DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-SF-09-20,098

In re: 2480 16th Street, NW

Ward One (1)

TENANTS OF 2480 16th STREET NW
Tenants/Appellants/Cross-Appellees

v.

DORCHESTER HOUSE ASSOCIATES, LLC
Housing Provider/Appellee/Cross-Appellant

DECISION AND ORDER

September 25, 2015

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from a final order issued by the Office of Administrative Hearings (OAH) based on a petition filed in the Housing Regulation Administration (HRA) of the District of Columbia Department of Department of Consumer and Regulatory Affairs (DCRA).[1] The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

[1] OAH assumed jurisdiction over tenant petitions from the DCRA, Rental Accommodations and Conversion Division (RACD) pursuant to the Office of Administrative Hearings Establishment Act, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2007 Repl.). The functions and duties of RACD in DCRA were transferred to Department of Housing and Community Development (DHCD) by § 2003 the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.)).

I. PROCEDURAL HISTORY

A. The Proceedings Before OAH

On February 6, 2009, Housing Provider/Appellee/Cross-Appellant Dorchester House Associates, LLC (Housing Provider) filed a Petition for Change in Related Services and/or Facilities, RH-SF-09-20,098 (Services/Facilities Petition) with HRA, regarding the Housing Accommodation located at 2480 16th Street, NW (Housing Accommodation). *See* Services/Facilities Petition at 1-2; Record for RH-SF-09-20,098 (R.) at 72-73. The Services/Facilities Petition indicated that the Housing Provider wished to complete "major renovation[s]" to the heating, cooling, and ventilation systems at the Housing Accommodation. Services/Facilities Petition at 5a; R. at 59.

Multiple evidentiary hearings were held before Administrative Law Judge Erika Pierson (ALJ) between September 2009, and May 2010, and the ALJ issued a final order on May 20, 2011: Dorchester House Associates, LLC v. Tenants of 2480 16th Street, NW, RH-SF-09-20,098 (OAH May 20, 2011) (Final Order).[2] Final Order at 1-55; R. at 775-830. The ALJ made the following findings of fact in the Final Order: [3]

A. The Current Heating and Cooling Costs

1. The petition in this case involves a multi-dwelling apartment complex known as the "Dorchester House" located at 2480 16th Street, NW. The building has 395 apartments, which are a combination of efficiency, one-bedroom, and two-bedrooms apartments. The building was constructed in 1941 and is owned by Dorchester House Associates, LLC. John Hoskinson is one of three owners that make up Dorchester House Associates, LLC. Many of the tenants have been living in the building for long periods of time.

[2] The evidentiary hearings occurred on the following dates: September 14, 2009, September 15, 2009, November 4, 2009, November 5, 2009, November 17, 2009, March 16, 2010, March 17, 2010, April 27, 2010, April 28, 2010, and May 3, 2010. Final Order at 3; R. at 828.

[3] The findings of fact are recited here using the language of the ALJ in the Final Order, except that the paragraphs have been numbered for ease of reference.

2. Currently, the costs of utilities (heat, gas, water, and electric) are included in the rent charged and paid by Housing Provider. Electric usage is charged to Housing Provider through two master meters for the building, which include apartments, common areas, and commercial offices located in the building. Unit May 2009, heat was provided through steam radiators in each individual apartment. Air conditioning was offered to the tenants as an optional service during the summer months. Tenants could rent a window unit from Housing Provider or purchase their own window unit and pay an electricity surcharge of $75/month to cover the additional electric costs. The Rental Housing Commission has previously held that air conditioning at Dorchester Housing [sic] is an optional service. *Brookens v. Hagner Mgmt*[.] *Corp.*, TP 3788 (RHC Aug. 30, 1995 (RHC Aug. 30, 1995) ("Absent a petition for change in related services or facilities, once an optional service always an optional service . . . As an optional service they are outside the purview of the Rental Housing Act").

B. The Decision to Convert

3. Prior to the renovations, steam radiators provided heat to individual apartments. Tenants were not able to control the temperature in their apartments because the radiator system only had on/off capabilities. Apartments on the lower floors were often extremely hot as the steam passed through the system to the higher floors. The steam came from boilers located on the roof of the building. At the time of the conversion, the existing boilers were approximately five years old. Although the average life of an industrial boiler is 20 years, the boilers at Dorchester House had an average life of 10 years and were replaced in the 1980's and again in the 1990's. The pipes that return condensation to the building were corroded and leaking. It was not feasible to replace the pipes which were underground and enclosed in the walls because of asbestos, which would require vacating the building for such a renovation. Replacement with a similar steam based system would have resulted in the same problems.

4. Terry A. Busby, President of Urban Structures, Inc., was the Construction Manager for the renovations at Dorchester House. Mr. Busby found that the pipes that returned condensation in the building were corroded and leaking. Mr. Busby further found that the underground pipes that carried the steam from the radiator system were severely damaged, causing water back-ups and frequent leaks in the apartments. Housing Provider made the decision to replace the system with a new water-source hearting [sic] and cooling system.

C. The Water-Source Heating and Cooling System & Electrical Upgrades

5. In May 2009, Housing Provider completed a major renovation project where it replaced the existing radiator heating system with a "water-source-heat-pump." The electricity in turn, was converted from master meters to individual meters in each apartment and commercial space. The cost of the renovation, $10 million dollars, was borne entirely by Housing Provider and not passed on to the tenants. Installation of the new heating system also required Housing Provider to replace the boilers, which were located on the roof. Individual heating, ventilation, and air conditioning (HVAC) units were placed in each apartment. In some apartments (depending the apartment size and configuration), the HVAC units were placed in the walls. In other apartments, they were placed in the kitchen and/or dining room, enclosed with dry wall, resulting in the loss of some space in the apartments.

6. The system that Housing Provider installed provides both heating and cooling with individually controlled thermostats in each apartment. The system is energy efficient and operates by pushing air through a closed loop system. Heat is added and removed from the loop using a boiler and a cooling tower. In cold weather, the heat pump removes heat from the water loop and transfers it to hot air. In the warm months, the water is cooled and provides cold air to the apartments. Air and heat can be provided to different apartments at the same time. Gas boilers located on the roof of the building heat the water. Housing Provider is responsible for the costs for water and for gas to heat the water and there is no proposal to transfer these costs to the tenants. The water-source-heat-pump system was more expensive to install than some other available systems, but is less expensive to run because it is energy efficient and environmentally friendly. It is environmentally friendly because tenants who pay their own electric costs are more energy conservative and therefore individual metering is recommended by the International Energy Conservation Code, which has been adopted by the District of Columbia. The system itself will cause diminution in green house [sic] gases.

7. To run the new heating and cooling system, it was necessary to also upgrade the existing electrical system to accommodate the heat pumps. The electrical system for each apartment could only bear a load of 60 amps, which is below the Building Code requirement of 100 amps and inadequate for modern electrical needs such as microwaves and computers running concurrently. Current building code requires a minimum of 180 amps. The electrical panels in the apartments contained old style glass fuses which had to be changed frequently from being overloaded. The electrical upgrade included individual electric panels in each apartment with capacity for 125 amps and a circuit breaker. The wire conduits for the electricity were run across the ceilings of the apartments and are visible, but painted to match the ceiling color. RS. 220.

D. Loss of Square Footage

8. The efficiency apartments have one HVAC unit. Depending on size, some one-bedroom units have one or two HVAC units. All two-bedroom apartments have two HVAC units. The majority of the apartments have one bedroom. The HVAC units were placed on the longest wall in the apartments and were enclosed in dry wall, which changed the physical appearance and available space in the rooms. For example, David Castleberry (#127), lost approximately 17 feet of wall use in his apartment due to the installation of the HVAC.

9. In Bonnie Branner's one-bedroom apartment (#821), she lost the use of six feet of wall in her bedroom. The electrical box that was installed in the kitchen measures 18 inches wide and 4 inches deep. Ms. Branner had to move her baker's rack that previously sat on the wall where the electrical panel was placed and she has a large picture she is no longer able to hang. Ms. Branner also had to rearrange the furniture in her living room to accommodate the HVAC. RX. 220. Photographs of Ms. Branner's apartment before and after the HVAC show that in her living room, the television had to be moved to the opposite corner, otherwise the living room looks the same.

10. Richard Mancini, a 30 year resident of Dorchester House, resides in unit 214, a large one-bedroom. Mr. Mancini had to reconfigure his living room to accommodate the HVAC for which he lost two feet of wall space. Mr. Mancini testified that he had to switch his living room and dining room because his rug no longer fit in the living room. Mr. Mancini lost approximately 15 square feet between the living room and kitchen. Mr. Mancini elected to pay his own electricity beginning in June 2009 and his average bill was $80/month. His highest bill was $110 in February 2010. Bills in the summer months averaged $60.

11. Vernell Grissom resides in apartment 912, a one-bedroom unit with two HVACs installed. The wall that was added for the electrical panel blocks the sunlight from her living room window to her dining room and she had to remove some decorative items. Because of the HVAC in her bedroom, Ms. Grissom's armoire no longer fit in the bedroom and had to be placed outside of the kitchen. Ms. Grissom lost two feet of space in her living room.

12. Anne Cooke, apartment 442, has resided in the building for 32 years and lives in a large one-bedroom apartment with two HVACs. Ms. Cooke testified that she lost approximately 14 square feet in her living room, dining room, and bedroom from the HVAC installation. Because of the HVAC, Ms. Cooke had to move the television in her bedroom and now has to sit on the bed to watch television.

13. Lorenzo Calender II, has resided in apartment 245, a large two-bedroom, for 14 years. His apartment has two HVACs and he lost approximately 21 inches of wall space in his living room. Mr. Calender has an extensive private library

and lost space for his bookshelves. The [a]rmoire in his second bedroom had to be moved to accommodate the HVAC.

14. Housing Provider engaged an architect to calculate the square footage of the units and the amount of floor space occupied by the HVAC equipment. Aubrey Grant, Architect with Eric Cobert & Associates, performed the calculations using BOMA (Building Owners and Managers Association) standards for measuring leasable residential square footage. PX. 105. The BOMA standard to obtain a gross measurement is to measure the perimeter of the rental unit and computing the area within the perimeter, without any deduction for interior walls or cabinets. PX 106. The measurements were calculated by computer for each type of apartment using information from floor models and drawings. The HVAC units in each of the apartment types occupies [sic] less than one percent (1%) of the total square footage of the apartments, except for 35 one-bedroom units where the HVAC occupied 1.05% of the space. *Id.* [sic]. Housing Provider, specifically owner John Hoskinson, then took these square foot measurements and converted them to dollar amounts, which is discussed further in the conclusions of law.

E. The HUD Allowance

15. Under the Tenant-based voucher program (also known as Section 8), the local Public Housing Agency (PHA) is authorized to determine a utility allowance for families receiving assistance. The utility allowance must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality. 24 CFR [§] 5.362, PX 115. In developing the allowance, the PHA must use normal patterns of consumption for the community as a whole and current utility rates. *Id.*

16. The U.S. Department of Housing and Urban Development (HUD) provides for the following monthly utility allowances for high-rise apartments in the District of Columbia, as of August 5, 2008 (PX 115, RX 202):

TABLE A: HUD SECTION 8 HOUSING MONTHLY ALLOWANCE FOR TENANT FURNISHED UTILITIES 8/5/2008			
	Efficiency	**One-Bedroom**	**Two-Bedroom**
Electric Heat	$69	$92	$115
General Electric	$26	$34	$43
Air Conditioning	$9	$11	$14
TOTAL	$104	$137	$172

Final Order at 3-9; R. at 821-28 (footnotes omitted). The ALJ made the following conclusions of law in the Final Order:[4]

. . .[5]

C. Legal Standard for Granting a Services and Facilities Petition

1. The housing regulations provide that I shall approve a related services or related facilities petition if I find the following:

   (a) The change shall not adversely affect the health, safety, and security of the tenants;

   (b) The change shall not directly result in a substantial violation of the Housing Code;

   (c) The change shall not be retaliatory, as defined in § 502 of the Act; and

   (d) The change shall not be intended to cause displacement of tenants from the housing accommodation.

   14 DCMR [§] 4211.2.

2. In considering the above factors, I find that Housing Provider's petition should be granted:

   (a) There is no evidence that the change adversely affects the health, safety, or security of the Tenants. There was some testimony, specifically from Tenants Branner and Calender, that the air quality in the apartments has decreased as a result of the new HVAC system. However, there was no evidence that Tenants' health was adversely affected by the change.

   (b) The change does not result in a violation of the Housing Code. Tenants' [sic] argued that Housing Provider violated the Housing Code by performing the renovations without the approval of this administrative court. However, Tenants' [sic] are confusing the requirements for a capitol [sic] improvement petition with the requirements for a petition to change services. In a capital improvement petition, a housing provider is prohibited from implementing the improvements until approved by the court or 60 days has lapsed. 14 DCMR [§] 4210.10. However, Housing Provider has not proposed to pass the cost of

[4] The conclusions of law are recited here using the language of the ALJ in the Final Order, except that the paragraphs have been numbered for ease of reference.

[5] The Commission omits a recitation of the ALJ's overview of the issues to be resolved, and statement of jurisdiction. Final Order at 9; R. at 821.

the actual renovations (installation of HVAC and electrical upgrades) on to the Tenants, which is the purpose of a capitol [sic] improvement petition. Housing Provider requests only to adjust rents for the individual metering of the electrical costs, which is properly done though a petition to change services. Housing Provider continues to pay for the building-wide electrical costs while the petition is pending and therefore, Housing Provider has not violated the Rental Housing Act and there was no evidence presented that Housing Provider otherwise violated the Housing Code.

(c) There was no evidence presented by the Tenants that the change in services was retaliatory.

(d) No tenants were displaced because of the renovations and no Tenants will be displaced as a result of assuming responsibility for the payment of their own electrical costs.

3. Having determined that the petition should be granted, the Act provides that I may increase or decrease the rent charged to reflect proportionally the value of the change in services or facilities. D.C. Official Code § 42-3502.11 (2005 [sic]). As such, the remaining issues, which I will address in turn, go to how much the rent should be either increased and/or decreased.

D. Loss of Square Footage

4. Tenants have argued that because they have lost square footage in their apartments to accommodate the HVAC systems, their rents should be reduced accordingly to compensate for the loss of space. It is the position of Housing Provider that loss of square footage is not a factor that should be calculated in the rent adjustments because the changes were *de minimis* and apartment value is not based on square footage. Nonetheless, in anticipation that Tenants might request loss of square footage to be factored into the rent adjustments, Housing Provider engaged an architect to calculate the square footage of the units and the amount of floor space occupied by the HVAC equipment. Aubrey Grant, Architect with Eric Cobert & Associates, performed the calculations using BOMA standards and determined that that [sic] the HVAC units occupied less than one percent of the total apartment square footage (except for 35 one-bedroom units where the HVAC occupied 1.05% of the space).

5. Owner John Hoskinson then took these square foot measurements and converted them to dollar amounts. Admittedly, there was no industry standard for doing so and therefore Mr. Hoskinson used his experience and knowledge to make these calculations. Typically, to determine a price per square foot, one would divide the property value by the total square feet. Here, a standard dollar amount per square foot would not be possible because each apartment is charged a different rent. Because of the varying rents, identical apartments would have different prices per

square foot due to rent control. As such, Mr. Hoskinson, very cleverly, came up with his own formula to establish an across[-]the[-]board per square foot cost.

6. Mr. Hoskinson used the appraisal information and the current market value of the apartments to determine how much, if any, the rent should be lowered to account for the reduced square footage. The calculations were made as follows (using the efficiency apartments as an example):

TABLE B: HP'S LOSS OF SQUARE FOOTAGE VALUE – Efficiency Apartment			
Total # units	**APT Sqft**	**HVAC Sqft**	**HVAC Percentage**
19	534	3.00	.056% [sic]
50	539	4.00	.074% [sic]
	Average: 19 x 0.56% = 10.67% 50 x 0.74% = 37.11% = 47.78% (Total Percentage) ÷ 69 (Number of efficiency apts) 0.69% (weighted average percentage) x 1,286 (weighted average market rent) **$9.00 (amount of rent reduction)**		
	The above calculations reflects [sic] *that on average, in an efficiency apt, the HVAC system takes up 0.69% of the apartment space. Multiplied by the weighted market average rent for efficiency units, Housing provider proposes a $9 per month reduction to allot for loss of square footage.*		

PX 106. In sum, based on the formula above, Housing Provider determined the following weighted average values for the loss of square footage in each of the unit types:

Efficiency: $9/month

One-Bedroom: $15/month

Two-Bedroom: $16/month

Weighted Average: $14/month

PX 106. Although Tenants argued that they should be compensated for loss of square footage, Tenants did not propose any alternate method of calculating loss of square footage.

7. I find however, that square footage is not a factor that should be taken into consideration in determining the applicable rent reduction. I am persuaded from the testimony of Mr. Hoskinson (Owner), Mr. Marcus (Appraiser), and Mr. Grant (Architect), that by and large, square footage of property is, at best, used as a method of comparison and not market value. When a property is appraised, for example in seeking a mortgage, appraisers look as [sic] "comparables." Square footage would be an important factor to determine a comparable property. Yet, two properties of the same square footage can be valued entirely differently based on improvements or additions, or in this case, rent control. For example, a furnished basement, a fireplace, or hard wood floors, *may* add value to a property. If you were building a new home, the cost per square foot would be a very important factor in comparing builders. Similarly, office space is often leased by the square foot and therefore it is directly tied to price. But, when it comes to renting apartments, the question in the minds of renters is rarely reduced to cost per square foot, but remains, "will my furniture fit?" The reality is that "market value" of an apartment is what a buyer is willing to pay and that is not tied directly to square footage. The practical value of any property is based on the sale or rental of comparable properties in the same area.

8. Tenants argued that they were significantly impacted by the loss of square footage and at times, expressed their loss in terms of cubic square feet. However, I am persuaded that cubic feet is [sic] not the property measurement to determine living space. As demonstrated by Tenant Hunter, a cubic foot is one foot long by one foot wide [by one foot tall], or a box. Measuring an apartment by cubic foot [sic] would include the entire open space from floor to ceiling. As such, installing a ceiling fan would also occupy cubic feet, but it would not decrease the value or living area of the apartment. Cubic feet are a measurement of volume, whereas square feet is [sic] a measurement of area. Going back to the ceiling fan example, if you wanted to know the volume of air in an apartment to install a fan, cubic feet would be important.

9. Tenants referred repeatedly to the loss of "livable space." Mr. Grant testified however that there is no standard for measuring "livable space," but there is an industry standard for measuring "leasable residential square footage." There also is no "legal standard" for measuring square footage. In the absence of a legal standard, it is appropriate to apply a widely accepted industry standards [sic], one of which is BOMA. While the Tenants disagree with the BOMA standard, they did not offer any other widely accepted industry standard. Mr. Grant testified that the BOMA standard for measuring leasable residential square footage is to measure the perimeter of the rental unit and computing the area within the perimeter, from wall to wall. As such, the installation of the HVAC and electrical boxes, although affecting the configuration of the apartment did not reduce the leasable square footage of the apartments. Therefore, I find that loss of square footage did not amount to a reduction in facilities such that the rent should be reduced.

10. In addition, the loss of square footage was not consistent throughout the building. The HVAC units and electrical panels were placed in different locations in each apartment and the inconveniences caused by the installation varied. The consistent testimony of the Tenants was that they had to rearrange furniture. Having to rearrange furniture may have been inconvenient and upsetting to the Tenants, but it did not change the square footage and it did not change the service. It is *possible* that such a complaint could be the basis for an individual tenant petition alleging a reduction in facilities, but it is not properly part of the rent reduction for the electrical costs.

E. Applicability of the HUD Allowance

11. Tenants argue that the rent reduction should, at a minimum, reflect the HUD allowances. Housing Provider argues that the HUD allowance is not applicable because it does not take into consideration the more efficient water-source-heat-pump system installed in Dorchester House and therefore it is not representative of actual electric costs.

12. Housing Provider admitted into evidence, the HUD instructions for determining the allowances, which states: "The utility allowance scheduled is based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality." PX 115. The instructions direct the local housing authority to determine the cost of utilities that are specific to the project, locality, and apartment type. *Id.* The instructions further state: "consumptions are for housing insulated for the heating system installed." *Id.* Housing Provider argues that HUD allowance should not be applied because it is not indicative of the costs associated with running a water-source-heat-pump system.

13. Regarding the applicability of the HUD allowance, Tenants presented the testimony of Tenant Mark Fisher (#407). Mr. Fisher is familiar with the HUD allowances as a mayoral appointee to the HIV Planning Council which utilizes the HUD allowances in determining subsidies for program participants. Mr. Fisher however was not aware of what factors went into determining the HUD allowances.

14. The HUD allowance chart provides for a certain allowance for "electric heat." *Id.* Mr. Kaufman testified that there are generally three different types of electric heating systems: electric heat, "typical" heat-pump systems, and water-source-heat-pump systems. Water-source-heat-pump systems are not common in high-rise buildings in the District of Columbia. Mr. Kaufman testified that in the HVAC industry, references to "electric heat," are generally understood to mean floor electric baseboard radiant heaters, which are commonplace. Unlike a water-source-heat-pump system, 100% of the heat generated from baseboard electrical heaters is provided from electricity and therefore, are more expensive to run than water-source-heat-pump systems.

15. To demonstrate the difference between the systems and their corresponding energy consumption, Mr. Kaufman presented a drawn diagram of three heating systems. PX 116. Diagram A in the drawing is representative of a baseboard electric heating system, which Mr. Kaufman believes is contemplated by the HUD allowance. *Id.* For his examples, Mr. Kaufman used the constant engineering factors that maintaining a particular apartment at 68 degrees would require a design load of 9200 BTUs per hour, regardless of the type of system, and an electricity cost of $0.13 KW/H. For a typical baseboard electric heat system (PX 116 at 2), this translates into requiring 2,700 watts of electricity, based on manufacturer's information. To run the electric heating system for 10 hours at $0.13 KW/H, the cost would be $3.51. *Id.*

16. Mr. Kaufman then applied the same specifications (9,200 BTUs needed to maintain 68 degrees in an apartment) to a typical heat pump system (through-the-wall system). PX 116, Diagram B. A typical through-the-wall heat pump system uses both electricity and a refrigeration cycle (moves heat from outside to inside) to heat the apartment. According to the manufacturer's information in his example, the heat pump requires 978 watts of electricity to produce 9,200 BTU's [sic]. PX 116. Therefore, with a typical heat pump system, the tenant would be paying for 978 watts of electricity at the cost of $0.13 KW/H for 10 hours which equals $ 1.27 [sic]; significantly less than an electric heat system.

17. Applying the same specifications to the water-source-heat-pump installed in Dorchester House yields yet another result. PX 116, Diagram C. Mr. Kaufman testified that the source of the energy is primarily from gas-heated water, which is provided by Housing Provider. In order to produce 9,200 BTUs from the water-source-heat-pump, the manufacturer's information provides that 628 watts of electricity is needed. At the cost of $0.13 KW/H, the electric cost paid by the tenant to run the water-source-heat-pump for 10 hours is $0.82 cents. As such, I am persuaded that the water-source-heat-pump system is more energy efficient than other available systems and cost[s] less to run.

18. The HUD Allowance chart (PX 115) lists four types of heating: ([a]) natural gas; (b) bottle gas; (c) oil; and (d) electric. Allowances are provided for natural gas, oil and electric. The water-source-heat-pump system, which runs on a combination of gas-heated water and electricity, does not fall squarely into any of these categories. None of the witnesses knew what factors were considered in determining the allowances for the District of Columbia. It is possible that water-source-heat-pumps were included in the averages for the electric category and it is possible they were not considered at all, especially in light of the testimony that they are not common in the District of Columbia. I am satisfied however, that the HUD guidelines would require the local housing authority to make a separate allowance for a building that has a water-source-heat-pump system in order to comply with the requirement that the allowance be specific to the project and the heating system installed. When the HUD allowances are compared to all of the

other estimates presented in this case: INTEC's estimate, DTA's analysis of actual bills, and Mr. Kaufman's analysis of actual bills, the HUD allowances are significantly higher. That is most likely due to the HUD allowances not taking into consideration the energy savings from a water-source-heat-pump system.

19. HUD's Utility Allowance Guidebook gives the PHA latitude in determining the methodology to be used to calculate the allowances. PX 113. The PHA may perform either an "engineering-based methodology" or a "consumption-based methodology." *Id.* Mr. Kaufman testified that INTEC, in fact, utilized an "engineering-based methodology," which requires using engineering calculations and technical data to estimate reasonable energy consumption and it was performed specific to the water-source-heat-pump. In subsequently analyzing the actual PEPCO bills, Mr. Kaufman testified that INTEC also performed a "consumption-based methodology," which requires using the actual utility data based on past consumption to determine the allowance. As such, INTEC provided estimates using methodologies consistent with that recommended by the federal government. Given the availability of the actual bills, there is no reason to apply the HUD allowances in determining the actual costs. It is also interesting, as noted in PX 113, that estimates from a consumption-based methodology (actual bills) are likely to be higher than estimates from an engineering-based methodology, because actual use is often not consistent with an "energy conservative household" which is used in an engineering-based methodology. In addition, consumption measures what actually happens as opposed to what may happen in theory.

F. Proposed Rent Adjustments

20. Electrical usage, which Tenants will now be required to pay, falls into two categories: (1) **general electric usage**, which is the electricity used for such items as lighting, appliances, and other items plugged into outlets, and (2) **heating**, the cost to run the water-sourced-heat-pump in the winter months. The cost to run the air conditioning in the summer remains an optional service (Tenant's [sic] can opt not to turn on their air). Therefore, to determine the amount of reduction in rent, it is necessary to determine the electrical costs of heating the apartment during the winter months, plus the cost of general electric use for all 12 months, excluding the cost of cooling the apartments in summer months.

21. Housing Provider proposes to both increase and decrease rents based on four factors: (1) Housing Provider proposes to **increase** the rents by a certain amount because Tenants will have substantially improved electrical, heating, and cooling systems, thereby **"adding value"** to the rental unit; (2) Housing Provider proposes to **increase** the rents by a certain amount because Tenants will now have **air conditioning** included as a basic service; (3) Housing Provider proposes to **decrease** the rents by a certain amount because Tenants will now be required to pay their own **general electric usage;** and (4) Housing Provider proposes to also

decrease the rents by a certain amount because Tenants will be paying for their **heating costs.**

22. After increasing and then decreasing the rents, Housing Provider's proposed net rent reduction is one dollar ($1) per month for efficiency and one-bedroom apartments, three dollars ($3) per month for two-bedroom apartments, or a weighted average reduction of two dollars ($2) per month for all apartments. PX 100, *Petition* at 5a-5d:

TABLE C: HOUSING PROVIDER'S PROPOSED RENT REDUCTIONS				
	Efficiency	**One-Bedroom**	**Two-Bedroom**	**Weighted Average**
General Electric	-$28/mo	-$34/mo	-$42/mo	-$33/mo
Heating	-$4/mo	-$8/mo	-$14/mo	-$8/mo
A/C	+[$]8/mo	+[$]12/mo	+[$]17/mo	+[$]12/mo
Added Value	+[$]32/mo	+[$]46/mo	+[$]52/mo	+[$]41/mo
Square Footage	-$9/mo	-$15/mo	-$16/mo	-$14/mo
NET Reduction	**-$1/mo**	**-$1/mo**	**-$3/mo**	**-$2/mo**

(1) Housing Provider's Proposed Rent Increases ("Added Value")

23. In its petition, Housing Provider proposed that part of the overall rent adjustment should include an increase to the rents because "tenants will have substantially improved electrical, heating, and cooling systems, adding value to the rental units." PX 100, *Petition* at 5b. Housing Provider argued that the following improvements resulted in an "added value" and therefore an increase in services:

- Increased electrical capacity through circuit breaker panels.
- Both heating and cooling available from the water-source heat pump which can by [sic] turned on and off when Tenants desire rather than waiting for central boilers to be activated or window air conditioners to be installed.
- Heat pumps more reliable, cleaner, and safer.
- Thermostat control by tenants.
- Window views will not be obstructed from window air conditioners.
- Apartments will have more modern appearances.

24. To determine the monetary value of these proposed increases in services, Housing Provider engaged the appraisal firm of M&B Appraisal Group whose mission was to "determine the potential impact on Market Rent occurring as a result of an

electrical upgrade and in the installation of electric-powered, built-in water-source heat pumps to provide heating and cooling to individual units at the subject property." PX 103. Ernest Marcus ([t]he Appraiser), Licensed Commercial Real Estate Appraiser, was qualified as an expert and testified to the appraisal process and results.

25. Mr. Marcus testified that this was an unusual project. He relied on the property description, comparable properties (of which there was only one with a water-source-heat-pump), his general experience, and conversations with property managers in the area. The appraisal considered that "overall, apartments with built-in heating and cooling systems will be regarded as more modern, comfortable, and functional." *Id.* at 5. Because of the many characteristics that contribute to rent differences in the various buildings considered, the Appraiser recognized "the great difficulty in obtaining an accurate survey from property managers." *Id.* at 6. Mr. Marcus identified the current market rents for the various apartments. After weighing all the factors, the Appraiser determined the following "added value" to the property from the installation of the new HVAC system:

TABLE D: ADDED VALUE APPRAISAL		
Efficiency (69 total)		
Sqft	**Market rate**	**Added Value**
534 sqft (19)	$1,250	$40
539 sqft (50)	$1,300	$40
One-Bedroom (287 total)		
724 sqft (52)	$1,450	$50
841-875 sqft (111)	$1,575-$1,650	$60
908 sqft (25)	$1,700	$60
1,013 sqft (99)	$1,850	$60
Two-Bedroom (33 total)		
1,055 sqft (8)	$2,150	$65
1,187 sqft (25)	$2,400	$70

PX 103 at 3 and 6. Based on Table D above, the Appraiser determined that the installation of the water-source-heat-pump has increased the market value of the apartments by the amounts in column three, between $40 and $70 per month.

26. In its petition, Housing Provider similarly proposes to increase the rents to reflect the proportionate value added by the availability of air conditioning as a basic service in that it is now readily available to all tenants, but still optional. PX 100, *Petition* at 5b. Prior to the renovations, Tenants could rent window air conditioners from Housing Provider or use their own window air conditioner and pay a monthly surcharge of $75/month to cover electrical costs associated with the air conditioning.

27. To determine the value of the optional air conditioning service, Housing Provider engaged Certified Public Accountant (CPA) John T. Barkanic of Barkanic & Ames, LLC. Mr. Barkanic's report noted that the pricing scheme for the air conditioning, which was meant to cover both the rental of the air conditioner and the associated electrical costs, was not economically rational. The $75 monthly cost did not take into consideration the size of the unit or the fact that some larger units had two air conditioners. It also did not distinguish those tenants with their own window units who paid the same amount as tenants renting air-conditioners [sic]. PX 102 at 2.

28. Mr. Barkanic determined the value of the window air conditioning units by imputing a rent based on (1) capital cost (cost per unit amortized over average life of three years), (2) operating expenses (i.e. installation, removal, contracts), and (3) profit margin (5%). *Id.* Mr. Barkanic determined the monthly value of the window air conditioning units as follows:

TABLE E: CPA'S A/C VALUE CALCULATIONS			
Efficiency	**One-Bedroom**	**Two-Bedroom**	**Weighted Average**
$8/month	$12/month	$17/month	$12/month

PX 102.

29. Housing Provider then took the above estimates to determine the amount by which the rents should be increased to compensate for the added value of the new HVAC system and air conditioning as a basic service. The increased market value from the new HVAC system shown in Table D [sic] above, includes the added value of both heating and cooling. Therefore, in recommending a rent increase, Housing Provider backed-out the value of the air-conditioning [sic] (Table E) from the total increased market value to separate out the added value of the new heating system and the cooling system. For example: for an efficiency apartment the Appraiser determined the added value of the HVAC was $40/month. The CPA determined the value of renting window air conditioners was $8/month. Therefore, Housing Provider determined that rents should be increased for an efficiency apartment by $32/month for the added value of the HVAC and $8/month for air conditioning as a basic service for a total of $40/month as a rent increase. As such, Housing Provider proposes rent increases of $40 (efficiency apartment); $58 (one-bedroom apartment); and $69 (two-bedroom apartment); or a weighted average of $33 for all apartments. PX 100 at 5a-5d.

30. I am somewhat perplexed by Housing Provider's argument that on the one hand, air conditioning remains an optional service and therefore there should be no reduction in rent to compensate for the cost of air conditioning which will be incurred only if Tenants choose to use the air conditioning. On this account, I

agree with Housing Provider that air conditioning remains an optional service. On the other hand, however, Housing Provider proposes to increase the rents because of the value added by the availability of air conditioning in each of the apartments. Housing Provider states that "tenants will have air conditioning included as a basic service." PX 100 at 5b. However, Housing Provider cannot have its cake and eat it too. Housing Provider cannot propose that air conditioning is an optional service not subject to a rent decrease, but is also a basic service subject to a rent increase. In effect, the service has not changed. The method of providing the service has changed, but I find that it is not appropriate to pass that choice onto [sic] the Tenants in the form of a rent increase. Indeed, because the previously charged $75 per month for air was not necessarily based on actual costs, some Tenants will likely be paying more than $225 per year to cool their apartments for the entire cooling season. The INTEC report estimates that the cost to cool a two-bedroom apartment is $430.59 per year. PX 101 at 5. Therefore, any increase in value is offset by the increase in cost.

31. I find Housing Provider's reasoning and methodology to be very interesting, but unprecedented and unpersuasive. What the CPA determined was the rental value of window-air conditioning previously offered by Housing Provider. The conclusion then drawn by Housing Provider is that the availability of air without having to rent a window unit has the same dollar value as renting a window unit. If the dollar value is the same, then the service has not increased. There is a difference between adding value and increasing services. The fact that the new system may have increased the market value of the apartment, does not translate into an increase in services. Indeed, the Rental Housing Act provides methods for housing providers to increase rents to bring them in line with market value under certain circumstances.

32. The other portion of the proposed "added value" increase is the more efficient HVAC system in general. The rationale provided for the "added value" (i.e. thermostat control, modern appearance), are not items which one can easily place a monetary value [on] and such value is subjective at best. They also have no relevance to the service itself. The Appraiser[']s report noted that the process they underwent for determining the increase in market value was unusual. While it may be true, as stated in the Appraisal report, that "overall, apartments with built-in heating and cooling systems will be regarded as more modern, comfortable, and functional," that does not automatically translate into an "added value" for the existing tenants, many of whom were happy with the previous radiator system. Indeed, many of the Tenants testified that the new HVAC system did not add value to them and they were unhappy with the system in many respects. But, the new system provides the same service as the former system. The alleged increase in market value *may* have a different impact in regards to new tenants coming and may make the apartments more appealing in marketing for those new tenants or may provide the basis for a vacancy rent increase. However, I find that the installation of the HVAC system did not amount to an

increase in services to the existing Tenants. Increasing the rents based on the installation of a purportedly "better" system could also be perceived as a back door way of recouping the costs of the renovations which could only have been done through a capitol [sic] improvement petition. Therefore, Housing Provider's request to increase the rents is denied. The remaining issue then, is by how much the rent should be decreased.

(2) Proposed Decreases in Rent: The Experts

33. In offering evidence on the appropriate amount by which the rent should be reduced to compensate for the cost of electricity paid by the Tenants, there was essentially a battle of the experts. Housing Provider presented the testimony of Mr. Scott Kaufman, Registered Professional Engineer. Tenants' [sic] presented the testimony of Dr. David Stallard, Licensed Electrical Engineer.

34. Scott C. Kaufman, PE, is a registered Professional Engineer, and the Director of Project Management and Chief Mechanical Engineer for INTEC Companies. INTEC is an architectural and engineering design and analysis firm. Mr. Kaufman specializes in building design with a specialty in HVAC, and served as the design engineer for the renovations at Dorchester House. Mr. Kaufman was qualified as an expert in **mechanical engineering**. Mechanical engineering is a discipline of engineering that applies the principles of physics and materials science for analysis, design, manufacturing, and maintenance of mechanical systems. It is the branch of engineering that involves the production and usage of heat and mechanical power for the design, production, and operation of machines and tools. *The American Heritage Dictionary of the English Language*, Fourth Edition.

35. David V. Stallard, Ph.D., is a retired Electrical Engineer licensed in the state of Massachusetts and is the father of Kent Stallard, a tenant at Dorchester House. Dr. Stallard was qualified as an expert in the field of **electrical engineering**. Dr. Stallard's professional career was largely as a specialist in missile guidance for Raytheon (an American defense contractor), more popularly referred to as a "rocket scientist." Electrical engineering is a field of engineering that generally deals with the study and application of electricity, electronics and electromagnetism. *The American Heritage Dictionary of the English Language*, Fourth Edition.

36. Mr. Kaufman, who prepared the INTEC report, testified that Dr. Stallard, as an electrical engineer, is not qualified to do an analysis of electrical costs. As an HVAC specialist, Mr. Kaufman is qualified to calculate heating requirements and those calculations are performed according to ASHRAE (American Society of Heating, Refrigeration and Air-Conditioning Engineers) standards, which are incorporated into a sophisticated computer system to make the calculations.

37. Dr. Stallard testified that the INTEC report, although accurate in calculating the general electric usage and the air conditioning costs, was "fatally flawed" in calculating the heating costs. Dr. Stallard testified that the INTEC report was fatally flawed because the calculations performed were based on the assumption that the heat pump is eight times as effective in heating as it is in cooling which resulted in a low average monthly cost (which I will discuss further herein). Dr. Stallard acknowledged during his testimony that he is not experienced in computing HVAC costs but that he applied a scientific and analytical approach based on his many years of analytical thinking. Dr. Stallard testified that his method of calculating the energy usage was not generally accepted in the HVAC industry, but it is scientifically sound.

38. As a general matter, the District of Columbia follows what is known as the *Frye* standard in determining the admissibility and weight to be given expert testimony. *Frye v. United States*, 293 F. 1013 ([D.C.] 1923). The Frye [sic] standard allows the introduction of expert testimony in situations where "inexperienced persons are unlikely to prove capable of forming a correct judgment" upon the issue due to lack of study and knowledge of the subject matter. *Id.* at 1014. The District of Columbia Court of Appeals has elaborated on the *Frye* standard and has held that "the *Frye* standard retards somewhat the admission of proof based on new methods of scientific investigation by requiring that they attain sufficient currency and status to gain acceptance of the relevant scientific community." *United States v. Porter*, 618 A.2d 629, 633 ([D.C.] 1992) [(]quoting *United States v. Addison*, 498 F.2d 741, 743 ([D.C. Cir.] 1974)[)]. The *Frye* analysis, begins and ends with "the acceptance of particular scientific methodology" and not the acceptance of a particular result or conclusion derived from that methodology. *Id.* (citing *Ibn-Tamas v. United States*, 407 A.2d 626, 638 (D.C. 1979)). The more flexible *Daubert* standard, which has been incorporated into the Federal Rules of Evidence, admits any expert testimony deemed helpful or germane to the scientific issue. *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 [sic] (1993). But, one of the *Daubert* factors is "widespread acceptance in the relevant scientific community." *Id.*

39. In *United States v. Jenkins*, 887 A.2d 1013, 1022-1023 [sic] (D.C. 2005), the Court of Appeals addressed (in the context of DNA testing), the difference between a disagreement over the competing questions to be asked and a disagreement over the methodologies used to answer those questions. It is the latter, the methodology, that must be generally accepted in the scientific community. In *Jenkins*, the Court held "[i]n other words, the math that underlies the calculations is not being questioned. Thus, the debate cited by [the defendant] is one of relevancy, not methodology; and because both *Frye* and *Porter* focus on whether the methodology is generally accepted, there is no basis under *Porter* for the trial court to exclude the DNA evidence in this case." *Jenkins*, 887 A.2d at 1023.

40. Similarly, in this case, the experts have a fundamental disagreement as to the methodology used to determined [sic] electric usage. They further have a disagreement on how temperature (outside temperature, thermostat settings, and degree days) is to be used in the calculations. In making his calculations, Dr. Stallard testified that his factors included the presumption that heat loss from the building is proportional to the degree days. Therefore, given the same number of degree days, the number of BTUs required to heat an apartment are the same as the number of BTUs required to cool the apartment. This assumption was the basis for the calculation method used by Dr. Stallard (Average daily KWH/Degree Days = KWH/day required to heat or cool).

41. Mr. Kaufman, on the other hand, testified that Dr. Stallard's methodology of calculating electrical use was not familiar, not used in the HVAC industry, and did not make sense. Mr. Kaufman testified that the above ratio used by Dr. Stallard reflects only the transmission of heat due to temperature differences. Mr. Kaufman testified that in calculating electric usage, one cannot take degree days in winter and degree days in summer and assume there is any uniformity of the load. Mr. Kaufman gave the example that the load on a day when you are heating and there is a 20 degree difference between outside and inside temperature, is not going to require the same number of BTUs that would be required to cool the apartment on a 20 degree difference day. Mr. Kaufman testified that the transmission of heat through the wall is not the only factor contributing to the heat or cooling requirement. The multiple factors that are considered are established by ASHRAE and entered into the computer system that calculates the electric usage. As such, it is not a simple mathematical formula. While Dr. Stallard did take other heat loss factors into consideration, they were not the ASHRAE factors.

42. As the finder of fact, I am not in a position to determine whether Dr. Stallard's or Mr. Kaufman's mathematical equations and considerations are correct, which is exactly why we rely on expert testimony. It is not my job to resolve disputes within the scientific community. I must either accept or reject the expert testimony, and draw the appropriate conclusions.

43. There is no question that Dr. Stallard is a brilliant and impressive individual with stellar credentials. However, his expertise and experience are not in the HVAC field or in the calculations of electrical usage. Dr. Stallard acknowledged that the methodology he used was probably not generally accepted in the HVAC field although he felt it was scientifically sound. As such, Dr. Stallard's testimony fails to meet the *Frye* standard. There was no dispute that ASHRAE sets the standard for the HVAC industry. Dr. Stallard repeatedly testified that he "consulted" the ASHRAE manual, but he seemed to in the end, reject the ASHRAE standards for computing electrical usage. Mr. Kaufman on the other hand, is an expert in mechanical engineering, a field that is dedicated to the production and usage of heat and mechanical power for the design and operation of machines and his specialty is in HVAC. He was also the design engineer who installed the HVAC systems in Dorchester House and is therefore keenly familiar with the capabilities

and demands of the system. In addition, as discussed further below, Mr. Kaufman's estimates for heating and general electric use come considerably close to the actual PEPCO bills presented by the Tenants and Dr. Stallard's estimates do not. Therefore, I credit the expert testimony of Mr. Kaufman over Dr. Stallard because I am persuaded that Mr. Kaufman's methodology is generally accepted in the HVAC industry and performed according to ASHRAE standards.

(3) Scoff Kaufman/INTEC's Recommendations

44. In addition to being the design engineer for the HVAC installation, Mr. Kaufman/INTEC calculated the estimated electrical expenses for each type of apartment following the renovations. In calculating electrical costs, INTEC used the rate schedule published by the local utility company PEPCO, at that time (December 19, 2008). PX 101 at 21-22. Mr. Kaufman based general electric (non-HVAC) usage on estimates of average energy consumption published by the Department of Energy. PX 117. Electric usage for heating was based on heat-loss calculations performed in conjunction with the design of the water-source heating system, according to standards published by ASHRAE and other sources. Heating expenses were calculated for each apartment type on a monthly basis based on average heating and general electric use. PX 101, Appendices A-C.

45. In making its calculations, INTEC obtained prior PEPCO bills paid by Housing Provider, made heating and cooling load (consumption and demand) estimates for each apartment type (based on published information on average household use and energy consumption of certain appliances), and applied the PEPCO usage charges and rates based on kilowatt hours (KWH). The calculations, which are done using a sophisticated computer system, also take into consideration ASHRAE factors measuring heat loss such as square footage of apartment, types of walls and insulation, and what direction the apartment faces. The estimated monthly costs for heating, cooling, and general electric use are set forth in Appendix D, attached to this Order. Appendix D is an excerpt from the extensive tables in the INTEC report. The full tables for each apartment type are attached as Appendices A-C.

46. After calculating the monthly estimated costs for heat and general electric use, INTECT [sic] divided the annual cost by 12 months and made the following recommendations for rent reductions (PX 101 at 5):

TABLE F: INTEC RECOMMENDED RENT REDUCTIONS				
	Efficiency	**One-Bedroom**	**Two-Bedroom**	**All-Unit Average**
General Electric	$28.06/mo	$33.71/mo	$42.28/mo	$33.45/mo
Heating	$3.85/mo	$8.08/mo	$13.85/mo	$7.83/mo
TOTAL	**$31.91/mo**	**$41.79/mo**	**$56.12/mo**	**$41.28/mo**

PX 101.

(4) Dr. David Stallard's Recommendations

47. Dr. Stallard performed two different types of analysis [sic]. Dr. Stallard reviewed the INTEC report and HUD allowances and performed his own scientific calculations to determine a "*recommended monthly allowance*," based on what he determined the average electric costs would be. RX 226. In his second analysis, Dr. Stallard reviewed and analyzed four months of actual PEPCO bills, scaled them to account for the remaining months, and *estimated* the *heating and general electric costs* for the tenants. RXs 229 (one-bedroom apartments); 230 ([e]fficiency apartments); 231 (two-bedroom apartments). However, both of these analyses are flawed for reasons I will discuss herein which further support my acceptance of Mr. Kaufman's expert analysis over Dr. Stallard's.

48. As previously mentioned, in Dr. Stallard's opinion, the INTEC report was "fatally flawed" because, according to Dr. Stallard, the calculations performed were based on the assumption that the heat pump is eight times as effective in heating as it is in cooling which resulted in a low average monthly cost. Dr. Stallard testified that in looking at the manufacturer's data on the heat pump operations, there was no basis for this assumption, and that the manufacturer's data establishes that the heating is about 1.16 as effective as cooling. Therefore, Dr. Stallard performed his own scientific calculations to determine what the average heating and general electrics [sic] costs would be for Dorchester House and then made his own recommendations for a rent decrease. Dr. Stallard spent significant time explaining why he believed the INTEC report assumed the heat pump was eight times more effective in heating than cooling. Mr. Kaufman, in turn, spent a good amount of time explaining why the report does <u>not</u> contain such an assumption. However, because we have the actual PEPCO bills to compare to the estimates in the reports, I need not decide whether such an assumption exists in the INTEC report nor is it ultimately relevant to determining the amount of reduction. It was however, the reason that Dr. Stallard rejected the findings in the INTEC report.

49. Dr. Stallard calculated the expected average bills for each apartment type using a thermostat setting of 65 degrees, and the published "average degree days." Dr. Stallard's calculations are extremely complicated. Dr. Stallard testified that he consulted the ASHRAE standards, incorporated some, but then performed what he described as "scientific calculations" that are not a published standard. Dr. Stallard testified that he is not an HVAC specialist, but that he looked at the data with new eyes. Dr. Stallard further testified that he believed that there was a mistake made in the computer program Mr. Kaufman used to calculate the heat costs. Dr. Stallard had no basis for this belief other than his disagreement with the final numbers and methodology used by Mr. Kaufman.

50. In making his estimations, as a starting point, Dr. Stallard testified that he "calibrated the building, so to speak." Dr. Stallard "calibrated" the building by doing an independent sample of 10-18 bills from July and August 2009 (cooling

months) for each unit type. RX 226, Table 2. From these average bills, Dr. Stallard deducted the HUD allowances for general electric use and determined that the leftover amount accounted for cooling costs. Applying the published PEPCO rates, Dr. Stallard computed the corresponding kilowatt hours (KWH). Using certain figures for the average monthly British Thermal Unit (BTU), Dr. Stallard determined the amount of heat transferred out of the apartment by the heat pump and computed other sources of heat that came into the apartment. Dr. Stallard's calibrations are reflected in Table 3 of RX 226. The Table takes 16 variables into consideration (referred to in Table 3 as L1 through L16). RX 226 at 12. These variables include factors such as "adjustment for future generality" (L2); "the heat transfer per day from outside through walls to apartment" (L5); "the daily heat rate from non-HVAC appliances and one human" (L6); "incremental rate above 400 KWH" (L14). *Id.*

51. Ultimately, these calculations resulted in a number representing how much "heat per degree day" came into the apartment, which Dr. Stallard testified, was in effect, calibrating the building. Therefore, in effect, Dr. Stallard used the air conditioning bills as a way to calibrate the apartment heat transfer.

52. Mr. Kaufman testified that Dr. Stallard's method of calibrating the building by measuring the heat coming in and out of the property is not a methodology used or accepted in the HVAC industry. Dr. Stallard acknowledged that his methodology was not an industry standard, but it was what he believed should be the standard. Mr. Kaufman testified that the ASHRAE standard is to look at the thermo performance of each item in the building and weather data, which is applied to a load calculation to decide the type of equipment needed. Without reiterating all the painstaking calculations made by Dr. Stallard, I have summarized his methodology in APPENDIX E.

53. Dr. Stallard's calculations resulted in the following estimated costs for heating and general electric amortized over 12 months:

Efficiency:	$57.01/month
One Bedroom[:]	$79.99/month
Two Bedroom[:]	$95.16/month

RX 226. However, in making his recommendation for rent reductions, Dr. Stallard **averaged** the HUD allowances and his above estimates and recommended the following rent reductions:

Efficiency:	$76/month
One Bedroom[:]	$103/month
Two Bedroom[:]	$126.58/month

54. In deciding to average the HUD allowances and his estimates to reach a recommendation, Dr. Stallard testified that is [sic] seemed "fair." This of course

assumes that the HUD allowances and Dr. Stallard's estimates are fair representations of the actual electric costs at Dorchester House and I do not believe they are. Both the HUD allowances and Dr. Stallard's estimates are significantly higher than Mr. Kaufman's estimates and, as discussed further below, significantly higher than the actual PEPCO bills, which I believe are the best indicators of actual costs. The reason that Dr. Stallard's estimates are higher is because of the different methodology he used to calculate the energy costs to run the heat pump.

(5) The Actual PEPCO Bills

55. At the time of the hearing, the Tenants' Association (DTA) was able to obtain the actual PEPCO bills for June 2009 through March 2010. RXs 203, 206, 209A, 209B, 224, and 233. I find that the actual PEPCO bills are the best indicators of actual costs and I give them great weight. Dr. Stallard, Mr. Kaufman, and DTA, each did an analysis of the PEPCO bills.

56. In calculating the average cost of the PEPCO bills, Dr. Stallard first removed what he referred to as "statistical outliers" – bills he deemed too high or too low to be accurate. However, Dr. Stallard did so without any reasonable grounds. While I agree with Dr. Stallard that there are some discrepancies in the bills that may call into question their accuracy, there are no verifiable explanations for the discrepancies. For example, in the month of June 2009, which was the first month that electricity was billed through individual meters, there are numerous apartments (close to 70%) where the bill was $81.27. RX 234. Clearly, with individual use patterns in a 385 unit building, it is highly unlikely that 70% of the tenants consumed the exact same amount of energy. However, Tenants chose not to bring in a witness from PEPCO to shed light on these inconsistencies. Housing Provider's witness, Mr. Hoskinson, however, did offer some possible explanations. Mr. Hoskinson testified that it was not unusual to see such bills from PEPCO because in some months, it may not actually read the meters. In those situations, PEPCO may estimate the electric use based on average use and bill the tenants accordingly. When PEPCO later reads the meter, the following bill will reflect the adjustment, up or down, based on the actual meter readings. Nonetheless, June 2009 was the only month with that type of anomaly, but it renders the bills for that month unhelpful.

57. In addition, there are some months where particular apartments have inexplicably high bills. For example, the October 2009 bill for apartment 917 is $793.86, with the bills for November and December 2009, being $77.47 and $119.30, respectively. RX 231, Table 4. The October bill was rejected by Dr. Stallard as a statistical outlier. The high bill could represent an error, an inoperable meter, a length of time of unpaid electric bills, or an actual bill. Regardless, not knowing the reason why a bill was extremely high or low, Dr. Stallard had no reasonable basis to exclude them from his calculations. There were a few bills, such as the February 2010 bill for apartment 123 in the amount of $2,010.55, which were

clearly statistical outliers and rejected by both Dr. Stallard and Mr. Kaufman. However, they both also testified that they were aware from the Tenant that the bill was incorrect and was being challenged. As such, there was a verifiable basis to determine it was a statistical outlier. While it is statistically appropriate to remove outliers, before an outlier is discarded, the cause should be known.

58. Even more concerning than the high bills, were the low bills that Dr. Stallard discarded as statistical outliers. In establishing a minimum cut-off point for what amounted to a statistical outlier (bills too low to be real), Dr. Stallard chose the published HUD allowances. RX 229. For example, the HUD allowance for general electric use in a one-bedroom apartment is $34. RX 202. Therefore, bills that were less than $34 for a one-bedroom apartment were rejected from the calculations as too low to be real. Dr. Stallard testified that the HUD allowance of $34, which is only for general electric and does not include heating or cooling, represents the bear [sic] minimum required to live and therefore any bill lower than $34 could not be real. This conclusion again presumes that the HUD allowance is representative of the actual cost of electric use at Dorchester House. Dr. Stallard testified that he chose the HUD allowance as setting the floor because it was a widely accepted number, prepared by a non-interested government entity, and anything lower would not be representative of real day-to-day life. However, I view it differently. *If* the HUD allowance represents *average* electric use by a consumer, then those bills lower than the HUD allowance could represent the more frugal consumers who conserve more electricity and hence have lower bills. As such, they are part of the universe that makes the average consumer. By discarding all the bills lower than the HUD allowance, Dr. Stallard established the HUD allowance as the floor for Dorchester House residents and he had no precedent for doing so. By creating a floor, you automatically increase the average amount.

59. It is not clear from Dr. Stallard's charts how many bills he rejected in total. But, his report for efficiency apartments (RX 230), reflects that he accepted 108 bills and rejected 118 bills – more than 50%! Mr. Kaufman, who also analyzed the actual bills, testified that by applying the HUD allowance as a cut-off, Dr. Stallard would have had to reject at least 30% of the total bills. RX 230 at 3. I am hard pressed to find that 30-50% of the bills did not represent real life. Implicit in the notion of averages is it will be inclusive of those below the mean and those above. There are months where the bills for certain apartments were zero. This could mean the apartment was vacant or it could mean the tenant was away for that month. Those bills were discarded by Dr. Stallard as statistical outliers. Tenants being away from their apartment for periods of time are still properly part of the building-wide average. The impact of removing all of the low bills was a significantly higher average of monthly bills.

60. After removing the "statistical outliers," Dr. Stallard computed the average cost of the PEPCO bills for each unit type in the months of October 9, 2009, through February 9, 2010 (four months). RX 229 (one-bedroom units); RX 230

(efficiency unit[s]); RX 231 (two-bedroom units). Dr. Stallard's mathematical calculations used to extrapolate for the missing months is complicated. I have summarized an example of his calculations in APPENDIX F, attached to this Order. The results of Dr. Stallard's calculations were the following average monthly PEPCO bills amortized over 12 months:

Efficiency:	$36.67
One-Bedroom:	$51.92
Two-Bedroom[:]	$69.05

RX 229 at 3 and Table 10. Dr. Stallard determined that these bills were deceptively low. In his "conclusion," Dr. Stallard states:

> It is believed that reasons why the efficiency bills are so low include: The recession; the necessary frugality of the tenants; the possibility for higher than normal temperature of the supply line to the heat pump; the opportunity to heat the compact apartment with the gas stove. Of course, the stove cannot substitute for the air conditioning in summer, and the electric bills then would be closer to expectation.

RX 231 at 4. Clearly, Dr. Stallard does not believe that the bills could be low because the water-source-heat-pump is a more efficient system. However, the fact is that Dr. Stallard's annualized amounts are consistent with INTEC's estimates and are consistent with the rent reductions I award in this case. Dr. Stallard seems to reject the possibility of the system being efficient and low cost to run, as testified to by Mr. Kaufman. Instead, Dr. Stallard has presented alternate theories such as frugal tenants and heating the apartment with a stove to explain why the bills are lower than his estimates. It is strikingly notable that in the section of Dr. Stallard's reported entitled "Comparative Estimates," he comments on the comparison of his analysis of the actual PEPCO bills to his estimates, the HUD allowances, and the INTEC estimates, and he states: "it is disappointing that the author's average bill of $51.92 is not far above the INTEC estimate" (which was $41.79).

61. Mr. Kaufman also analyzed the actual PEPCO bills for October 2009 through January 2010, without removing the "statistical outliers" removed by Dr. Stallard (with the exception of three bills that were rejected for known reasons of inaccuracy). Comparing only the actual bills from the months of October 2009 to January 2010 (the months of actual bills used by Dr. Stallard), Dr. Stallard's averages for those months are higher than INTEC's and DTA's.

62. The Tenants' Association also analyzed the bills and provided a spreadsheet (both in hard copy and electronic form) which showed calculations of the "10-month average" of the actual PEPCO [b]ills. RX 234. The spreadsheet provided total bills for each month, but did not calculate the average bill per month for all apartments (it calculated the average bill for each individual apartment). From

that spreadsheet, I calculated the average monthly bill for all apartments with the following results:

TABLE G: DTA MONTHLY BILL AVERAGES											
EFFICIENCY APARTMENT											
Jun-09	**Jul-09**	**Aug-09**	**Sep-09**	**Oct-09**	**Nov-09**	**Dec-09**	**Jan-10**	**Feb-10**	**Mar-10**	**Total Billed**	**10 mos Avg Bill**
$61.92	$75.86	$51.84	$41.69	$29.88	$31.65	$31.43	$48.32	$35.78	$35.50	$443.84	$46.37[sic]
ONE BEDROOM APARTMENT											
Jun-09	**Jul-09**	**Aug-09**	**Sep-09**	**Oct-09**	**Nov-09**	**Dec-09**	**Jan-10**	**Feb-10**	**Mar-10**	**Total Billed**	**10 mos Avg Bill**
$66.08	$77.48	$70.86	$68.55	$42.28	$42.48	$45.52	$73.58	$62.36	$52.31	$601.51	$60.15
TWO-BEDROOM APARTMENT											
Jun-09	**Jul-09**	**Aug-09**	**Sep-09**	**Oct-09**	**Nov-09**	**Dec-09**	**Jan-10**	**Feb-10**	**Mar-10**	**Total Billed**	**10 mos Avg Bill**
$74.94	$98.42	$106.55	$103.30	$57.23	$93.27	$61.76	$135.58	$84.18	$84.58	$899.81	$89.98

DTA's averages also differ, but are closest to Mr. Kaufman's averages:

TABLE H: Actual Bill Averages v. INTEC Estimate

EFFICIENCY APARTMENTS						
		October	**November**	**December**	**January**	**4 Month Avg**
INTEC Actual Bills	**PX 111**	$30.81	$32[.00]	$46.48	$36.27	**$36.39**
Stallard Actual Bills	**RX 230 Table 9**	$43.50	$53.42	$62.00	$47.63	**$51.63**
DTA Actual Bills	**PX 234**	$29.88	$31.65	$31.43	$48.32	**$35.32**
INTE[C] Estimate	**PX 101**	$30.55	$32.74	$36.93	$39.49	**$34.92**

ONE-BEDROOM APARTMENTS						
		October	**November**	**December**	**January**	**4 Month Avg**
INTEC Actual Bills	**PX 111**	$42.56	$46.21	$72.76	$57.94	**$54.86**
Stallard Actual Bills	**RX 229 Table 9**	$59.59	$64.20	$90.00	$78.59	**$73.10**
DTA Actual Bills	**PX 234**	$42.28	$42.48	$45.52	$73.58	**$50.97**
INTEC Estimate	**PX 101**	$38.08	$43.85	$52.01	$56.73	**$47.66**

TWO-BEDROOM APARTMENTS						
		October	**November**	**December**	**January**	**4 Month Avg**
INTEC Actual Bills	**PX 111**	$63.69	$69.97	$110.01	$84.65	**$82.08**
Stallard Actual Bills	**RX 231 Table 9**	$86.40	$91.10	$122.12	$93.34	**$98.24**
DTA Actual Bills	**PX 234**	$57.23	$93.27	$61.75	$135.58	**$86.96**
INTEC Estimate	**PX 101**	$49.37	$59.56	$73.93	$81.40	**$66.07**

63. In the above charts, there are slightly large differences in the months of December and January ($10+) between INTEC's analysis of the bills and the results from DTA's spreadsheet. However, the four-month average of the INTEC analysis of the actual PEPCO bills is strikingly close to the four-month average of the DTA's analysis of the bills, and significantly different from Dr. Stallard's analysis of the bills because he removed the "statistical outliers." For efficiency and one-bedroom apartments, the four-month average of INTEC's estimates is very close to the actual bills. For two-bedroom apartments, the INTEC estimate is $16 lower than the actual bills

64. Based on the above information, I am persuaded that the INTEC estimates for heating and general electric use are very close to accurate and are reliable. The PEPCO bills, while also reliable, do not distinguish between the costs for heating, cooling, and general electric use. Therefore, while the information for the heating months is useful, I am unable to extract from the PEPCO bills, the cost of general electric use for the cooling months and I am unable to determine the annualized cost of heating and general electric. So, the difficulty is how to use the INTEC estimates in conjunction with the actual PEPCO bills to determine the appropriate rent reduction.

[G.] Remedies

65. The Rental Housing Commission has consistently held that the hearing examiner, now the Administrative Law Judge, is not required to assess the value of a reduction in services and facilities with "scientific precision," but may instead rely on his or her "knowledge, expertise and discretion as long as there is substantial evidence in the record." *Kemp v. Marshall Heights Cmty. Dev.*, TP 24,786 (RHC Aug. 1, 2000) at 8 [(]*citing* [sic] *Calomiris v. Misuriello*, TP 4809 (RHC Aug. 30, 1982) and *Nicholls v. Tenants of 5005, 07, 09 D St., S.E.*, TP 11,302 (RHC Sept. 6, 1985)[)].

66. To determine the monthly rent reduction, I have considered the most reliable information from the INTEC estimates, DTA's analysis of the actual PEPCO

[b]ills, and INTEC's analysis of the actual PEPCO bills. I have set forth my detailed analysis of how I determined the rent reduction for each month in APPENDIX G, attached to this Order. My methodology is summarized as follows:

(1) I accepted INTEC's representation of whether a particular month was heating, cooling, or a combination of heating and cooling, which was based on published information from the Department of Energy.

(2) Based on my detailed analysis for each month, I found that the INTEC estimates for general electric use and heating were accurate and reliable for efficiency and one-bedroom apartments, but not for two-bedroom apartments. I also found that INTEC's estimates for cooling were likely not accurate.

(3) For the heating months (November through March), where data from both were available, I averaged INTEC and DTA's estimates of the actual bills which I accepted as representative of the actual costs for those months and I reduced the rent according[ly]. Where INTEC data on the actual bills was not available, I accepted DTA's estimates and reduced the rent accordingly.

(4) Where actual PEPCO bills were not available, I accepted the INTEC estimates for general electric and heating and reduced the rent accordingly.

(5) In months where there was inadequate data, from any months, I extrapolated from similar months.

(6) After determining a rent reduction for each month for heating and general electric use, I divided the annual costs by 12 months for a monthly rent reduction. As such, the below reductions are not representative of the actual monthly bills, which will vary, but represent the annual costs amortized over 12 months.

67. In conclusion, I reduce the rents by the following monthly amounts:

Efficiency:	**$32**
One-Bedroom:	**$46**
Two-Bedroom:	**$68**

The below table reflects the monthly rent reductions:

Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	TOTAL	Average
EFFICIENCY													
$27	$28	$29	$28	$31	$33	$42	$42	$36	$36	$31	$29	$392.00	**$32**
ONE-BEDROOM													
$33	$34	$35	$34	$42	$45	$62	$66	$62	$66	$42	$35	$556.00	**$46**
TWO-BEDROOM													
$42	$44	$45	$43	$61	$81	$92	$110	$84	$110	$61	$45	$818[.00]	**$68**

Final Order at 9-39; R. at 792-821 (footnotes omitted).

On June 1, 2011, the "Dorchester Tenants' Motion for Reconsideration of its May 20, 2011 Final Order" was filed on behalf of a number of tenants of the Housing Accommodation represented by attorney B. Marian Chou; on June 3, 2011, Tenant Rudolph Douglas (Tenant Douglas) filed a Motion for Reconsideration; on June 9, 2011 Larry Hunter filed a Motion for Reconsideration. Each of the Motions for Reconsideration was opposed by the Housing Provider. The ALJ issued an Order Denying Tenants' Motions for Reconsideration on August 16, 2011, denying all three motions in their entirety. Dorchester House Assocs., LLC v. Tenants of 2480 16th St., NW, RH-SF-09-20,098 (OAH Aug. 16, 2011); R. at 924-31.

On September 14, 2011, the Dorchester Tenants Association (DTA) filed a Motion for Attorney's Fees (Motion for Attorney's Fees), requesting $87,034.78. Motion for Attorney's Fees at 1, 4; R. at 1583, 1586. The Housing Provider filed its Opposition (Opposition to Motion for Attorney's Fees) on September 28, 2011. Opposition to Motion for Attorney's Fees at 1. On April 12, 2012, the ALJ entered an Order Granting Tenant's Motion for Attorney's Fees (Order Granting Attorney's Fees), awarding $76,560.80. Order Granting Attorney's Fees at 1; R. at 1622.

B. The Proceedings Before the Commission

On August 1, 2011, the "Dorchester Tenants" filed a Notice of Appeal (Dorchester Tenants' Notice of Appeal)[6] with the Commission, asserting that the ALJ erred as follows:[7]

1. Holding that "air conditioning at the Dorchester is an optional service;"

2. Failing to calculate the aggregate rent and rent ceiling for the apartments and adjusting for loss of square footage in the apartment units; [and]

3. Failing, in the order, to distinguish other charges of heating, cooking [sic], and general purpose electricity; [sic]

Dorchester Tenants' Notice of Appeal at 1. On August 1, 2011, Larry Hunter filed a Notice of Appeal (Tenant Hunter's Notice of Appeal) with the Commission.[8] On August 2, 2011, Tenant Douglas filed a Notice of Appeal (Tenant Douglas' Notice of Appeal)[9] with the Commission asserting that the ALJ erred as follows:

1. [T]he rejection of "loss of square footage" as a legitimate basis for reduction of tenants['] rents;

2. [T]he rejection of Dr. David Stallard['s] testimony on the grounds that his approach to calculation of the appropriate rent decreases had no foundation in precedence;

3. [J]udicial notice must be given to the fact that general electric granted at the time of [J]udge Pierson's Order does not include electric stoves; at present the stoves operate on gas;

4. [A]ttempts to make arguments during the hearings on the issue of air condition[ing] as well as that of rent overcharges were ignored by Judge Pierson

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[6] The Commission observes that the Dorchester Tenants' Notice of Appeal was filed by counsel B. Marian Chou (Ms. Chou), and did not specify which of the Dorchester Tenants joined in the Notice of Appeal. *See* Dorchester Tenants' Notice of Appeal at 1. The Commission ruled on the identity of the tenants who were parties to the Dorchester Tenants' Notice of Appeal in an order issued on February 6, 2014, *see infra* at 33. Tenants of 2480 16th St., NW v. Dorchester House Assocs., LLC, RH-SF-09-20,098 (RHC Feb. 6, 2014).

[7] All issues raised on appeal, and recited in pages thirty-one through thirty-eight, are stated using the language of each of the respective notices of appeal, unless otherwise noted.

[8] The Commission omits a recitation of the issues raised in Tenant Hunter's Notice of Appeal, as the appeal was subsequently dismissed as untimely, and is no longer pending before the Commission.

[9] The Commission determined that the claims raised in Tenant Douglas' Notice of Appeal only pertained to Mr. Douglas in his individual capacity. Dorchester House Assocs., LLC, RH-SF-09-20,098 (RHC Sept. 6, 2013) at 8.

as being irrelevant to the matter of Changes in Related Service. Nevertheless these issues remain important unresolved matters;

5. [T]he large one-bedroom is comparable in size to the two-bedroom. Two HVACs were install[ed] in both type[s] of apartment[s] yet the reduction for the two-bedroom is $68.00 while that for the large one-bedroom is $46.00.

Tenant Hunter's Notice of Appeal at 2. The Housing Provider filed a Motion to Dismiss the Appeal of Rudolph Douglas on August 24, 2011.

A Notice of Appeal was filed on behalf of the "Dorchester Tenants, hereby through the undersigned President of DTA, Eleanor Johnson" (Tenant E. Johnson's Notice of Appeal) on August 30, 2011.[10] Tenant E. Johnson's Notice of Appeal at 1. The Housing Provider filed a Motion to Dismiss the Appeal of Eleanor Johnson on September 21, 2011.

On April 25, 2012, the Housing Provider filed a Notice of Appeal (Housing Provider's Notice of Appeal) of the ALJ's Order Granting Attorney's Fees, asserting the following claims of error:

1. The ALJ erred in determining that DTA was the prevailing party. The ALJ identified four issues that she was called to decide were [sic]: (1) the petition requested to shift the cost of heating and general electric usage to the tenants, (2) if the petition was granted, "whether the loss of square footage is a factor to consider in reducing rents", (3) "[w]hether the new HVAC system 'added value' to the rental unit such that services and facilities were increased and rents be increased accordingly"; and (4) identify the amount of decrease to reflect the change in services. See Final Order at 9. The tenants prevailed only as to the third issue. DTA did not prevail in its challenge to Associates [sic] was authorized to separately meter the rental units, the main point of the petition, even though DTA had challenged this request. Also, DTA request [sic] that rents be reduced [for loss of] square footage was denied. Since the principal relief Associates sought was granted, it was the prevailing party.

2. It was arbitrary, capricious, and clearly erroneous for the ALJ to determine that Marian Chou, Esq. was entitled to receive an award of fees based on the Laffey matrix rather than the rate she actually charged. The ALJ misconstrued

[10] The Commission omits a recitation of the issues raised in Tenant E. Johnson's Notice of Appeal, as the appeal was subsequently dismissed as untimely, and is no longer pending before the Commission.

applicable case authority because there is no evidence in the record that Ms. Chou's normal rate is at the Laffey matrix level, or that in this type of proceeding, the application of Laffey was not warranted.

3. Since Marian Chou, Esq. only entered her appearance as counsel for the Dorchester Tenants Association ("DTA") and the court determined that DTA was not a party to the proceeding, the fee award is improper.

4. Marian Chou, Esq. may not be awarded attorney's fees for representation of DTA because this, in effect, authorizes DTA to engage in the practice of law in violation of D.C.C.A. 49 [sic] and earlier District of Columbia case authority. Only the D.C. Court of Appeals is empowered to establish who may practice and under what circumstances. The Court of Appeals rules do not empower membership organizations to provide legal services or representation to or on behalf of the association's members. Thus, no award of fees is permissible.

Housing Provider's Notice of Appeal at 1-2.

On September 6, 2013, the Commission entered an Order on Motions to Dismiss Appeals,[11] determining that the notices of appeal filed on behalf of the "Dorchester Tenants," by Tenant Douglas, and by the Housing Provider were timely, and dismissing the notices of appeal filed by Larry Hunter and Eleanor Johnson as untimely. Dorchester House Assocs., LLC v. Tenants of 2480 16th St. NW, RH-SF-09-2,0098 (RHC Sept. 6, 2013).

The Housing Provider filed a brief on October 18, 2013 (Housing Provider's Brief). The "Dorchester Tenants" filed a brief on November 19, 2013 (Dorchester Tenants' Brief). A joint

[11] The Commission notes that the September 6, 2013 Order on Motions to Dismiss Appeals was subsequently reissued on two separate occasions: on September 18, 2013 and on November 22, 2013. Dorchester House Assocs., LLC, RH-SF-06-20,098 (RHC Nov. 22, 2013); Dorchester House Assocs., LLC, RH-SF-06-20,098 (RHC Sept. 18, 2013). The September 18, 2013 reissuance was for the purpose of reflecting the address change of Ms. Chou, counsel for the Dorchester Tenants; the November 22, 2013 reissuance was for the purpose of reiterating that Mr. Douglas was only authorized to pursue the claims filed in Tenant Douglas's Notice of Appeal in his individual capacity. *See* Dorchester House Assocs., LLC, RH-SF-06-20,098 (RHC Nov. 22, 2013) at nn.1-2. No changes were made to the substance of the order in either reissuance. *Compare* Dorchester House Assocs., LLC, RH-SF-06-20,098 (RHC Sept. 6, 2013), *with* Dorchester House Assocs., LLC, RH-SF-06-20,098 (RHC Nov. 22, 2013), *and* Dorchester House Assocs., LLC, RH-SF-06-20,098 (RHC Sept. 18, 2013).

brief was filed by Tenant Douglas, Campbell Johnson, and Benoit Brookens on March 24, 2015 (Tenant Douglas' Brief).[12]

A hearing was held before the Commission on November 20, 2013, at which time the Commission instructed Ms. Chou to provide evidence to clarify and confirm the identities of the tenants that she was authorized to represent on appeal. Tenants of 2480 16th St., NW, RH-SF-09-20,098 (RHC Feb. 6, 2014) at 1. In an order entered on February 6, 2014, the Commission determined that Ms. Chou was authorized to represent the following tenants with respect to issues raised in the Dorchester Tenants' Notice of Appeal: Kow Hagan, Robert Ebel, Ty Mitchell, Eleanor Johnson, and Peter Petropoulos (collectively, the Dorchester Tenants). *Id.* at 7.

On January 30, 2015, Ms. Chou filed a motion to withdraw from her representation of the Dorchester Tenants (First Motion to Withdraw), which was denied in an Order issued by the Commission on February 19, 2015. On March 25, 2015, Ms. Chou filed a second motion to withdraw as counsel for the Dorchester Tenants (Second Motion to Withdraw).

The Commission held a second hearing on April 2, 2015, providing each party with an opportunity to address pending preliminary matters. Subsequently, on April 10, 2015, the Commission issued an Order granting Ms. Chou's Second Motion to Withdraw. Douglas v. Dorchester House, RH-SF-09-20,098 (RHC Apr. 10, 2015) (Order on Second Motion to Withdraw). The Commission also issued an Order taking notice of the death of Tenant Robert

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[12] The Commission notes that Benoit Brookens filed two (2) motions to intervene in this appeal, the first on November 15, 2013, and the second on March 24, 2015. Both motions were denied by the Commission in orders entered on December 11, 2013, and March 24, 2015, respectively. *See* Tenants of 2480 16th St., NW, RH-SF-09-20,098 (RHC Mar. 24, 2015); Dorchester House Assocs., LLC, RH-SF-06-20,098 (RHC Dec. 11, 2013).

Moreover, the Commission observes that Campbell Johnson, who joined the brief filed on March 24, 2015, is not a party to this appeal, despite having been served with the majority of the pleadings in this appeal. *See* Dorchester Tenants' Notice of Appeal; Tenant Douglas' Notice of Appeal. As the Commission has explained repeatedly, the claims asserted in Tenant Douglas' Notice of Appeal pertain to Tenant Douglas only in his individual capacity. Dorchester House Assocs., LLC, RH-SF-06-20,098 (RHC Nov. 22, 2013) at n.2; Dorchester House Assocs., LLC, RH-SF-06-20,098 (RHC Sept. 6, 2013) at 8.

Ebel, and providing ninety-days for a personal representative of Mr. Ebel to file a motion for substitution. Douglas v. Dorchester House, RH-SF-09-20,098 (RHC Apr. 10, 2015) at 3.

On July 7, 2015, Attorney Claude Roxborough filed a Notice of Appearance, entering his appearance on behalf of Tenant Douglas, and filed a Motion for Continuance, requesting that the Commission continue the hearing scheduled for July 8, 2015.

The Commission held its third, and final, hearing in this matter on July 8, 2015. Present at the hearing were: Hans Christian Ebel, appearing in a representative capacity for Robert Ebel, Eleanor Johnson, Peter Petropoulos, Claude Roxborough, appearing as counsel for Tenant Douglas, and Richard Luchs, appearing as counsel for the Housing Provider.

The Commission issued an Order on July 10, 2015, denying Tenant Douglas' Motion for Continuance, and denying the motions for continuance made orally at the July 8, 2015 hearing by Tenant Eleanor Johnson and Tenant Peter Petropoulos. Douglas v. Dorchester House Assoc., LLC, RH-SF-09-20,098 (RHC July 10, 2015) (Order Denying Continuance). The Commission provided Tenant Douglas, Ms. Johnson, Mr. Petropoulos, and Mr. Ebel, the opportunity to file a Memorandum of Law no later than July 16, 2015. *Id.* at 5-6. The Commission also provided the Housing Provider with the opportunity to respond to any memoranda filed by any or all of the Dorchester Tenants, or Tenant Douglas, no later than July 24, 2015. *Id.* at 7.

The Commission issued a second Order on July 10, 2015, vacating its previous June 23, 2015 Order dismissing Robert Ebel as a party to the case, and allowing Hans Ebel to appear as a personal representative on behalf of Robert Ebel. Douglas v. Dorchester House Assoc., LLC, RH-SF-09-20,098 (RHC July 10, 2015) (Order Allowing Personal Representative).

Tenant Douglas filed a Memorandum of Law on July 16, 2015 (Tenant Douglas' Memorandum); the Housing Provider filed a response on July 23, 2015. No filings were received from Ms. Johnson, Mr. Petropoulos, or Mr. Ebel.

II. PRELIMINARY ISSUE

The Commission has consistently held that failure to appear at the Commission's scheduled hearing is grounds for dismissal of an appeal. Stancil v. D.C. Rental Hous. Comm'n, 806 A.2d 622, 622-25 (D.C. 2002); *see also* Hardy v. Sigalas, RH-TP-09-29,503 (RHC July 21, 2014) (dismissing tenant's cross-appeal where tenant failed to appear at the Commission's hearing); Carter v. Paget, RH-TP-09-29,517 (RHC Dec. 11, 2013) (dismissing appeal where appellant failed to appear at the Commission's hearing); Wilson v. KMG Mgmt., LLC, RH-TP-11-30,087 (RHC May 24, 2013) (dismissing the tenant's notice of appeal where she failed to appear at the Commission's hearing).

The District of Columbia Court of Appeals (DCCA) held in Stancil, that the Commission has authority to dismiss an appeal when the appellant fails to attend a scheduled hearing. Stancil, 806 A.2d at 622-25. The DCCA recognized that, although the Commission does not have a specific regulation that prescribes dismissal when a party fails to appear, 14 DMCR § 3828.1 (2004) empowers the Commission to rely on the DCCA's rules when its rules are silent on a matter before the Commission. *Id.* The DCCA noted that DCCA Rule 14 (D.C. App. R. 14) permits dismissal of an appeal "for failure to comply with these rules or for any other lawful reason," and that DCCA Rule 13 (D.C. App. R. 13) "authorizes an appellee to file a motion to dismiss whenever an applicant fails to take the necessary steps to comply with the court's procedural rules." Stancil, 806 A.2d at 625. The DCCA concluded that "both [DCCA] Rule 13 and Rule 14 support the proposition that dismissal is an appropriate sanction when an appellant

is not diligent about prosecuting his appeal." *Id.*; *see also* Radwan v. D.C. Rental Hous. Comm'n, 683 A.2d 478, 480 (D.C. 1996) (favoring the Commission's adoption of other court rules absent a regulation specifically governing the Commission's discretion).

The Commission notes that two notices of appeal were filed by tenants in this case: (1) by the Dorchester Tenants (Kow Hagan, Robert Ebel, Ty Mitchell, Eleanor Johnson, and Peter Petropoulos); and (2) by Tenant Douglas. However, neither Kow Hagan, nor Ty Mitchell, appeared at the Commission's hearing, either in person or through a representative. Moreover, the Commission's review of the record reveals no evidence that Mr. Hagan and Mr. Mitchell did not receive actual notice of the Commission's hearing. The Commission's Notice of Scheduled Hearing and Notice of Certification of Record (Notice of Hearing), issued on June 5, 2013, was mailed by first-class mail to Mr. Hagan and Mr. Mitchell at their respective addresses of record. Notice of Hearing at 3-7. The Notice of Hearing warns the parties that "[t]he failure of an Appellant to appear may result in the dismissal of the party's appeal." *Id.* at 1.

Accordingly, the Commission dismisses Kow Hagan and Ty Mitchell from this appeal for failure to appear at the Commission's hearing.[13] Stancil, 806 A.2d at 622-25; Hardy, RH-TP-09-29,503; Carter, RH-TP-09-29,517; Wilson, RH-TP-11-30,087.

III. DORCHESTER TENANTS' ISSUES ON APPEAL

A. Holding that "air conditioning at the Dorchester is an optional service."

B. Failing to calculate the aggregate rent and rent ceiling for the apartments and adjusting for loss of square footage in the apartment units.

C. Failing, in the order, to distinguish other charges of heating, cooking [sic], and general purpose electricity.

[13] Hereinafter, all references to the "Dorchester Tenants" will only refer to Robert Ebel, Eleanor Johnson, and Peter Petropoulos.

IV. TENANT DOUGLAS' ISSUES ON APPEAL

A. The rejection of "loss of square footage" as a legitimate basis for reduction of tenants' rents.

B. The rejection of Dr. David Stallard's testimony on the grounds that his approach to calculation of the appropriate rent decreases had no foundation in precedence.

C. Judicial notice must be given to the fact that general electric granted at the time of Judge Pierson's Order does not include electric stoves; at present the stoves operate on gas.

D. Attempts to make arguments during the hearings on the issue of air conditioning as well as that of rent overcharges were ignored by Judge Pierson as being irrelevant to the matter of Changes in Related Service. Nevertheless these issues remain important unresolved matters.

E. The large one-bedroom is comparable in size to the two-bedroom. Two HVACs were installed in both typeds of apartments yet the reduction for the two-bedroom is $68.00 while that for the large one-bedroom is $46.00.

V. HOUSING PROVIDER'S ISSUES ON APPEAL[14]

A. Since Marian Chou, Esq. only entered her appearance as counsel for the Dorchester Tenants Association ("DTA") and the court determined that DTA was not a party to the proceeding, the fee award is improper.

B. The ALJ erred in determining that DTA was the prevailing party.

C. It was arbitrary, capricious, and clearly erroneous for the ALJ to determine that Marian Chou, Esq. was entitled to receive an award of fees based on the Laffey matrix rather than the rate she actually charged.

D. Marian Chou, Esq. may not be awarded attorney's fees for representation of DTA because this, in effect, authorizes DTA to engage in the practice of law in violation of D.C.C.A. 49 [sic] and earlier District of Columbia case authority. Only the D.C. Court of Appeals is empowered to establish who may practice and under what circumstances. The Court of Appeals rules do not empower membership organizations to provide legal services or

[14] The Commission, in its discretion, has rephrased the issues on appeal in this section of its Decision and Order to omit the Housing Provider's supporting assertions that were included in the statements of the issues on appeal. *See, e.g.*, Hardy, RH-TP-09-29,503; Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013) at n.12; Jackson v. Peters, RH-TP-12-28,898 (RHC Sept. 27, 2013). For the complete language of the Housing Provider's Notice of Appeal, see *supra* at 32-3.

representation to or on behalf of the association's members. Thus, no award of fees is permissible.

VI. DISUCSSION OF DORCHESTER TENANTS' ISSUES ON APPEAL

A. Holding that "air conditioning at the Dorchester is an optional service."

In the Services/Facilities Petition, the Housing Provider sought to adjust rent levels at the Housing Accommodation in order to reflect a change in the services and facilities at the Housing Accommodation, namely, the shift in responsibility for paying the electricity costs from the Housing Provider to each individual tenant. Final Order at 18, 21-22; R. at 808-809, 812. It is the Dorchester Tenants' assertion on appeal that the ALJ erred in her calculation of the monthly rent reduction resulting from the shift in responsibility for paying the electricity costs, because she did not include in her calculation of the reduction the tenants' payment of electricity costs associated with air conditioning. Dorchester Tenants' Notice of Appeal at 1. The Commission notes that the Dorchester Tenants elected not to address this issue in their brief. *See* Dorchester Tenants' Brief. Thus, aside from the general statement recited above, the Dorchester Tenants have not provided any additional information in support of this issue. Dorchester Tenants' Notice of Appeal at 1; *see* Dorchester Tenants' Brief.

In the Final Order, the ALJ found that prior to the renovations at the Housing Accommodation, air conditioning was not a related service. Final Order at 4; R. at 827 (citing Brookens v. Hagner Mgmt. Corp., TP 3788 (RHC Aug. 30, 1995). If the tenants wanted air conditioning in their units, the ALJ explained, they were required to pay $75 per month in addition to their normal rental rates. *Id.* The $75 per month fee covered the rental of a window air conditioning unit, and the electricity costs associated with air conditioning. *Id.*

The ALJ also determined that after the renovations, air conditioning remained an optional service for the tenants, not a related service. *Id.* at 21; R. at 809. She found that all tenants

would have access to air conditioning through the newly installed HVAC units, without needing to rent or buy a window air conditioning unit. *Id.* at 20; R .at 810. As proposed in the Services/Facilities Petition, tenants would be required to pay for all electricity costs within their unit, and therefore they would continue to be responsible to pay for the electricity costs associated with the use of the air conditioning. *Id.* The ALJ denied any rent decrease due to the electricity costs associated with air conditioning, explaining that the responsibility for paying electricity costs associated with air conditioning at the Housing Accommodation had not changed. *Id.* at 21; R. at 809.

The Commission's standard of review of the ALJ's Final Order is contained at 14 DCMR § 3807.1, which provides as follows:

> The Commission shall reverse final decisions of the Rent Administrator [or ALJ] which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the Rent Administrator [or ALJ].

See, e.g., Sheikh v. Smith Prop. Holdings Three (DC) LP, RH-TP-12-30, 279 (RHC July 29, 2015); Richardson v. Barac Co., TP 28,196 (RHC June 24, 2015); Presley v. Admasu, RH-TP-08-29,147 (RHC June 18, 2015).

Under the Act, a housing provider may not decrease or eliminate any related service without a corresponding decrease in rent. D.C. OFFICIAL CODE § 42-3502.11.[15] A "related service" is defined as a service that is "provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental

[15] D.C. OFFICIAL CODE § 42-3502.11 provides the following:

> If the Rent Administrator determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect proportionally the value of the change in services or facilities.

unit[.]" D.C. OFFICIAL CODE § 42-3501.03(27). The related services that are "required by law" include those related services that are identified in the registration form for a particular housing accommodation, and those services that may be required to ensure that the housing accommodation is in compliance with the D.C. housing regulations. D.C. OFFICIAL CODE § 42-3502.05(f)(3) & 42-3502.05(g);[16] Jonathan Woodner Co. v. Enobakhare, TP 27,730 (RHC Feb. 3, 2005) (stating that the failure of a housing provider to furnish the services and facilities required by the housing regulations amounts to a reduction in services and facilities); *see* Dejean v. Gomez, RH-TP-07-29,050 (RHC Aug. 15, 2013) (determining that the ALJ erred in failing to address the applicability of housing code requirements to the question or whether services or facilities had been reduced).

The Commission's review of the record reveals substantial evidence to support the ALJ's finding that, prior to the Services/Facilities Petition, the payment of electricity costs associated with air conditioning was not a related service. D.C. OFFICIAL CODE §§ 42-3501.03(27), 42-3502.05(f)(3) & 42-3502.05(g); 14 DCMR § 3807.1. First, the Commission's review of the record reveals that no evidence was presented by any party regarding whether the electricity costs associated with air conditioning were "required by law or by the terms of a rental agreement" to be paid by the Housing Provider. *See* Hearing CD (OAH May 3, 2010); Hearing CD (OAH Apr. 28, 2010); Hearing CD (OAH Apr. 27, 2010); Hearing CD (OAH Mar. 17,

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[16] D.C. OFFICIAL CODE § 42-3502.05(f)(3) provides, in relevant part, as follows:

> [E]ach housing provider of any rental unit . . . shall file . . . a registration statement . . . [which] shall contain, but not be limited to: . . . (3) The base rent for each rental unit in the housing accommodation, the related services included, and the related facilities and charges[.]

D.C. OFFICIAL CODE § 42-3502.05(g) provides, in relevant part, as follows: "An amended registration statement shall be filed by each housing provider . . . within 30 days of any even which changes or substantially affects the rents including . . . services, [or] facilities . . . of any rental unit in a registered housing accommodation."

2010); Hearing CD (OAH Mar. 16, 2010); Hearing CD (OAH Nov. 17, 2009); Hearing CD (OAH Nov. 5, 2009); Hearing CD (OAH Nov. 4, 2009); Hearing CD (OAH Sept. 15, 2009); Hearing CD (OAH Sept. 14, 2009); *see also* D.C. OFFICIAL CODE §§ 42-3501.03(27), 42-3502.05(f)(3) & 42-3502.05(g); Dejean, RH-TP-07-29,050; Enobakhare, TP 27,730.

Second, the Housing Provider's witness, John Hoskinson,[17] provided uncontested testimony that it is the current policy of the Housing Provider that any tenant who elects to have air conditioning in his or her unit is required to pay an additional fee above the regular rental rates for both the use of an air conditioner and for the electricity costs associated with operating the air conditioner. *See* Hearing CD (OAH Sept. 14, 2009) at 2:13-3:23.

The Commission has consistently held that "credibility determinations are 'committed to the sole and sound discretion of the ALJ.'" Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014) (quoting Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 (D.C. 1994)); *see* Smith Prop. Holdings Consulate, LLC v. Lutsko, RH-TP-08-29,149 (RHC Mar. 10, 2015); Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014). The District of Columbia Court of Appeals (DCCA) has explained that when assessing an ALJ's credibility determination, "the relevant inquiry is whether the [ALJ's] decision was supported by substantial evidence, not whether an alternative decision might also have been supported by substantial evidence." Gary v. D.C. Dep't of Empl. Servs., 723 A.2d 1205 (D.C. 1998) (quoting McEvily v. D.C. Dep't of Empl. Servs., 500 A.2d 1022, 1024 n.3 (D.C. 1985)); *see* Notsch, RH-TP-06-28,690 (RHC May 16, 2014) (explaining that where an ALJ's findings are supported by substantial evidence, the findings will not be overturned even if

[17] The Commission notes that John Hoskinson identified himself at the OAH hearing as one of "many owners" of the Housing Accommodation, and a Manager for the Housing Provider. Hearing CD (OAH Sept. 14, 2009) at 2:13. Mr. Hoskinson stated that he was testifying on behalf of the Housing Provider. *Id.*

substantial evidence exists to the contrary); *see also,* Lutsko, RH-TP-08-29,149; Boyd v. Warren, RH-TP-10-29,819 (RHC June 5, 2013).

Nonetheless, even assuming, *arguendo*, that the payment of electricity costs associated with air conditioning was a related service, the Commission determines that there was substantial record evidence to support the ALJ's determination that there had been no change in the service, and thus no rent adjustment was warranted. For example, in addition to the regular rental payments, tenants were required to pay for the electricity associated with air conditioning prior to, and after, the Services/Facilities Petition. 14 DCMR § 3807.1; Final Order at 20-21; R. at 809-10; Hearing CD (OAH May 3, 2010); Hearing CD (OAH Apr. 28, 2010); Hearing CD (OAH Apr. 27, 2010); Hearing CD (OAH Mar. 17, 2010); Hearing CD (OAH Mar. 16, 2010); Hearing CD (OAH Nov. 17, 2009); Hearing CD (OAH Nov. 5, 2009); Hearing CD (OAH Nov. 4, 2009); Hearing CD (OAH Sept. 15, 2009); Hearing CD (OAH Sept. 14, 2009); *see* D.C. OFFICIAL CODE § 42-3502.11.

Based on its review of the record, the Commission is satisfied that the ALJ's determination that the payment of electricity costs associated with air conditioning is not a related service under the Act, is in accordance with the relevant provisions of the Act, and is supported by substantial evidence. 14 DCMR § 3807.1; *see* D.C. OFFICIAL CODE §§ 42-3501.03(27), 42-3502.05(f)(3) & 42-3502.05(g); Dejean, RH-TP-07-29,050; Enobakhare, TP 27,730; Hearing CD (OAH May 3, 2010); Hearing CD (OAH Apr. 28, 2010); Hearing CD (OAH Apr. 27, 2010); Hearing CD (OAH Mar. 17, 2010); Hearing CD (OAH Mar. 16, 2010); Hearing CD (OAH Nov. 17, 2009); Hearing CD (OAH Nov. 5, 2009); Hearing CD (OAH Nov. 4, 2009); Hearing CD (OAH Sept. 15, 2009); Hearing CD (OAH Sept. 14, 2009). Additionally, the Commission observes that the ALJ's finding that the responsibility for the paying electricity

costs associated with air conditioning was not being changed by the Services/Facilities Petition, and thus warranted no rent adjustment, was in accordance with the relevant provisions of the Act and supported by substantial evidence. 14 DCMR § 3807.1; *see* D.C. OFFICIAL CODE § 42-3502.11; Final Order at 20-21; R. at 809-10; Hearing CD (OAH May 3, 2010); Hearing CD (OAH Apr. 28, 2010); Hearing CD (OAH Apr. 27, 2010); Hearing CD (OAH Mar. 17, 2010); Hearing CD (OAH Mar. 16, 2010); Hearing CD (OAH Nov. 17, 2009); Hearing CD (OAH Nov. 5, 2009); Hearing CD (OAH Nov. 4, 2009); Hearing CD (OAH Sept. 15, 2009); Hearing CD (OAH Sept. 14, 2009).

B. Failing to calculate the aggregate rent and rent ceiling for the apartments and adjusting for loss of square footage in the apartment units.[18]

Both the Dorchester Tenants and Tenant Douglas assert that the ALJ erred in failing to adjust the rent levels at the Housing Accommodation to compensate for loss of square footage due to the installation of HVAC units. Dorchester Tenants' Notice of Appeal at 1; Tenant Douglas' Notice of Appeal at 2. Although the Dorchester Tenants elected not to brief this issue, Tenant Douglas provided supporting contentions on this issue in his notice of appeal. Tenant Douglas' Notice of Appeal at 2-4; *see* Dorchester Tenants' Brief; Dorchester Tenants' Notice of Appeal. Tenant Douglas asserts that square footage is "the most easily identifiable variant" in determining the value of a rental unit, and that tenants who have experienced a loss of square footage after the installation of HVAC units are faced with the option of either moving out of "stay[ing] and painfully adjust[ing]." Tenant Douglas' Notice of Appeal at 3.

[18] The Commission notes that the Dorchester Tenant's issue B is nearly identical to Tenant Douglas' issue A: both issues assert that the ALJ erred by not reducing the rent levels at the Housing Accommodation to compensate for the loss of square footage due to the installation of HVAC units. *Compare* Dorchester Tenants' Notice of Appeal at 1, *with* Tenant Douglas' Notice of Appeal at 2. Accordingly, the Commission, in its discretion, will incorporate the arguments asserted by Tenant Douglas in its discussion of the Dorchester Tenants' issue B. *See, e.g.*, Gelman Mgmt. Co. v. Campbell. RH-TP-09-29,715 (RHC Dec. 23, 2013); Barac Co. v. Tenants of 809 Kennedy St., NW, VA 02-107 (RHC Sept. 27, 2013); Ahmed. Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) at n.8.

In the Final Order, the ALJ stated that the Housing Provider' calculated the following values for the loss of square footage in each type of unit in the Housing Accommodation due to the installation of the HVAC units:

Efficiency:	$9/month
One-Bedroom:	$15/month
Two-Bedroom:	$15/month

Final Order at 13; R. at 817. Nevertheless, despite the testimony of the Dorchester Tenants and Tenant Douglas at the OAH hearing regarding the negative effects of the loss of square footage, and the Housing Provider's suggestion of a dollar value attributable to the loss of square footage due to the installation of the HVAC units, the ALJ reasoned that loss of square footage was not compensable through the Services/Facilities Petition, because she found that square footage is not relevant in determining the market value of the rental units at the Housing Accommodation. *Id.* Additionally, the ALJ found that the loss of square footage did not constitute a reduction in services or facilities because the loss of square footage due to the HVAC units did not alter the "leasable square footage," i.e., the square footage computed by measuring the perimeter of the rental unit.[19] *Id.* at 14; R. at 816.

As the Commission stated previously, *see supra* at 40, the Commission will uphold the ALJ's decision where it is in accordance with the Act and supported by substantial record evidence. 14 DCMR § 3807.1; *see, e.g.,* Sheikh, RH-TP-12-30, 279; Richardson, TP 28,196; Presley, RH-TP-08-29,147. The Commission reviews an ALJ's interpretation of the Act *de novo* to determine whether it is unreasonable or embodies a material misconception of the law. 14 DCMR § 3807.1; United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426,

[19] The Commission notes that the ALJ references the following Building Owners and Managers Association (BOMA) standard for measuring leasable square footage: "to obtain a gross measurement is to measure the perimeter of the rental unit and computing the area within the perimeter, without any deduction for interior walls or cabinets." Final Order at 8; R. at 822.

430-31 (D.C. 2014); Sheikh, RH-TP-12-30,279; DHCD v. 1433 T St. Assocs., LLC, RH-SC-06-002 (RHC May 21, 2015).

The Act requires that a housing provider compensate tenants for any reduction in related facilities at the housing accommodation. D.C. OFFICIAL CODE § 42-3502.11.[20] A related facility is defined as "any facility, furnishing, or equipment made available to a tenant by a housing provider, the use of which is authorized by the payment of the rent charged for a rental unit[.]" D.C. OFFICIAL CODE § 42-3501.03(26). *see, e.g.,* Pinnacle Realty Mgmt. v. Doyle, TP 27,067 (RHC Aug. 8, 2008) (affirming hearing examiner's finding that roof deck was a related facility, where the record reflected that the roof deck was made available for tenants' use in conjunction with their payment of rent); Pinnacle Realty Mgmt. Co. v. Voltz, TP 25,092 (RHC Mar. 4, 2004) (explaining that the true concern in determining whether a facility at a housing accommodation is a "related facility" is whether a tenant who pays rent would be entitled to use that facility); Pinnacle Mgmt. Co. v. Marsh, TP 24,827 (RHC Sept. 7, 2000) (determining that the roof deck at the housing accommodation was a related facility because it was available for use by tenants without an additional fee). Included in the definition of a "facility" is "space or equipment necessary for doing something." Oxford Dictionaries, http://www.oxforddictionaries.com/definition/american_english/facility (last visited Sept. 3, 2015) (emphasis added).

The Commission is satisfied based on its review of the record that the square footage taken up by the newly-installed HVAC units was a "space . . . necessary for doing something," and thus a facility, that was previously made available to tenants, "the use of which [was] authorized by the payment of the rent charged." D.C. OFFICIAL CODE § 42-3501.03(26); Doyle, TP 27,067; Voltz, TP 25,092, Marsh, TP 24,827. The Commission therefore determines that the

[20] D.C. OFFICIAL CODE § 42-3502.11 is recited *supra* at n.15.

ALJ's conclusion that the loss of square footage resulting from the installation of HVAC units at the Housing Accommodation did not amount to a compensable reduction in a related facility, embodies a material misconception of the Act, and was thus an error of law. *Compare* D.C. OFFICIAL CODE § 42-3501.03(26), *with* Final Order at 13-14; R. at 816-17; *see* 14 DCMR § 3807.1; United Dominion Mgmt. Co., 101 A.3d at 430-31; Sheikh, RH-TP-12-30,279; 1433 T St. Assocs., LLC, RH-SC-06-002.

The Commission observes that the ALJ failed to apply the appropriate standard for a reduction in facilities under the Act, confusing the loss of "leasable square footage," with the loss of "any facility, furnishing or equipment made available to a tenant . . . the use of which is authorized by the payment of the rent charged." *Compare* D.C. OFFICIAL CODE § 42-3501.03(26), *with* Final Order at 14; R. at 816.

Therefore, the Commission reverses the ALJ's determination that the loss of square footage due to installation of the HVAC units did not amount to a compensable reduction in facilities. The Commission remands this issue to the ALJ for a determination of the value of the lost square footage, based on the "nature of the violation, duration, and substantiality" of the reduction. *See, e.g.,* Williams v. Thomas, TP 28,530 (RHC Sept. 27, 2013) (explaining that the trier of fact need not assess the value of a reduction in services or facilities with "scientific precision" but may instead rely upon his or her "knowledge, expertise, and discretion as long as there is substantial evidence in the record regarding the nature of the violation, duration, and substantiality") (quoting Kemp v. Marshall Heights Cmty. Dev., TP 24,786 (RHC Aug. 1, 2000)); Covington v. Foley Props., Inc., TP 27,985 (RHC June 21, 2006); Enobakhare, TP 27,730. The Commission notes that the ALJ may adopt the Housing Provider's proffered

calculations as the proper value of the reduction, or may reach some other value based on her knowledge, expertise, and discretion, that is supported by the substantial record evidence.

The Commission further instructs the ALJ to amend the rent reduction in her Final Order to include the value assigned to the lost square footage. The ALJ may, in her discretion, base her valuation on the existing evidence in the record, or may elect to hold a hearing, limited to the issue of the dollar value of the lost square footage.

C. Failing, in the order, to distinguish other charges of heating, cooling, and general purpose electricity.

The Commission observes that, aside from the above-recited statement of issue C in the Dorchester Tenants' Notice of Appeal, the Dorchester Tenants have not provided any additional information in support of this issue, including supporting evidence in the record, statutory or regulatory provisions, or case law precedent. Dorchester Tenants' Notice of Appeal at 1; *see generally,* Dorchester Tenants' Brief.

The Commission's long-standing precedent requires that issues on appeal contain a "clear and concise statement of the alleged error(s)" in the lower court's decision. 14 DCMR § 3802.5(b);[21] *e.g.,* Tenants of 2300 & 2330 Good Hope Rd., SE v. Marbury Plaza, LLC, CI 20,753 & CI 20,754 (RHC Mar. 10, 2015); Burkhardt, RH-TP-06-28,708; Bohn Corp. v. Robinson, RH-TP08-29,328 (RHC July 2, 2014); Barac Co., VA 02-107. The Commission will dismiss issues that are "vague, overly broad, or do not allege a clear and concise statement of error." Burkhardt, RH-TP-06-28,708 (dismissing the following issue as too vague for review: "[w]hether the ALJ erred in applying [the Act's statute of limitations]"); Bohn Corp., RH-TP-08-29,328 (dismissing housing provider's contention that the ALJ gave the tenant legal advice

[21] 14 DCMR § 3802.5(b) provides the following, in relevant part: "The notice of appeal shall contain the following:. . . (b) . . . a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator."

where the housing provider failed to provide any additional details concerning the alleged advice given); Barac Co., VA 02-107 (finding issue stating "the Hearing Examiner used the wrong burden of proof" was too vague for review).

The Commission's review of the Dorchester Tenants' statement of issue C on appeal, recited above, reveals that it is vague, overly broad, and does not contain a clear and concise statement of the alleged error(s) in the Final Order. Dorchester Tenants' Notice of Appeal at 1; *see* 14 DCMR § 3802.5(b); Tenants of 2300 & 2330 Good Hope Rd., SE, CI 20,753 & CI 20,754; Burkhardt, RH-TP-06-28,708; Bohn Corp., RH-TP-08-29,328; Barac Co., VA 02-107. The Commission notes that the Dorchester Tenants assert generally that the ALJ erred by "failing to distinguish other charges of heating, cooling, and general purpose electricity," without any reference to the specific "other charges" that should have been distinguished, why this constituted error, what provisions of the Act were violated, or any other support for the contention that the ALJ erred. Dorchester Tenants' Notice of Appeal at 1. The Commission dismisses this issue for failure to state a clear and concise statement of alleged error in the Final Order. 14 DCMR § 3802.5(b); Tenants of 2300 & 2330 Good Hope Rd., SE, CI 20,753 & CI 20,754; Burkhardt, RH-TP-06-28,708; Bohn Corp., RH-TP-08-29,328; Barac Co., VA 02-107.

VII. DISCUSSION OF TENANT DOUGLAS' ISSUES ON APPEAL

A. The rejection of "loss of square footage" as a legitimate basis for reduction of tenants' rents.

Tenant Douglas asserts that the ALJ erred by failing to reduce the rent ceiling at the Housing Accommodation to reflect the loss in square footage due to the installation of the HVAC units. Tenant Douglas' Notice of Appeal at 2-4; *see* Tenant Douglas' Memorandum at 10-11, 15-17.

The Commission has incorporated Tenant Douglas' assertions on this issue in its consideration of the Dorchester Tenants' issue B, *supra* at 44-8, which raises the same contention regarding the loss of square footage.

B. The rejection of Dr. David Stallard's testimony on the grounds that his approach to calculation of the appropriate rent decreases had no foundation in precedence.

Tenant Douglas asserts on appeal that the ALJ erred in rejecting the testimony of Dr. David Stallard, in favor of the testimony of the Housing Provider's expert witness, Scott Kaufman. Tenant Douglas' Notice of Appeal at 2. Tenant Douglas provides the following additional assertions in support of this issue, in relevant part:

> Dr. Stallard's estimates [of electricity usage] based on four months of actual P[EPCO] bills provides the best case for monthly rent reductions . . . . Dr. Stallard's testimony was the best expert testimony available at the hearing but Dr. Stallard's testimony was marginalized and not given due diligence by [ALJ] Pierson. His competence as an expert engineer deserved a more serious analysis than the one given to it.

Tenant Douglas' Notice of Appeal at 4. No additional statutory, regulatory or case law support for this issue was provided in Tenant Douglas' Brief, or Tenant's Douglas' Memorandum. *See generally,* Tenant's Douglas' Memorandum; Tenant Douglas' Brief.

As the Commission has previously explained, the ALJ's decision will be affirmed where it is in accordance with the provisions of the Act and supported by substantial record evidence. 14 DCMR § 3807.1; *see, e.g.,* Lutsko, RH-TP-08-29,149; Doyle v. Pinnacle Realty Mgmt., TP 27,067 (RHC Mar. 10, 2015); Ahmed, Inc. v. Torres, RH-TP-07-29,064 (RHC Oct. 28, 2014). The DCCA has stated that when assessing an ALJ's credibility determination, "the relevant inquiry is whether the [ALJ's] decision was supported by substantial evidence, not whether an alternative decision might also have been supported by substantial evidence." Gary, 723 A.2d 1205 (quoting McEvily, 500 A.2d at 1024 n.3); *see* Notsch, RH-TP-06-28,690 (explaining that

where an ALJ's findings are supported by substantial evidence, the findings will not be overturned even if substantial evidence exists to the contrary); Boyd, RH-TP-10-29,819; Hago v. Gewirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Feb. 15, 2012). Additionally, "the Commission has consistently stated that credibility determinations are 'committed to the sole and sound discretion of the ALJ.'" Notsch, RH-TP-06-28,690 (quoting Fort Chaplin Park Assocs., 649 A.2d at 1079); *see* Lutsko, RH-TP-08-29,149; Burkhardt, RH-TP-06-28,708; Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012). Finally, as noted, the Commission has consistently asserted that "[w]here substantial evidence exists to support the [ALJ's] findings, even 'the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute its judgment for that of the [hearing] examiner.'" Boyd, RH-TP-10-29,816 (quoting Hago, RH-TP-08-11,552 & RH-TP-08-12,085 at 6); *see also,* Lutsko, RH-TP-08-29,149; Marguerite Corsetti Trust, RH-TP-06-28,207.

The DCCA has held that the admissibility of expert testimony is governed by the following three-part test: "(1) the subject matter must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman; (2) the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth; and (3) expert testimony is inadmissible if the state of the pertinent art of scientific knowledge does not permit a reasonable opinion to be asserted even by an expert. Jones v. United States, 990 A.2d 970, 976-77 (D.C. 2010) (citing Dyas v. United States, 376 A.2d 827, 832 (D.C. 1977)); *see also, e.g.,* Girardot v. United States, 92 A.3d 1107, 1109 n.3 (D.C. 2014); Russell v. United States, 17 A.3d 581, 586 (D.C. 2011). The DCCA has further elaborated that the third element incorporates the federal Frye standard, requiring that scientific testimony will be admissible only "if the theory or

methodology on which it is based has gained general acceptance in the relevant scientific community." Jones, 990 A.2d at 977 (citing Frye v. United States, 293 F. 1013, 1014 (D.C. 1923)); *see also, e.g.,* United States v. Porter, 618 A.2d 629, 633 (D.C. 1992); Ibn-Tamas v. United States, 407 A.2d 626, 638 (D.C. 1979).

The Commission's review of the record reveals that the ALJ spent eight pages in the Final Order discussing and comparing the qualifications and testimony of Mr. Kaufman and Dr. Stallard.[22] *Id.* at 23-31; R. at 799-807. The ALJ stated that Mr. Kaufman was a professional engineer, the Director of Project Management and Chief Mechanical Engineer for INTEC Companies; he was qualified at the OAH hearing as an expert in mechanical engineering. Final Order at 23; R. at 807. Dr. Stallard was described by the ALJ as a retired electrical engineer, whose professional career had been spent largely as a specialist in missile guidance for a defense contractor; Dr. Stallard was qualified as an expert in electrical engineering. *Id.*

The ALJ's decision on which expert to credit came down to the application of the Frye standard: whether the methodology used by each expert had gained general acceptance in the scientific community. Final Order at 24-5; R. at 805-806 (citing Frye, 293 F. 1013); *see also,* Dyas, 376 A.2d at 832. The ALJ explained that Mr. Kaufman's methodology for determining electrical costs at the Housing Accommodation was based on the standards promulgated by the American Society of Heating, Refrigeration and Air-Conditioning Engineers (ASHRAE), and incorporates "a sophisticated computer system" to make the necessary calculations. Final Order at 23-4; R. at 806-807. Dr. Stallard, on the other hand, applied his own "scientific and analytical approach" based on "his many years of analytical thinking" to calculate the electrical costs at the

[22] Contrary to Tenant Douglas' assertion that the ALJ "marginalized" and failed to give "due diligence" to the testimony of Dr. Stallard, the Commission's review of the record reveals that the ALJ documented her careful consideration of the testimony of Dr. Stallard in the Final Order. Final Order at 23-31; R. at 799-807.

Housing Accommodation. *Id.* at 24; R. at 806. The ALJ stated that Dr. Stallard conceded that his methodology was not generally accepted within the HVAC industry. *Id.* In support of her determination to credit the testimony of Mr. Kaufman over that of Dr. Stallard, the ALJ explained as follows:

> There is no question that Dr. Stallard is a brilliant and impressive individual with stellar credentials. However, his expertise and experience are not in the HVAC field or in the calculations of electrical usage. Dr. Stallard acknowledged that the methodology he used was probably not generally accepted in the HVAC field . . . . There was no dispute that ASHRAE sets the standard for the HVAC industry . . . . Mr. Kaufman on the other hand, is an expert in mechanical engineering . . . and his specialty is in HVAC. He was also the design engineer who installed the HVAC systems in [the Housing Accommodation] and is therefore keenly faimilar with the capabilities and demands of the system. In addition . . . Mr. Kaufman's estimates for heating and general electric use came considerably close to the actual PEPCO bills presented by the [t]enants and Dr. Stallard's estimates do not. Therefore, I credit the expert testimony of Mr. Kaufman over Dr. Stallard because I am persuaded that Mr. Kaufman's methodology is generally accepted in the HVAC industry and performed according to ASHRAE standards.

Id. at 26-27; R. at 803-804 (emphasis added).

The Commission's review of the record reveals substantial evidence to support the ALJ's findings of fact on this issue, particularly the testimony of both Mr. Kaufman and Dr. Stallard at the OAH hearing, and the reports submitted by both witnesses. Hearing CD (OAH Nov. 4, 2009) at 10:21-10:52; Hearing CD (OAH Apr. 27, 2010) at 10:24-3:00; Hearing CD (OAH Apr. 28, 2010) at 9:42-3:15); PX 101 at 1-4;[23] RX 226 at 1-9;[24] R. at 958-61, 1193-1201. Moreover, the Commission is satisfied that the ALJ correctly applied the Act and other relevant legal precedent in the District regarding the consideration of expert testimony. Jones, 990 A.2d at 976-77; Dyas, 376 A.2d at 832; Frye, 293 F. at 1014.

[23] PX 104 is a letter from Mr. Kaufman to the Housing Provider entitled "Electrical Expense Estimate." PX 101 at 1; R. at 958.

[24] RX 226 is the report submitted into evidence by Dr. Stallard, entitled "Recommended Rental Adjustments for Electricity in Three Apartment Types at Dorchester House." RX 226 at 1; R. at 1193.

As the Commission explained *supra* at 51, where there is conflicting testimony on an issue, the Commission will not substitute itself for the trier of fact, and will affirm the ALJ's findings where they are supported by substantial evidence, even if the record also contains substantial evidence to the contrary. Gary, 723 A.2d 1205; Lutsko, RH-TP-08-29,149; Burkhardt, RH-TP-06-28,708; Notsch, RH-TP-06-28,690; Boyd, RH-TP-10-29,819; Hago, RH-TP-08-11,552 & RH-TP-08-12,085.

The Commission is satisfied, based on its review of the record, that the ALJ's determination to credit the testimony of Mr. Kaufman over that of Dr. Stallard was in accordance with the Act, and supported by substantial record evidence. *Id.*; *see* 14 DCMR § 3807.1; Jones, 990 A.2d at 976-77; Gary, 723 A.2d 1205; Dyas, 376 A.2d at 832; Frye, 293 F. at 1014; Lutsko, RH-TP-08-29,149; Burkhardt, RH-TP-06-28,708; Notsch, RH-TP-06-28,690; Boyd, RH-TP-10-29,819; Hago, RH-TP-08-11,552 & RH-TP-08-12,085. Accordingly, the Commission affirms the ALJ on this issue.

C. Judicial notice must be given to the fact that general electric granted at the time of Judge Pierson's Order does not include electric stoves; at present the stoves operate on gas.

Tenant Douglas asserts on appeal that the Housing Provider intends to replace the current gas-powered stoves with electric stoves, and that the ALJ erred by failing to order the Housing Provider to file another petition for change in services and/or facilities once the replacement occurs. Tenant Douglas' Notice of Appeal at 2, 4. The Commission notes that Tenant Douglas has not supplied any additional information in support of this issue on appeal in either his Brief or Memorandum, including supporting evidence in the record, statutory or regulatory provisions, or case law precedent. *See* Tenant Douglas' Memorandum; Tenant Douglas' Brief.

To promote the "principles of judicial economy," the DCCA and the Commission have adopted the threshold jurisdictional requirement of "ripeness" before either will decide the merits of a party's claim. Wash. Teacher's Union. Local # 6 v. District of Columbia Pub. Schs., 960 A.2d 1123, 1134 n.25 (D.C. 2008) (finding claims are subject to dismissal for lack of ripeness); Carmel Partners, LLC v. Barron, TP 28,510, TP 28,521, & TP 28,526 (RHC Oct. 28, 2014) (dismissing issue on appeal that the Commission determined was too hypothetical and uncertain for review). The Commission has stated that ripeness "depends on the certainty of the alleged harm, and will not be satisfied where the alleged harm is too 'abstract, hypothetical and contingent.'" Young v. Vista Mgmt., TP 28,635 (RHC Sept. 18, 2012); *see* Barron, TP 28,510, TP 28,521, & TP 28,526.

The Commission notes that in his statement of issue C on appeal, *supra*, Tenant Douglas concedes that electric stoves have not been installed in the Housing Accommodation. Tenant Douglas' Notice of Appeal at 2, 4. Accordingly, the Commission determines that issue C is not ripe for decision, because any alleged harm related to the installation of electric stoves at the Housing Accommodation is too uncertain, hypothetical, or contingent at this time. Wash. Teacher's Union. Local # 6, 960 A.2d at 1134 n.25; Barron, TP 28,510, TP 28,521, & TP 28,526; Young, TP 28,635. Thus, the Commission dismisses this issue on appeal, *without prejudice*.[25]

D. Attempts to make arguments during the hearings on the issue of air conditioning as well as that of rent overcharges were ignored by Judge Pierson as being irrelevant to the matter of Changes in Related Service. Nevertheless these issues remain important unresolved matters.

[25] The Commission notes that its decision on this issue is not meant to exempt the Housing Provider from the requirements under the Act if it elects to reduce the services and/or facilities at the Housing Accommodation in the future; nor does the Commission's decision prevent any tenant of the Housing Accommodation, including Tenant Douglas, from filing a separate tenant petition if he or she believes that the installation of electric stoves has caused a reduction in services and/or facilities at the Housing Accommodation without a corresponding decrease in rent. D.C. OFFICIAL CODE § 42-3502.11 (*see supra* at n.15).

Tenant Douglas asserts that it was error for the ALJ to not hear arguments that the existing rent levels at the Housing Accommodation are improper.[26] Tenant Douglas' Notice of Appeal at 2, 5. In his brief, Tenant Douglas explains that the Housing Provider has continued to raise the rents at the Housing Accommodation in contravention of an order of the Rent Administrator in Brookens v. Hagner Mgmt. Corp., T/P 3788 (RACD June 18, 1981). Tenant Douglas' Brief at 3. It is the position of Tenant Douglas that the current rent level at the Housing Accommodation continues to be improper, and thus any adjustments to the rent levels made by the ALJ in the Final Order are also improper. *Id.* at 4.

The Commission observes that the ALJ did not make any findings in the Final Order regarding whether the rent levels at the Housing Accommodation at the time that the Services/Facilities Petition was filed were proper. *See* Final Order at 1-37; 793-830. The ALJ's decision to not address the propriety of rent levels at the Housing Accommodation in the context of the Services/Facilities Petition is a legal decision, that the Commission reviews *de novo* to determine whether it is unreasonable or embodies a material misconception of the Act. 14 DCMR § 3807.1; United Dominion Mgmt. Co., 101 A.3d at 430-1; Sheikh, RH-TP-12-30,279; 1433 T St. Assocs., LLC, RH-SC-06-002.

Under the DCAPA, parties are entitled to notice of issues involved in a contested case. D.C. OFFICIAL CODE § 2-509(a); *see* Richard Milburn Pub. Charter Alt. High Sch. v. Cafritz, 798 A.2d 531, 538 n.7 (D.C. 2002); *see also,* Hedgman v. D.C. Hackers' License Appeal Bd., 549 A.2d 720, 723-4 (D.C. 1988) ("[a] respondent is entitled to be fully aware of the scope of charges in order to have an effective opportunity to be heard and to explain his conduct"). Both

[26] The Commission notes that it has addressed the ALJ's findings and conclusions on the issue of air conditioning services at the Housing Accommodation in its discussion of issue the Dorchester Tenants' issue A, *supra* at 39-44.

the DCCA and the Commission have held that tenants may not raise counterclaims in the context of housing provider petitions, because the housing provider is not properly on notice of those issues. *See, e.g.,* Tenants of 2301 E St., NW v. D.C. Rental Hous. Comm'n, 580 A.2d 622, 625-6 (D.C. 1990) (DCCA affirmed Commission's determination that tenants cannot raise counterclaims in capital improvement proceedings, because the housing provider did not have notice of those issues); Tenants of 2480 16th St., NW v. Dorchester House Assocs. Ltd. P'ship, CI 20,768 (RHC Aug. 31, 2004) (stating that tenants could not raise registration issues as a defense to the housing provider's petition for a rent ceiling increase); Fountain v. Smith, SR 20,066 (RHC Jan. 31, 2003) (reversing hearing examiner's award of a rent refund in the context of a substantial rehabilitation petition initiated by the housing provider); Willis Ltd. P'ship v. Burress, CI 20,748 (RHC July 27, 1999) (explaining that "a tenant may not raise in a capital improvement petition the issues that can properly be raised in a tenant petition"); Tenants of 1755 N St., NW v. N St. Follies Ltd. P'ship, HP 20,746 (RHC Apr. 30, 1998) (stating that a hardship petition, filed by a housing provider, is not a substitute for a tenant petition).

As the Commission has previously concluded in relation to other housing provider petitions, the Commission determines here that the Services/Facilities Petition, filed by the Housing Provider, did not by itself provide the Housing Provider with proper notice of a counterclaim of generally improper rent levels, unrelated to the services and/or facilities at the Housing Accommodation. *See generally,* Services/Facilities Petition; R. at 1-73; *see also,* Cafritz, 798 A.2d at 538 n.7; Tenants of 2301 E St., NW, 580 A.2d at 625-6; Tenants of 2480 16th St., NW, CI 20,768; Fountain, SR 20,066; Burress, CI 20,748; Tenants of 1755 N St., NW, HP 20,746. Accordingly, the Commission is satisfied that the ALJ's decision to only address the rent levels at the Housing Accommodation with respect to an adjustment in rent levels based on

the Services/Facilities Petition, was not unreasonable or a material misconception of the Act. 14 DCMR § 3807.1; United Dominion Mgmt. Co., 101 A.3d at 430-1; Sheikh, RH-TP-12-30,279; 1433 T St. Assocs., LLC, RH-SC-06-002. The Commission notes that the proper method for asserting a claim that the rent levels at the Housing Accommodation are improper may be brought through a separately filed tenant petition. 14 DCMR § 4214.3.[27] Accordingly, the Commission affirms the ALJ on this issue.

E. The large one-bedroom is comparable in size to the two-bedroom. Two HVACs were installed in both types of apartments yet the reduction for the two-bedroom is $68.00 while that for the large one-bedroom is $46.00.

Tenant Douglas asserts on appeal that the ALJ erred in failing to consider the impact of two HVAC units installed in his large one-bedroom apartment, versus one HVAC unit in the smaller one-bedroom apartments, in calculating the appropriate rent reduction to compensate for electricity costs. Tenant Douglas' Notice of Appeal at 5. It is his contention that both the square footage of his unit and the number of HVAC units that were installed indicate that his rent reduction should be equal to the rent reduction awarded for two-bedroom units, rather than the rent reduction awarded generally for all one-bedroom units. *Id.*

The Commission's review of the record reveals that Tenant Douglas and several other tenants of the Housing Accommodation testified at the OAH hearing that two HVAC units had been installed in the large one-bedroom apartments. Hearing CD (OAH Apr. 27, 2010); *see also* Hearing CD (OAH Mar. 17, 2010). The ALJ's findings of fact acknowledge that several tenants testified at the OAH hearing that their one-bedroom apartments contained two HVAC units. Final Order at 6-7; R. at 824-5. However, the ALJ's conclusions of law do not indicate that the

[27] 14 DCMR § 4214.3 provides, in relevant part, as follows: "The tenant of a rental unit or an association of tenants of a housing accommodation may, by petition filed with the Rent Administrator, challenge or contest any rent or rent increase that is: . . . (b) Greater than the rent [charged] for the rental unit authorized by the Act or order of the Rent Administrator or Commission[.]"

ALJ considered whether the presence of two HVAC units in one apartment versus one HVAC unit would affect the electricity costs for that apartment. *See generally, id.* at 23-37; R. at 793-807.

In accordance with the DCAPA, the ALJ is required to make findings of fact and conclusions of law on each contested issue. D.C. OFFICIAL CODE § 2-509(e);[28] *see also* 14 DCMR § 4012.2.[29] When specific findings of fact and conclusions of law on each contested issue are missing from the record, the Commission is unable to properly perform its review function. Wilson v. Smith Prop. Holdings Van Ness, RH-TP-07-28,907 (RHC Mar. 10, 2015); Gelman Mgmt. Co. v. Grant, TPs 27,995, 27,997, 27,998, 28,002, & 28,004 (RHC Aug. 19, 2014) (citing Perkins v. D.C. Dep't of Emp't Servs., 482 A.2d 401, 402 (D.C. 1984)).

Where the Commission's review of the record reveals that Tenant Douglas raised the issue of the two HVAC units in his apartment affecting his electricity costs, the Commission determines that the ALJ erred by failing to make findings of fact and conclusions of law on this issue. D.C. OFFICIAL CODE § 2-509(e); 14 DCMR § 4012.2; Wilson, RH-TP-07-28,907; Grant, TPs 27,995, 27,997, 27,998, 28,002, & 28,004. Accordingly, on remand, the Commission directs the ALJ to make findings of fact and conclusions of law regarding whether the two HVAC units placed in Tenant Douglas' one-bedroom apartment affect the electricity costs for his apartment, and thus warrant a higher rent reduction than the rent reduction for a smaller one bedroom apartment with one HVAC unit. The Commission instructs the ALJ that she may, in her discretion, hold an evidentiary hearing limited to the issue of whether the electricity costs of

[28] D.C. OFFICIAL CODE § 2-509(e) provides, in relevant part, as follows: "Every decision and order adverse to a party to the case . . . shall be in writing and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact[.]"

[29] 14 DCMR § 4012.2 provides, in relevant part, as follows: "Each draft decision shall contain the following: (a) Findings of fact and conclusions of law (including the reasons or basis of those findings) upon each material contested issue of fact and law presented on the record[.]"

the two HVAC units in Tenant Douglas' one-bedroom apartment are more comparable in amount to those for a two bedroom apartment with two HVAC units than the electricity costs for a one bedroom apartment with one HVAC unit.

VIII. HOUSING PROVIDER'S ISSUES ON APPEAL

A. Since Marian Chou, Esq. only entered her appearance as counsel for the Dorchester Tenants Association ("DTA") and the court determined that DTA was not a party to the proceeding, the fee award is improper.

The Housing Provider asserts on appeal that the Order Granting Attorney's Fees related to the work performed by Ms. B. Marian Chou (Ms. Chou) is improper because Ms. Chou only entered her appearance on behalf of DTA, and the ALJ found that DTA was not a party to this case. Housing Provider's Notice of Appeal at 2; Housing Provider's Brief at 2. The Housing Provider elaborated that the record does not contain any evidence that Ms. Chou had an attorney-client relationship with any individual tenants, such as, for example, a separate attorney-client representation agreement with each of the individual tenants that Ms. Chou claimed to represent. Housing Provider's Notice of Appeal at 2; Housing Provider's Brief at 2-3.

The ALJ explained in the Order Granting Attorney's Fees that DTA did not demonstrate that it represented a majority of the tenants at the Housing Accommodation, as required by the rules in effect at the time the Services/Facilities Petition was filed, and thus DTA was not named as a party to this case. Order Granting Attorney's Fees at 5; R. at 1618. Nevertheless, the ALJ determined that, despite Ms. Chou's initial entry of appearance on behalf of DTA, the 123 individual members of the DTA who had apparently authorized Ms. Chou to represent them

were entitled to her representation regardless of whether DTA was named as a party.[30] *Id.* (citing D.C. OFFICIAL CODE § 42-3501.03(24); 1 DCMR §§ 2838 & 2839).

The Commission will uphold an ALJ's decision where it is in accordance with the provisions of the Act and supported by substantial evidence. 14 DCMR § 3807.1. The Commission has consistently defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." Sheikh, RH-TP-12-30,279; Richardson, TP 28,196; Wilson, RH-TP-07-28,907. It is not the Commission's role "to 'weigh the testimony and substitute ourselves for the trier of fact.'" Joyner, TP 28,151 (quoting Fort Chaplin Park Assocs., 649 A.2d at 1079; *see* Wilson, RH-TP-07-28,907; Torres, RH-TP-07-29,064.

As the ALJ noted in the Order Granting Attorney's Fees, 1 DCMR § 2933, governing rental housing cases before OAH, provides that "[p]ersons authorized to appear before [OAH] by 1 DCMR 2838 and 1 DCMR 2839 may represent parties in rental housing cases." 1 DCMR § 2933. The provision relevant to Ms. Chou's representation in this case is contained at 1 DCMR § 2838.1, which provides, in relevant part, as follows: "[a]n individual or other party may be represented before this administrative court by an attorney[.]" The Commission notes that there is no OAH rule explicitly stating what must be filed by an attorney in order to prove that they are authorized to act in a representative capacity. *See generally,* 1 DCMR §§ 2838-2839.

In this case, the Commission's review of the record reveals that on July 31, 2009, a document was submitted by Ms. Chou entitled "DTA Members Represented by B. Marian Chou, Esq." (DTA Members Representation List). R. at 548-51. In this document, Ms. Chou provided

[30] The Commission will hereinafter refer to the 123 individual members of the DTA that authorized Ms. Chou to represent them in this case as the "DTA Tenants," collectively.

a list of tenants that had agreed to be represented by her. *See* DTA Members Representation List at 1; R. at 551. The Commission observes that, having determined that the DTA was not a proper party to the case, the ALJ accepted the DTA Members Representation List as a clarification regarding the individual tenants that Ms. Chou was authorized to represent. Order Granting Attorney's Fees at 5; R. at 1618.

The Commission notes that the ALJ's determination that 123 tenants had authorized Ms. Chou to represent them with respect to the Services/Facilities Petition is supported by substantial record evidence. *See* DTA Members Representation List. Although individual attorney-client representation agreements may be useful in determining who an attorney is authorized to represent, contrary to the assertions of the Housing Provider, they are not required in order for an attorney to appear before OAH, or to collect attorney's fees for work performed before OAH. 1 DCMR §§ 2838.1 & 2933; *see generally* 1 DCMR §§ 2838-2839. The Commission notes that the Housing Provider has not pointed to any statutory, regulatory, or case law precedent that undermines the ALJ's authority to allow Ms. Chou to shift her representation from DTA to the 123 DTA members as individuals. Housing Provider's Notice of Appeal at 2; Housing Provider's Brief at 2. Nor has the Housing Provider cited any evidence in the record that Ms. Chou was not authorized to represent the 123 DTA members as individuals. Housing Provider's Notice of Appeal at 2; Housing Provider's Brief at 2.

Where the Commission's review of the record reveals that the ALJ's determination to allow Ms. Chou to represent the 123 DTA Tenants as individuals is in accordance with the relevant regulations governing the appearance of attorneys before OAH and supported by substantial evidence, the Commission affirms the ALJ on this issue. 1 DCMR §§ 2838.1 &

2933; 14 DCMR § 3807.1; Sheikh, RH-TP-12-30,279; Joyner, TP 28,151; DTA Members Representation List; R. at 551.

B. The ALJ erred in determining that DTA was the prevailing party.

The Housing Provider asserts that the ALJ erred in determining that the DTA Tenants were the "prevailing party," for purposes of determining whether they were entitled to an award of attorney's fees. Housing Provider's Notice of Appeal at 1. The Housing Provider states that out of the four issues raised by the Services/Facilities Petition, the Housing Provider prevailed on three. *Id.* Therefore, the Housing Provider was the prevailing party, not the DTA Tenants. *Id.*

The ALJ reasoned in the Order Granting Attorney's Fees that the rent decrease ordered in the Final Order was significantly greater than the rent decrease requested in the Services/Facilities Petition. Order Granting Attorney's Fees at 9; R. at 1614. The ALJ stated that she had denied the Housing Provider's request to increase rents in its entirety. *Id.* Finally, the ALJ found that the DTA Tenants had "achieved a significant benefit sought by litigation because they prevailed on the issue of whether Housing Provider could increase rents, and they received a significantly higher rent reduction than requested." *Id.* (citing 14 DCMR § 3825.2; Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)).

The Commission will affirm an ALJ's decision where it is in accordance with the Act, and supported by substantial evidence. 14 DCMR § 3807.1; *see, e.g.,* Lutsko, RH-TP-08-29,149; Doyle, TP 27,067; Torres, RH-TP-07-29,064.

The Act provides that "the Rent Administrator [or OAH], Rental Housing Commission, or a court of competent jurisdiction may award reasonable attorney's fees to the prevailing party in any action under this chapter . . . ." D.C. OFFICIAL CODE § 42-3509.02. A prevailing party "is 'a party in whose favor a judgment is rendered, regardless of the amount of damages awarded.'"

Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (RHC Sept. 27, 2013) at 42; Cascade Park Apartments v. Walker, TP 26,197 (RHC Mar. 18, 2005) at 2 (quoting BLACK'S LAW DICTIONARY 1145 (7th ed. 1999)). The Act "creates a presumptive award of attorney's fees for 'prevailing tenants in both tenant-initiated and landlord-initiated proceedings.'" Loney v. D.C. Rental Hous. Comm'n, 11 A.3d 753, 759 (D.C. 2010) (quoting Hampton Courts Tenants' Ass'n v. D.C. Rental Hous. Comm'n, 573 A.2d 10, 13 (D.C. 1990)); Lizama, RH-TP-07-29,063 at 42-43; *see also* D.C. OFFICIAL CODE § 42-3509.02. A prevailing party "merely has to 'succeed on any significant issue which achieves some of the benefit the parties sought in bringing the suit.'" Walker, TP 26,197 (RHC Jan. 14, 2005) (quoting Slaby v. Bumper, TPs 21,518 & 22,521 (RHC Sept. 21, 1995)); *see also* Morris, RH-TP-14-28,794; Hardy, RH-TP-09-29,503.

The Commission notes that the ALJ correctly stated the law regarding awards of attorney's fees to prevailing tenants, requiring only that a tenant has prevailed on "any significant issue," not that a tenant prevail on all issues raised in a case. Order Granting Attorney's Fees at 8-9; R. at 1614-5; *see* Morris, RH-TP-14-28,794; Hardy, RH-TP-09-29,503; Walker, TP 26,197. Additionally, the Commission's review of the record reveals substantial evidence to support the ALJ's determination that the DTA Tenants prevailed on the issue of whether the Housing Provider would be able to increase rents in connection with the Services/Facilities Petition, resulting in a higher rent reduction than requested by the Housing Provider in the Services/Facilities Petition. *Compare* Services/Facilities Petition at 3a-3k; R. at 61-71, *with* Final Order at 38; R. at 792a.

Therefore, satisfied that the ALJ's finding that the DTA Tenants were a prevailing party for purposes of attorney's fees was in accordance with the Act and supported by substantial evidence, the Commission affirms the ALJ on this issue.[31]

C. It was arbitrary, capricious, and clearly erroneous for the ALJ to determine that Marian Chou, Esq. was entitled to receive an award of fees based on the Laffey matrix rather than the rate she actually charged.

The Housing Provider claims on appeal that the ALJ erred in awarding attorney's fees to the DTA Tenants' counsel, Ms. Chou, based on the Laffey matrix.[32] Housing Provider's Notice of Appeal at 2. The Housing Provider claims that because the DTA Tenants and Ms. Chou entered into an agreement of $175 per hour and there was no evidence on the record to support a finding that Ms. Chou accepted a lesser fee on a pro bono basis, application of the Laffey matrix was inappropriate. Notice of Appeal at 2.

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[31] The Commission notes that the fact that a party has not prevailed on all issues may be used to adjust the award of attorney's fees, under 14 DCMR § 3825.8(b)(13) ("The lodestar amount may be reduced or increased after considering the following factors: . . . (13) the results obtained, when the moving party did not prevail on all the issues."). The ALJ determined that an adjustment to the lodestar award of attorney's fees was not warranted in this case, despite her determination that the DTA Tenants did not prevail on all issues. Order Granting Attorney's Fees at 16-17; R. at 1606-7; *see* Hampton Courts Tenants Ass'n v. D.C. Rental Hous. Comm'n, 599 A.2d 1113, 1115 (D.C. 1991) (explaining that the fact-finder has significant discretion in determining an award of attorney's fees); *see also,* Hardy, RH-TP-09-29,506; Loney, SR 20,089 (RHC Mar. 10, 2011). However, the Commission need not consider whether this determination was error, as the Housing Provider has not appealed the ALJ's determination that no adjustment to the lodestar was warranted. *See* Housing Provider's Notice of Appeal.

[32] The Laffey Matrix begins with rates from 1981–1982 allowed and established by the U.S. District Court for the District of Columbia in the case of Laffey v. Northwest Airlines, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). It is a matrix form comprised of hourly rates for attorneys of varying experience levels and paralegals/law clerks, which has been compiled by the Civil Division of the United States Attorney's Office for the District of Columbia. It has been used since then by courts in the District to reflect billing rates for attorneys in the Washington, D.C. area with various degrees of experience. *See, e.g.,* Heller v. District of Columbia, 832 F. Supp. 2d 32, 40 (D.D.C. 2011). The Laffey Matrix is intended to be used in cases where a fee shifting statute permits a prevailing party to recover "reasonable" attorney's fees. In that regard, it is similar to Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(k), the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) and the EAJA, 28 U.S.C. §2412(b). Rates for subsequent years after 1981-1982 are adjusted annually based on cost of living increases for the Washington, D.C. area. The Commission has used the Laffey Matrix as a supplement to the "prevailing market rates in the relevant community" to gauge whether the requested fees are reasonable. *See, e.g.* Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Jan. 29, 2012); Avila, RH-TP-28,799; Loney v. Tenants of 710 Jefferson Street, N.W., SR 20,089 (RHC June 6, 2012).

The ALJ stated in the Order Granting Attorney's Fees that Ms. Chou requested an hourly rate of $410 per hour for her services, based on the rates established in the Laffey Matrix. Order Granting Attorney's Fees at 12; R. at 1611. The ALJ noted that Ms. Chou had agreed to represent the DTA Tenants at a "reduced rate" of $175 per hour. *Id.* at 13; R. at 1610. In support of her determination that the Laffey Matrix rate of $410 per hour was a reasonable hourly rate for Ms. Chou's representation of the DTA Tenants in this case, the ALJ stated as follows:

> [T]here was no evidence that Ms. Chou's "usual billing rate" was $175/hour. Indeed, in her motion, Ms. Chou states that she charged the [DTA] Tenant's [sic] a "reduced rate" of $175/hour . . . . Where pro bono attorneys charge absolutely nothing for rendering legal services, they are still permitted to recover the prevailing market rate . . . . Although Ms. Chou accepted a reduced billing rate (as opposed to agreeing to represent DTA for no charge), she is not prohibited from recovering a rate in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.

Id. at 14; R. at 1609.

As explained, *supra* at 40, the Commission shall reverse final orders issued by an ALJ if "the Commission finds [the final decision] to be based on arbitrary action, capricious action, or an abuse of discretion, or which contains conclusions of law not in accordance with provisions of the Act." 14 DCMR § 3807.1; *see, e.g.*, Burkhardt, RH-TP-06-28,708; Karpinski, RH-TP-09-29,590.

The DCCA has explained that for an administrative agency's decision "to pass muster, [it] must state findings of fact on each, material contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions of law must follow rationally from its findings." Barac Co., VA 02-107; Avila, RH-TP-28,799. As the DCCA has explained, "[n]either the repetition of the statutory language (or of language from a decided case) nor a summary of the evidence of the witness credited by the agency satisfies the

requirements of the Act." Eilers, 583 A.2d at 686 (citing Hedgeman, 549 A.2d at 723). Where critical questions remain regarding how certain events occurred or whether a witness's testimony was both reliable and probative, the reviewing court "cannot say, on [the existing] record, that the 'agency has given full and reasoned consideration to all material facts and issues.'" Eilers, 583 A.2d at 686 (citing Dietrich v. D.C. Bd. of Zoning Adjustment, 293 A.2d 470, 473 (D.C. 1972)).

The relevant regulations regarding the calculation of an award of attorney's fees require that the award be calculated by multiplying the "number of hours reasonably expended on a task" by a "reasonable hourly rate." 14 DCMR § 3825.8(a). The DCCA has explained that three elements must be shown by the party requesting attorney's fees in order to establish a reasonable hourly rate: "(1) the attorney's billing practices; (2) the attorney's skill, experience, and reputation; and (3) the prevailing market rates in the relevant community." Tenants of 710 Jefferson St., NW v. D.C. Rental Hous. Comm'n, No. 13-AA-199, 2015 D.C. App. LEXIS 376, at *22 (D.C. Aug. 20, 2015) (citing Covington v. District of Columbia, 57 F.3d 1101, 1107 (D.C. Cir. 1995)).

The Commission has used the Laffey matrix previously to determine the reasonably hourly rate for *pro bono* counsel,[33] who do not typically charge their clients an hourly rate. *See, e.g.*, Campbell, RH-TP-09-29,715 (RHC Apr. 22, 2015) (determining reasonable hourly rate based upon Laffey Matrix rates for work performed by supervising attorneys and student attorneys from the University of the District of Columbia David A. Clark School of Law (UDC School of Law)); Morris, RH-TP-14-28,794; Lizama, RH-TP-07-29,063 (awarding hourly rates

[33] The Commission notes that "pro bono" is defined as follows: "Being or involving uncompensated legal services performed esp. for the public good." BLACK'S LAW DICTIONARY 1240 (8th ed. 1999) (emphasis added).

based upon applicable Laffey Matrix rates to pro bono supervising attorneys and student attorneys from the UDC School of Law).

In Morris, the Commission discussed the Laffey matrix, noting that "Laffey matrix rates have been used in the past as a starting point to determine the reasonable hourly rate for pro bono counsel, who do not typically charge their clients an hourly rate." Morris, RH-TP-14-28,794. In that case, the Commission issued an order directing the tenants to submit supplemental evidence to show that the tenant's attorney had accepted the tenant's case on a pro bono basis, or, alternatively, evidence of the actual hourly rate that the tenant's counsel charged, if not pro bono, and "legal authority and precedent for the Commission's capacity to award legal fees at a Laffey Matrix hourly rate which exceeds the rate actually charged by the [t]enant's counsel." Morris, RH-TP-06-28,794 (RHC July 17, 2014) (Morris Order). In response, the tenants reported that they were charged a set hourly rate of $200 per hour, which was $160 per hour less than the relevant Laffey matrix rate. Morris, RH-TP-06-28,794 (RHC Aug. 19, 2014) at 5. The Commission concluded that "that $ 200 [sic] is a reasonable hourly rate for purposes of the lodestar calculation," where the tenants did not assert that $200 per hour was an unreasonable hourly rate, even where the rate was lower than rates typically awarded for attorneys with similar experience as tenants' counsel. *Id.* at 12-13 (citing 14 DCMR § 3825.8(a)).

In the instant case, the ALJ does not cite to any legal authority or precedent to support deviating from the agreed upon hourly rate in favor of the Laffey Matrix. *See generally* Order Granting Tenant's Motion for Attorney's Fees at 9-17; R. at 1606-14. Additionally, the DTA Tenants and their attorney, Ms. Chou, have not cited any supporting evidence in support of their assertion that $175 per hour was less than the rate Ms. Chou normally charged. *See* Order Granting Tenant's Motion for Attorney's Fees at 12-13; R. at 1610-11. Likewise, the

Commission's review of the record did not uncover any evidence regarding Ms. Chou's customary billing rate. Order Granting Motion for Attorney's Fees at 9-17; R. 1606-14. Finally, the Commission observes that the ALJ did not address the factors enumerated by the DCCA, regarding "(1) the attorney's billing practices; (2) the attorney's skill, experience, and reputation; and (3) the prevailing market rates in the relevant community." Tenants of 710 Jefferson St., NW v. D.C. Rental Hous. Comm'n, No. 13-AA-199, 2015 D.C. App. LEXIS 376, at *22 (D.C. Aug. 20, 2015

Accordingly, the Commission's review of the record reveals that the ALJ failed to make proper findings of fact and conclusions of law regarding the reasonable hourly fee rate that should be applied in this case. Where the findings of fact and conclusions of law are insufficient, a remand is required in order for them to be completed. *See, e.g.*, Hedgeman, 549 A.2d at 723 (D.C. 1988); Renjilian v. Thellen, TP 27,686 (RHC July 11, 2005). Thus, the Commission reverses the award of attorney's fees, and remands to the ALJ to make further findings of fact and conclusions regarding the reasonable hourly rate to be awarded for the services of Ms. Chou, specifically addressing: (1) Ms. Chou's billing practices; (2) Ms. Chou's skill, experience, and reputation; and (3) the prevailing market rates in the relevant community.

The Commission instructs the ALJ to make findings of fact regarding Ms. Chou's customary billing rate, including the amount of the discount provided to the DTA Tenants to reach the agreed upon rate of $175 per hour. Finally, the ALJ is instructed to provide the legal and factual authority to support her conclusions on a reasonable hourly rate in this case, whether the rate is based upon the pre-existing agreement between Ms. Chou and the DTA Tenants of $175 per hour, Ms. Chou's customary billing rate, a rate based on the Laffey Matrix, or some

other reasonable hourly rate that is in accordance with the Act and supported by substantial record evidence. *See* Morris, RH-TP-06-28,794 (RHC July 17, 2014).

D. Marian Chou, Esq. may not be awarded attorney's fees for representation of DTA because this, in effect, authorizes DTA to engage in the practice of law in violation of D.C.C.A. 49 [sic] and earlier District of Columbia case authority. Only the D.C. Court of Appeals is empowered to establish who may practice and under what circumstances. The Court of Appeals rules do not empower membership organizations to provide legal services or representation to or on behalf of the association's members. Thus, no award of fees is permissible.

The Commission notes that the ALJ determined that the DTA had not satisfied the requirements to be named as a party to this case, a ruling that has not been appealed. Order Granting Attorney's Fees at 5; R. at 1618. Additionally, the Commission has already upheld the ALJ's determination that Ms. Chou would be allowed to shift her representation from DTA to the 123 DTA members as individuals. 1 DCMR §§ 2838.1 & 2933; 14 DCMR § 3807.1; Sheikh, RH-TP-12-30,279; Joyner, TP 28,151; DTA Members Representation List; R. at 551; *see also, supra* at 60-3.

Accordingly, the Commission is satisfied that the Housing Provider's issue D, related solely to the participation of DTA in this case, and Ms. Chou's representation of DTA, is moot.[34] *See, e.g.*, Burkhardt, RH-TP-06-28,708 (citing McChesney v. Moore, 76 A.2d 89 (D.C. 1951) (noting that "it is not within the province of appellate courts to decide abstract hypothetical or moot questions, disconnected with the granting of actual relief or from the determination of which no practical relief can follow")); Knight-Bey v. Henderson, RH-TP-07-28,888 (RHC Jan. 8, 2013) (where tenant/petitioner fails to appear at hearing, failure to afford due process through proper notice of hearing to housing provider/respondent is moot); Kuratu, RH-TP-07-28,985

[34] The Commission notes that "moot" is defined as follows: "Having no practical significance; hypothetical or academic." BLACK'S LAW DICTIONARY 1029 (8th ed. 1999).

(where case remanded to determine remedy for violation of registration provision of the Act, issue of notice to tenant of reduction in services was moot on appeal).

IX. CONCLUSION

The Commission affirms the ALJ on the Dorchester Tenants' issue A, Tenant Douglas' issues B and D, and the Housing Provider's issues A and B.

The Commission dismisses the Dorchester Tenants' issue C, Tenant Douglas' issue C, and the Housing Provider's issue D.

The Commission reverses the ALJ's determination with respect to the Dorchester Tenants' issue B, and Tenant Douglas' issue A, that the loss of square footage due to installation of the HVAC units did not amount to a compensable reduction in facilities. The Commission remands this issue to the ALJ for a determination of the value of the lost square footage, whether based on the Housing Provider's proffered calculations, or on some other method determined by the ALJ to be in accordance with the Act and supported by the substantial record evidence. The Commission further instructs the ALJ to amend the rent reduction in her Final Order to include the value assigned to the lost square footage. The ALJ may, in her discretion, hold an evidentiary hearing limited to the value of the loss of square footage.

With respect to Tenant Douglas' issue E, the Commission determines that the ALJ erred by failing to make findings of fact and conclusions of law on the issue of whether the two HVAC units placed in Tenant Douglas' one-bedroom apartment affect the electricity costs in his apartment. On remand, the Commission directs the ALJ to make findings of fact and conclusions of law regarding whether the two HVAC units placed in Tenant Douglas' one-bedroom apartment affect the electricity costs for his apartment, and thus warrant a higher rent reduction than the rent reduction for a smaller one bedroom apartment with one HVAC unit.

The Commission instructs the ALJ that she may, in her discretion, hold an evidentiary hearing limited to the issue of whether the electricity costs of the two HVAC units in Tenant Douglas' one-bedroom apartment are more comparable in amount to those for a two bedroom apartment with two HVAC units than the electricity costs for a one bedroom apartment with one HVAC unit.

The Commission reverses the award of attorney's fees based on the Housing Provider's issue C, and remands to the ALJ for further findings of fact and conclusions regarding the reasonable hourly rate to be awarded for the services of Ms. Chou, specifically addressing (1) Ms. Chou's billing practices; (2) Ms. Chou's skill, experience, and reputation; and (3) the prevailing market rates in the relevant community. The Commission instructs the ALJ to make findings of fact regarding Ms. Chou's customary billing rate, including the amount of the discount provided to the DTA Tenants to reach the agreed upon rate of $175 per hour. Finally, the ALJ is instructed to provide the legal and factual authority to support her conclusions on a reasonable hourly rate in this case, whether the rate is based upon the pre-existing agreement between Ms. Chou and the DTA Tenants of $175 per hour, Ms. Chou's customary billing rate, a rate based on the Laffey Matrix, or some other reasonable hourly rate that is in accordance with the Act and supported by substantial record evidence. *See* Morris, RH-TP-06-28,794.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

CLAUDIA L. McKOIN, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (2004), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission...may seek judicial review of the decision...by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

D.C. Court of Appeals
Office of the Clerk
Historic Courthouse
430 E Street, N.W.
Washington, DC 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the **DECISION AND ORDER** in RH-SF-09-20,098 was served by first-class mail, postage prepaid, this **25th day of September, 2015**, to:

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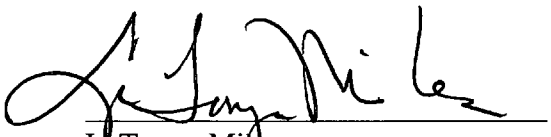

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