application for an injunction, giving content to the phrase "when justice so requires" even if the phrase might, in other contexts, be ambiguous. Indeed, the Federal Rules of Civil Procedure, adopted by Congress just a decade earlier, use the phrase "when justice so requires" or "in the interest of justice" repeatedly, making clear that they are suitable for judicial analysis. *See, e.g.*, Fed. R. Civ. P. 8, 15, 32, 61, 65. While agencies may be entitled to a degree of deference as to their determination, courts have ample ability to determine whether an agency made a finding that justice requires and whether that finding was in any meaningful way based on the facts in the administrative record. Moreover, as discussed below, DOE in considering section 705 stays

has historically applied a version of the traditional multifactor test for injunctive relief, which readily lends itself to judicial review. *See infra* p. 17 & n.10; *cf. Sierra Club II*, 833 F. Supp. 2d at 31 (where agency has historically applied multifactor test in evaluating 705 stays, court should vacate 705 stay that fails to do so without explanation). There is simply no reason to conclude that an agency can competently analyze those factors but not a court.

Finally, even if DOE's novel argument were correct, a finding that the *substance* of the agency's finding was unreviewable would not deprive the court of jurisdiction over the Delay Rule's other defects, as DOE concedes. *See* Def.'s Mot. at 12 ("The portion of agency action under Section 705 that is unreviewable is limited, however. … [M]ultiple aspects of an agency's action are subject to judicial review."). "[U]nder the APA the ultimate availability of substantive judicial review is distinct from the question of whether the basic rulemaking strictures of notice and comment and reasoned explanation apply." *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1134 (D.C. Cir. 1995). Thus, the Court may consider whether the Delay Rule contains a "reasoned explanation" supported by the administrative record even if it has no power to review whether the Department abused its discretion in finding that justice required a stay.

B. The Delay Rule Was Arbitrary and Capricious, Contrary to Law, and Without Observance of Procedure Required by Law

1. DOE Acted Arbitrarily and Capriciously

The Department's decision to stay portions of the Test Procedures Rule indefinitely is arbitrary and capricious and therefore unlawful. *See* 5 U.S.C. § 706(2)(A). "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*,

463 U.S. at 43. A rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* "[W]here the agency has failed to provide even [a] minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars*, 136 S. Ct. at 2125. "[C]onclusory statements … do not meet the requirement that the agency adequately explain its result." *Dickson*, 68 F.3d at 1407 (internal quotation marks omitted); *accord, e.g.*, *Batalla Vidal*, 279 F. Supp. 3d at 430. These rules apply equally to the creation of regulatory requirements and to "the removal of a regulation." *State Farm*, 463 U.S. at 42. When an agency changes its position, it must "display awareness that it *is* changing position" and "show that there are good reasons for the new policy." *Fox Tele.*, 556 U.S. at 515.

The Delay Rule falls far short of these requirements, for at least five reasons.

First, DOE's entire reasoning was less than a sentence long, stating only that "DOE has determined to postpone the effectivenes [sic] of these provisions based on JCI's submissions to DOE that raise concerns about significant potential impacts on JCI, and further to ensure all manufacturers of central air conditioners and heat pumps have the same relief granted to JCI." SAR 2. Such conclusory statements cannot carry an agency's burden of providing a reasoned explanation. *See, e.g.*, *Batalla Vidal*, 279 F. Supp. 3d at 430. DOE did not explain *why* JCI's submissions raised concerns, or why the delay would provide any relief to other manufacturers; it simply concluded that they did so. But "[t]he agency's statement must be one of 'reasoning'; it must not be just a 'conclusion.'" *Butte Cnty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010).

Second, DOE's conclusory assertions are contrary to the record that was before it. The Delay Rule purports "to ensure all manufacturers of central air conditioners and heat pumps have the same relief granted to JCI." SAR 2. But the administrative record makes clear that *only* JCI

could benefit from the delay, because *only* JCI sold units covered by the delayed provisions. AR 86, 324. AHRI, a trade association representing more than 300 manufacturers of central air conditioners and related products, had expressly told DOE that it was "not seeking to delay or rescind the [Test Procedures] Rule," AR 322, and Lennox had disavowed any desire "to be held to a less-accurate testing and representations requirement," AR 42. In other words, the very entities whose interests DOE claimed to be protecting had made clear that a stay was not in their interests. Where an agency's cursory explanation "is simply not supported by the record," it must be invalidated. *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999); *see also, e.g.*, *State Farm*, 463 U.S. at 43 (action arbitrary and capricious where agency "offered an explanation for its decision that runs counter to the evidence before the agency").

Third, DOE "entirely failed to consider an important aspect of the problem." *Id.* The administrative record contained numerous arguments against any delay, from the benefits that the Test Procedures Rule provided consumers to factual errors in JCI's submissions. AR 322-35, 343-46. But neither the record nor the text of the Delay Rule reveals *any* effort to engage with these arguments by DOE, even to conclude that they need not be analyzed. "It most emphatically remains the duty of [federal courts] to ensure that an agency engage the arguments raised before it—that it conduct a process of *reasoned* decisionmaking." *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) (internal quotation marks omitted); *see also, e.g.*, *Thalasinos v. Harvey*, 479 F. Supp. 2d 45, 50 (D.D.C. 2007) ("[I]f [an agency] decides not to address these arguments, it must explain why." (internal quotation marks omitted).); *California*, 277 F. Supp. 3d at 1122 (705 stays that "failed to consider the benefits of the" stayed rule must be vacated).

DOE claims that any requirement that an agency address counterarguments against a 705 stay would "impose[] on agencies an overly prescriptive requirement to engage in cost-benefit analysis that is entirely absent from the statute." Def.'s Mot. at 15. But NRDC is not proposing cost-benefit analysis; it is merely requesting that the Department be held to the basic, blackletter requirement of reasoned decisionmaking.[9] Similarly, DOE claims that this Court cannot "assess whether DOE adequately accounted for 'reasoned counterarguments'" without trenching on the merits of JCI's petition for review in the Seventh Circuit. *Id.* at 16. But this Court need not *weigh* the merits of the arguments against a stay to observe that DOE made no effort to address them. "If the words 'justice so requires' are to mean anything, they must satisfy the fundamental understanding of justice: that it requires an impartial look at the balance struck between the two sides of the scale ... ." *California*, 277 F. Supp. 3d at 1122. Because DOE refused even to look at the arguments against the stay, it failed this fundamental requirement.

Fourth, DOE did not even attempt to explain how its stay satisfies the four-part test for staying agency action. As the district court explained in *Sierra Club II*, "the standard for a stay at the agency level is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test" required by the Supreme Court. 833 F. Supp. 2d at 30; *cf. Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 (2d Cir. 2010) (explaining test). Here, as in *Sierra Club*, the Department "neither employed nor mentioned the four-part test in its Delay Notice" and "the failure to do so … is arbitrary and capricious." *Sierra Club II*, 833 F. Supp. 2d at 31.

[9] DOE cites *Southern Shrimp Alliance v. United States*, 33 C.I.T. 560, 572 (2009), for the proposition that agencies need not "specifically address and reject counterarguments against a postponement." Def.'s Mot. at 15. Nothing in *Southern Shrimp Alliance* even hints at such a rule.

DOE makes a cursory attempt to argue that *Sierra Club* was wrongly decided as part of its argument that agencies' stay determinations are entirely free from judicial review. *See* Def.'s Mot. at 10-11. But the equitable test grows naturally out of both the language and the legislative history of section 705. As noted above, the APA's drafters explicitly explained that the authority they granted to agencies "is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy." Pub. L. 1944–46, S. Doc. 248 at 277 (1946). Moreover, *DOE itself* has long understood section 705 to require some version of the traditional equitable test, as numerous examples in the Federal Register reveal.[10] *See Sierra Club II*, 833 F. Supp. 2d at 31 (applying test where "EPA previously has employed the four-part preliminary injunction test in its review of requests to stay prior agency actions"). Indeed, JCI recognized that the traditional four factors "must be balanced against one another," AR 69, and devoted most of its application for a stay to arguing that the four-factor test was satisfied, AR 70-72. DOE's failure to follow its own precedent or even engage with the arguments made by the proponent of the stay shows the unreasoned nature of its decision.

Fifth, at the time DOE issued the stay, the Seventh Circuit proceedings—the entire premise for the stay—had been suspended indefinitely so that DOE and JCI could engage in settlement discussions. *See* AR 106. At the time it issued the stay, DOE thus had the ability to let settlement discussions, and therefore the stay, drag on indefinitely. This beggars the purpose of section 705. A stay is supposed to be grounded on "the existence or consequences of the pending litigation." *Sierra Club II*, 833 F. Supp. 2d at 33. Section 705 cannot be used "simply because litigation in the court of appeals *happens to be pending*." *Id.*; *see also, e.g.*, *California*, 277 F.

[10] *See, e.g.*, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. 32184, 32246 (May 31, 2012); Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 74 Fed. Reg. 30924, 30931 (June 29, 2009).

Supp. 3d at 1121 (rejecting stay where the agency "merely paid 'lip service' to the pending judicial review"). Where an agency stays a rule without making any effort to see the litigation to an actual conclusion, it uses the pending litigation as a pretext and thus acts arbitrarily and capriciously. *See Becerra*, 276 F. Supp. 3d at 964 (vacating rule where the agency "blocked judicial review by obtaining a stay in the [underlying] litigation"). Notably, *nothing* has happened in the Seventh Circuit litigation since DOE entered the stay: there have been zero docket entries, and briefing has remained suspended for more than a year.[11] The stay is in no meaningful sense "cabined by judicial proceedings," as DOE puts it. Def.'s Mot. at 15. While justice sometimes requires a stay where litigation is proceeding, it cannot require a stay where the parties are content to keep the case indefinitely on hold. The purpose of such a stay is not to preserve the status quo during litigation, but to let JCI continue selling air conditioners whose efficiency falls below DOE standards. *See* AR 102. That is not the purpose of section 705.

Each of these reasons would suffice on its own to render the Delay Rule arbitrary and capricious. In combination, they overwhelmingly compel vacatur.

2. DOE Unlawfully Delayed the Test Procedures Rule After Its Effective Date

Section 705 only allows an agency to "postpone the effective date of action taken by it." 5 U.S.C. § 705. It does not allow agencies to suspend a rule that has already taken effect. *See Safety-Kleen*, 1996 U.S. App. LEXIS 2324, at *2-3 ("The statute permits an agency to postpone the effective date of a not yet effective rule, pending judicial review. It does not permit the agency to suspend without notice and comment a promulgated rule … ."); *accord California*, 277 F. Supp. 3d at 1118-19; *Becerra*, 276 F. Supp. 3d at 964. The Test Procedures Rule

[11] The Court may take judicial notice of the entries (or lack thereof) in a court's public docket. *See, e.g.*, *Magniafico v. Blumenthal*, 471 F.3d 391 (2d Cir. 2006).

originally had an effective date of February 6, 2017, which was rescheduled twice (unlawfully, as discussed below) to July 5, 2017. DOE, however, did not file the Delay Rule with the Office of the Federal Register until July 12, 2017—seven days *after* the purportedly rescheduled effective date of July 5, and five months after the actual effective date of February 6. The Delay Rule was thus contrary to law and must be vacated.

To start, the Test Procedures Rule's original effective date, February 6, was never validly amended. The February Final Rule purporting to delay that date was published on February 2, 2017. AR 349. But "[t]he APA generally requires that, prior to issuing a final rule, an agency should provide both notice and an opportunity for comment to the public. It also requires that, generally, publication of a final substantive rule should precede its effective date by at least thirty days." *NRDC v. Abraham*, 355 F.3d 179, 204 (2d Cir. 2004) (citing 5 U.S.C. § 553(c)-(d)). DOE violated both of these requirements. While DOE claimed that the February Final Rule was "exempt from notice and comment because it constitutes a rule of procedure" and was alternatively exempt for "good cause," AR 349, the Second Circuit has rejected these exact arguments about an indistinguishable delay, *see Abraham*, 355 F.3d at 205-06. Accordingly, "the February 2 rule failed to amend the original standards' designated effective date" and thus the Delay Rule was issued some five months after the Test Procedures Rule had taken effect. *Id.* at 206. The March Final Rule was invalid for the same reason. *See* AR 348.

But even if the Court were to overlook the invalidity of the February and March Final Rules, the Delay Rule was filed seven days *after* the amended effective date of July 5. The Federal Register notice for the Delay Rule, which DOE inappropriately omitted from the administrative record, *see* Pl.'s Mot. to Supplement Admin. Record at 1-2, reveals that the notice was not filed with the Office of the Federal Register until July 12, 2017. SAR 2. The Federal

Register Act provides that a document that must be published in the Federal Register "is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection." 44 U.S.C. § 1507. As courts have repeatedly held, the relevant date for a rule's issuance is therefore the date of publication in the Federal Register. *See, e.g.*, *Abraham*, 355 F.3d at 196 ("*[P]ublication* in the Federal Register … is the culminating event in the rulemaking process."); *Public Citizen Inc. v. Mineta*, 343 F.3d 1159, 1161 (D.C. Cir. 2003); ("We hold that an order has not been 'issued' until it has been filed with the Office of the Federal Register and thus made available for public inspection."); *Fla. Manuf. Housing Ass'n, Inc. v. Cisneros*, 53 F.3d 1565, 1573 (11th Cir. 1995) (rejecting argument "that the rule was issued when the rulemaking decision was dated, not when it was published").

DOE claims nevertheless that the Delay Rule was issued on July 3, citing the Rule's signatory line. Def.'s Mot. at 16 (citing AR 5 ("Issued in Washington, DC on July 3, 2017.")). This exact argument has been rejected previously. *See Mineta*, 343 F.3d at 1164-68 (rejecting argument that rule was issued on day it was signed, rather than day it was filed with OFR).

DOE also points to its attachment of the text of the Delay Rule to a notice filed in a district court case in Texas on July 3 and its purported posting on a DOE website the same day. As an initial matter, only the former can properly be considered. The declaration's assertion of the date of the purported website posting is based not on the declarant's recollection but on the content of unidentified "records" not placed into evidence. *See* Corfield Decl. ¶ 2. This assertion therefore violates Federal Rule of Evidence 1002 and cannot be considered on DOE's motion. *See, e.g.*, *Spitzer v. Saint Francis Hosp.*, 94 F. Supp. 2d 423, 428 (S.D.N.Y. 2000). DOE does not claim that the mere act of submitting the text of a rule to one court constitutes making a rule

"available for public inspection." *Mineta*, 343 F.3d at 1167. Such a rule would allow an agency to manipulate public notice and statutes of limitation to a wholly inappropriate degree. *Cf. Fla. Manuf. Housing Ass'n*, 53 F.3d at 1574 ("[I]f HUD's interpretation were adopted, the agency conceivably could release its final rule to the public thirty, forty, fifty, or more days after the stated date of decision and thereby impede or prevent any judicial review.").

But even if the Court could consider the purported website posting, the same result would apply. The Federal Register Act requires that documents be "filed with [OFR] *and* a copy made available for public inspection as provided by [44 U.S.C. § 1503]." 44 U.S.C. § 1507 (emphasis added). These requirements are conjunctive, not disjunctive, precluding DOE's argument.[12] Nor does online posting qualify as making a document "available for public inspection" under 44 U.S.C. § 1503 (documents shall be "available for public inspection in the [OFR]").

Moreover, just two years ago DOE explicitly amended its regulations for issuing energy-efficiency standards to allow "error correction" between "post[ing] a rule with the appropriate official's signature" and "publication in the Federal Register." Energy Conservation Program: Establishment of Procedures for Requests for Correction of Errors in Rules, 81 Fed. Reg. 26998, 26999 (May 5, 2016). In doing so, it acknowledged the well-settled APA "mandate[]" that no rule is "effective until after [the agency] has published the rule in the Federal Register." *Id.* at 27002. Similarly, DOE accepted the arguments of commenters explaining that issuance requires "publication in the Federal Register." Prevailing Rate Systems; Redefinition of the Asheville,

[12] The cases DOE cites both deal with the impact of *actual* notice, and thus have no bearing on the efficacy of posting a rule on a government website or filing it with a court. *See United States v. Aarons*, 310 F.2d 341 (2d Cir. 1962) (considering whether individuals who were directly sent a notice that boarding nuclear submarines would be illegal were immune from prosecution because the notice was not published in the Federal Register); *Saturn Airways v. Civil Aeronautics Bd.*, 476 F.2d 907 (D.C. Cir. 1973) (considering whether an agency action was ripe for suit for purposes of identifying the first-filed case, where the first filer had received actual notice of the action).

NC, and Charlotte, NC, Appropriated Fund Federal Wage System Wage Areas, 81 Fed. Reg. 57745, 57751 (Aug. 24, 2016). DOE's unexplained departure from its prior position must be rejected, because "[w]hen an agency departs from its own prior precedent without explanation, … its judgment cannot be upheld." *Manin v. NTSB*, 627 F.3d 1239, 1243 (D.C. Cir. 2011).

As a last resort, DOE argues that the phrase "effective date" in section 705 does not actually mean "effective date." Def.'s Mot. at 18. This argument has been roundly rejected. *See Safety-Kleen*, 1996 U.S. App. LEXIS, at *2-3 (section 705 "does not permit the agency to suspend without notice and comment a promulgated rule"); *California*, 277 F. Supp. 3d at 1118 ("The plain language of the statute authorizes postponement of the 'effective date,' not 'compliance dates.'"); *Becerra*, 276 F. Supp. 3d at 964 (same). DOE's "policy arguments … [can]not overcome the statute's plain language." *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1678 (2017) (internal quotation marks omitted). And even if they could, they would be wholly unpersuasive. DOE claims that agencies may not have enough time to delay a regulation before its effective date because litigation may be filed "immediately before or at any time after the agency action's designated 'effective date.'" Def.'s Mot. at 18. But section 705 contains a ready answer to that supposed problem: the agency or the petitioner may move the court for a stay. DOE does not explain why the reviewing court's power is insufficient to protect the interests of justice. This solution similarly disposes of DOE's argument that some forms of agency action do not have an "effective date" separate from the date on which they are issued.

3. DOE Was Required to Provide Notice and Opportunity to Comment

Finally, DOE's failure to provide notice and an opportunity to comment requires vacatur of the Delay Rule. Section 553 of the APA "generally requires that, prior to issuing a final rule, an agency should provide both notice and an opportunity for comment to the public." *Abraham*,

355 F.3d at 204. That requirement is inapplicable only "if an agency is prescribing a rule of procedure, or if the agency finds for good cause that notice and comment is impracticable, unnecessary or contrary to the public interest." *Id.* In the latter case, "[t]he agency must … incorporate both its finding of good cause, and 'a brief statement of reasons therefor in the rules issued.'" *Id.* (quoting 5 U.S.C. § 553(b)(3)(B)). The Delay Rule did not include a finding of good cause, so DOE could only bypass section 553 if it was a rule of procedure.

There is little question, however, that it is not. "The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553." *Envtl. Defense Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983); *see also Abraham*, 355 F.3d at 205 (collecting cases); *Sierra Club v. Jackson*, 833 F. Supp. 2d 9, 10-11 (D.D.C. 2011) ("*Sierra Club I*") (collecting cases). As the Second Circuit explained in favorably citing another case, "despite [the] agency's characterization, suspension of [a] deadline with respect to [a] whole class of individuals that had [the] effect of relieving them of attendant substantive obligations [is a] rule subject to notice and comment requirements." *Abraham*, 355 F.3d at 205 (summarizing *Envtl. Defense Fund v. Gorsuch*, 713 F.2d 802, 817 (D.C. Cir. 1983)). Under these well-settled standards, the Delay Rule required notice and an opportunity to comment.

DOE nonetheless argues that the requirement of notice and comment does not apply because "[a]n agency's authority under Section 705 is distinct from the power an agency generally has … to undertake new rulemaking that would amend or repeal the earlier agency action." Def.'s Mot. at 19-20. But that distinction is wholly irrelevant to section 553. The requirements of section 553(b) do not apply only to rules authorized by organic statutes; they apply to the formulation of *all* "agency statement[s] of general or particular applicability and future effect" other than "interpretative rules, general statements of policy, or rules of agency

organization, procedure or practice." 5 U.S.C. §§ 551(4)-(5), 553(b)(A). DOE does not and could not argue that the Delay Rule fits into any of those excepted categories; it has the status of law and has an immediate and direct effect on regulated parties, and is therefore a legislative rule subject to the requirements of 5 U.S.C. § 553. *See, e.g.*, *Abraham*, 355 F.3d at 200.

The Department again invokes a policy argument: that "an agency's ability to exercise [the section 705] power would be significantly constrained if agencies had to follow time-consuming notice-and-comment rule making before they could postpone agency action under Section 705." Def.'s Mot. at 20. But again, policy arguments cannot overcome the plain language of the APA. *Sandoz*, 137 S. Ct. at 1678. Moreover, the drafters of the APA foresaw that issue and accounted for it, by including the "good cause" exception in section 553. When justice requires an agency to move faster than a comment period would allow, or faster than the statutorily required 30 days, *see* 5 U.S.C. § 553(d), the APA's requirements will be no obstacle.[13] When an agency cannot even muster an argument that good cause exists, as here, it is entirely appropriate for an agency to be "constrained" from skipping standard administrative procedures.

The only case DOE can affirmatively rely on is *Sierra Club*, a case that it elsewhere is at pains to rebut. But DOE ignores a key concession in *Sierra Club*: the plaintiff "expressly … disclaimed any argument that the Delay Notice operates as an amendment or rescission" of the previous rule. *Sierra Club II*, 833 F. Supp. 2d at 27-28. The Court was initially inclined to view the delay in that case as requiring notice and comment, *see id.* at 27; *Sierra Club I*, 833 F. Supp. 2d at 10-11, but concluded otherwise because it was undisputed that the delay was "temporary, for a definite period of time, and relatively short.'" *Sierra Club II*, 833 F. Supp. 2d at 28.

[13] DOE is thus correct that "NRDC's argument … suggest[s] that other rulemaking requirements in Section 553 should apply, such as the requirement that an agency publish a rule not less than 30 days before its effective date." Def.'s Mot. at 21. This is another ground for vacatur.

Here, by contrast, the stay is "an indefinite postponement" and thus "tantamount to a revocation." *NRDC v. EPA*, 683 F.2d 752, 763 n.23 (3d Cir. 1982); *see also Sierra Club II*, 833 F. Supp. 2d at 27. As discussed above, the Seventh Circuit litigation was *already* suspended indefinitely when DOE issued the Delay Rule, so that the stay was in no way "for a definite period of time." *Sierra Club II*, 833 F. Supp. 2d at 28. Like the stays in *Becerra* and *California*, the agency "effectively repeal[ed] [a final rule], simply by indefinitely postponing its operative date." *Becerra*, 276 F. Supp. 3d at 966; *accord California*, 277 F. Supp. 3d at 1120-21. This is not the purpose of section 705, and is not consistent with the APA.

II. DOE's Motions Should Be Denied

For all the same reasons that the Court should grant NRDC's motion for summary judgment, it should deny DOE's motion for summary judgment. DOE's motion to dismiss, meanwhile, simply repeats the arguments the Court rejected in denying its motion to transfer. *See* ECF No. 17 at 6-13. As NRDC explained previously, these arguments are unavailing: nothing in the All Writs Act strips this Court of jurisdiction, and DOE's novel extension of *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), is inconsistent with the reasoning of that opinion and with blackletter principles of jurisdiction. *See* ECF No. 19 at 14-21. Accordingly, DOE's motion to dismiss should be denied.

III. Conclusion

For the foregoing reasons, the Court should grant NRDC's motion and deny DOE's motion.

Dated: June 4, 2018

Respectfully submitted,

/s/ Jeffrey B. Dubner
Javier M. Guzman (*pro hac vice*)
Jeffrey B. Dubner (JD4545)
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
(202) 448-9090
jguzman@democracyforward.org
jdubner@democracyforward.org

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on June 4, 2018, I filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send a notice of filing to all counsel of record.

/s/ *Jeffrey B. Dubner*
JEFFREY B. DUBNER