

1. The narrative discussion of submitted comments fails to distinguish fact from opinion.

The discussion of the public commentary submitted in response to the FHFA's Advanced Notice of Proposed Rulemaking aims to cite a variety of responses with respect to the various issues raised. However, this discussion appears to represent an arbitrary selection of those in support or in opposition of the Proposed Rule. While the public comment process under the APA does not suggest that all comments be given equal weighting, it does distinguish the precision, veracity, or supporting documentation of a position.

In this case, the Notice of Proposed Rulemaking makes little to no distinction between unsupported opinions versus comments supported by documentation. In its subsequent discussion and conclusions, the FHFA treats all comments as having equal value and precision. FHFA seems to simply restate its prior concerns and then validates that conclusion by picking out sentence fragments or statements consistent with its pre-existing position. In so doing, FHFA is abandoning the importance of substantial evidence over unsupported opinion.

Several unsupported opinions cited by FHFA are as follows:

- a) Commenters in opposition to PACE programs treat the PACE premise as static and uniform, and then attack the less-defined versions as representative of the entire concept. One example is the assertion by Freddie Mac that PACE problems include risk of loss due to no "underwriting controls".(pg 36090). Most PACE legislation passed by States do require underwriting standards; Freddie Mac would judge the entirety of the PACE landscape by its lowest common denominator.
- b) Another example is in the discussion of "cash flow" effects. In this section, the FHFA posting notes that the large number of comments that assert a positive cash flow, but FHFA then notes that "most such comments were not accompanied by supporting data" (pg. 36092). There is the clear implication that some submissions on this issue did in fact provide supporting data. Yet this "supporting data" is not identified, discussed or tested against the claim of PACE opponents. This creates a clear and improper bias against PACE with respect to cash flow issues.
- c) PACE opponents attack energy savings/cash flow issues by claiming that "future utility costs are conjecture and unreliable."(pg. 36092). This might be true in a short time horizon of a few years, but the vast majority of PACE loan programs rely on a 20-year payback. Data from the Department of Energy indicate a steady increase in fossil fuel-based energy prices over any 20-year interval.

- d) Another fallacious argument of PACE opponents is that is that the tremendous variation of factors affecting energy savings on any given building makes it impossible to predict results. This is contrary to a growing array of energy audit programs and services that have emerged irrespective of the PACE financing approach. These audits are structured to ensure that the most cost-effective systems are installed.

- e) Another error is the attempt to shift environmental benefits off the table by stating that the PACE programs do not present any environmental benefits per se, since PACE simply provides financing options. The logic seems to be that any given set of improvements could be financed by other means. This defies the core value of PACE allowing significant improvements be made with minimal up-front expenditures. The net effect is that the capacity to carry out retrofits is greatly expanded by virtue of being able to serve a much larger market. As a consequence, the PACE financing does contribute significantly to the advancement of stated environmental goals expressed by multiple Federal Agencies and the White House itself.

Beyond that, denying access to PACE financing will disproportionately impact low income households, contrary to the policies regarding environmental justice that are in force and to which FHFA is subject. The prior submittal from Ygrene provided extensive discussion of the environmental socioeconomic benefits of PACE type financing systems in response to the NEPA scoping process, but which was also specifically included by reference in the discussion of the Proposed Rule.

2. The analytical discussion ignores the wide variety of PACE offerings nationwide.

As cited above, the analysis of comments makes little effort to weight information as to its accuracy, documentation, and relevance. The acknowledgement of studies submitted by PACE proponents should have triggered an assessment of these cited reports. Instead, the FHFA discussion repeatedly cites unsupported opinions as to the faults or flaws of PACE.

Equally significant is that FHFA (and the vast majority of PACE opponents) treats the PACE system as a single approach that can be assessed as only one version. In so doing, FHFA raises issues and considerations that have often already been accounted for at the level of State legislation and local implementation. It is akin to saying that dogs are dangerous as a species, and disregard the difference between a toy poodle and a Rottweiler. Broad-brush attacks based upon generalities do not amount to substantial evidence in support of a rule making.

3. The FHFA's actions act in opposition to its HERA responsibilities.

The most striking example of violating Federal policies is that the approach taken by FHFA to constrain PACE activities acts contrarily to its fundamental responsibilities under HERA, which is to protect both the asset value and the physical assets of the Enterprises.

As noted in the prior Ygrene commentary submittal, the State of Florida is aggressively pursuing residential PACE programs as a means to finance property “hardening” against storm damage. Repeated hurricanes and storms have left enormous physical and economic damage to many coastal areas.

This loss of homes also has put extreme pressure on the insurance industry, resulted in substantial losses (including major insurance firms going bankrupt or withdrawing from the state) and sharp increases in insurance premiums. The insurance industry in Florida is a strong advocate of crafting PACE coverage to provide better security for homes and more reasonable insurance costs.

It is clearly possible for FHFA to assess the loss of physical assets in Florida due to storm events. It is also possible for FHFA to examine whether the marginal monthly cost of elevated insurance premiums is greater than the marginal monthly payment for installing the PACE improvements. Florida officials and insurance leaders believe that the marginal cost of PACE improvements is a sound investment versus the present situation of increasing premiums and losses. If so, FHFA is arguably in violation of its legal obligation to protect the physical assets of the Enterprises.

Similar situations exist in other areas, such as coastal areas of Texas, the Mid-Atlantic States and central plains, where flood and storm events are common. These issues were all presented and documented in the Ygrene submittal, with the FHFA failing to acknowledge in its discussion of Proposed Rulemaking.

These examples also reinforce the fallacy of treating PACE financing as a “one size fits all” system. Regulating or barring PACE programs based on a lowest common denominator, in spite of the breadth of approaches is again an arbitrary act unsupported by substantial evidence.

With respect to the “environmental justice” issues raised previously in this comment as well as the prior submittal, many of the areas subject to adverse weather in these coastal areas contain significant low-income or minority populations. As discussed above, the PACE financing model can open up financing options to residents in these areas where the improvements could not otherwise bear the associated upfront costs.

Given those socio-economic considerations, FHFA is inadvertently contributing to housing discrimination and violation of the environmental justice policies. Interestingly enough, FHFA has inadvertently confirmed the PACE restrictions are placing a disproportionate burden on poorer communities. The FHFA analysis rejects data submitted as to default rates by dismissing those studies as just reflective of more affluent communities.

4. The FHFA has ignored NEPA compliance issues throughout the Rulemaking process.

The FHFA's Proposed Rule ignores the prior reference to NEPA compliance in the original Advanced Notice published earlier this year and must be folded into and proceed with the rulemaking process.

The preparation of an EIS begins with a scoping process, which must move forward in tandem with the rulemaking procedure, yet there is no evidence that FHFA is meeting these environmental obligations. In response to a Freedom of Information Act (FOIA) request, FHFA has conceded that they have no designated NEPA officer as required of all Federal Agencies.

In addition, FHFA violated NEPA procedures by originally creating the administrative obstacles to residential PACE imposed prior to starting a EIS process. NEPA specifically states that proceeding with a Rule or Project in advance of NEPA consideration compromises the integrity of the NEPA process.

Another example of the FHFA's lack of NEPA compliance is that the FOIA request to FHFA also disclosed that there have been no discussions with the Department of Energy since initiating the EIS process.

In fact, FHFA has admitted to failing to consult with any Federal Agency pertaining to the required EIS. On August 31, 2012, the FHFA FOIA Officer David Lee stated that FHFA has no documents with respect to the following request:

List of federal agencies with which FHFA has communicated with in regards to preparation of the EIS as specified in NEPA Regulations Part 1501.6 regarding Cooperating Agencies.

Since there has been no consultation as required by NEPA, it is inappropriate to proceed further on the rulemaking process until the status of the PACE EIS is determined.

In closing, I cite the PACE Federal decision and the limits on APA rule making.

"...the FHFA's directives are arbitrary and capricious. Under § 706(2)(A) of the Act, "an agency action may be found unlawful by a reviewing court and set aside, if it is found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."

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