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Via CEC Docket 22-BSTD-03

### **CalCERTS Preliminary Comments on Draft Staff Report**

CalCERTS, Inc. (CalCERTS) submits the following preliminary comments in response to 22-BSTD-03. The Draft Staff Report supporting 22-BSTD-03 was filed on 10/14/2022, with a comment period deadline of 12/2/2022. (Notice TN#246546). Given the pending 2022 Code Cycle Adoption and Approval, and related issues, CalCERTS has not been able to review the 22-BSTD-03 Draft Staff Report, and supporting documents in full. (Draft Staff Report TN#246542). The comments provided below are offered as preliminary feedback to help guide a fruitful rulemaking. Comments have been numbered for ease of reference for future submissions.

1. The public must be allowed to participate in this rulemaking in a substantive rather than perfunctory way. The initial workshop held for the 22-BSTD-03, and 22-HERS-02, was held on November 15, 2022, the same day as the IHACI conference, California's largest HVAC stakeholder convention. Commission Staff indicated that the workshop was not moved in order to keep a schedule that would conclude the 22-BSTD-03 and 22-HERS-02 rulemaking concurrent with adoption of the 2025 Energy Code. (TN#247469, slide 6.) The timeline proposed by the Commission does not take into consideration the availability and impact on key stakeholders to participate, since key stakeholder will be required under the 2022 Code to be focused on implementation of the 2022 Code Cycle commencing on January 1, 2023. Key elements of the 2022 Code are still in development. (22-HERS-01 TN 247667). This rulemaking has been more than a decade in the making. (22-BSTD-03, CEC-400-2022-016-SD referring to Commission Order Number 12-1114-6 on 12-HERS-01).  
CalCERTS asks the Commission to adopt a rulemaking schedule that will allow the multitude of small businesses impacted to participate in the process. The regulations should be adopted on a schedule that is commensurate with the scope of changes being proposed. The Commission has proposed more than forty pages of new regulations that impact hundreds of businesses and thousands of HERS employees and all of California's homeowners and ratepayers. The proposed regulations impact everything from naming

conventions, to limitations on work, to payment structures for HERS Rating Companies. The definitions of the terms and restrictions in these regulations need to be carefully defined in order to achieve the reasons for the regulatory changes.

2. The Commission should bring in more veteran members of the Building Energy Efficiency Standards Branch, experienced HERS Raters, and industry Subject Matter Experts (SME) to help advise on this rulemaking. There are areas of disconnect between the proposals in this rulemaking and the requirements of the Building Energy Efficiency Standards that need to be reconciled to help have a productive rulemaking. Please see items four (4) and eight (8) as examples. The team at CalCERTS has not been able to review the entirety of the documents published in support of this rulemaking. Once a review is completed, CalCERTS will identify SMEs to help provide further feedback.
3. Naming Convention. The Commission has proposed changing the adopted naming convention for HERS Raters. The proposed nomenclature appears similar in construct to the Commission's Acceptance Test Technician program. It is unclear if this is intended. By changing a naming convention that has been in use prior to the 2008 changes, small businesses will be impacted. (See Docket 08-HERS-02 - <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=08-HERS-02>) The impact is not insignificant. The Commission indicated during the workshop that there are about 1,000 HERS Raters; however, CalCERTS has close to 1,900 *active* Rating Companies registered with an additional 657 inactive Rating companies on record. Marketing, branding, websites, fleet vehicles, intellectual property, and personal property of HERS Rating Companies will be affected. The Commission is required to quantify and justify the impact to these businesses, and to identify reasonable alternatives. Government Code §11346.2(b).
4. Conflict of Interest and Restraints on Raters. The Commission is proposing to limit a Rater's ability to sign documents as a document author despite whether or not that Rater has been delegated signature authority by the Responsible Person. The Commission supports the proposal as a mechanism to reduce conflicts of interest. The logic of this proposal is unclear. The proposal on its face hurts small HERS Rating Companies that cannot compete with the staffing availability of large HERS Rating Companies. A Responsible Person maintains the liability when executing a signature authority agreement and when designating signature authority to an authorized representative. The agreement terms are specified in the code. (See 10-103(a)(3)(A).) There is nothing inherently conflicted by having a certified HERS Rater act as a document author versus a general staffer since the liability *must* remain with the Responsible Person. This proposal hurts Rating Companies that do not have data entry personnel to complete CF2Rs on behalf of the Responsible Party. The Commission should

better justify this impact on small businesses. Government Code §11346.2(b). Code section 10-103(a)(3)(A) provided below for ease of reference:

A. Delegation of Signature Authority. Except where prohibited by law, including but not limited to any requirements under Division 3 of the Business and Professions Code, the Responsible Person may delegate signature authority to third parties (Authorized Representatives) provided that there is a written agreement:

i. Between the Responsible Person and the person to be designated as the Authorized Representative.

ii. Specifying that the Authorized Representative may sign Certificates of Installation on behalf of the Responsible Person.

iii. Specifying that the legal responsibility for construction or installation in the applicable classification for the scope of work specified on the Certificate of Installation document(s) remains with the Responsible Person.

iv. That is signed by both the Responsible Person and the Authorized Representative.

v. That is retained by the HERS Provider to which all compliance documents are submitted for the building to which the Certificate of Installation documentation pertains.

vi. That is maintained in the HERS Provider Data Registry such that it is accessible for verification.

5. Conflict of Interest: The Commission is proposing to clarify and limit the ability of HERS Raters to pull permits on behalf of HVAC Installers. The regulations as proposed significantly disadvantages small HERS Rating Companies, by allowing large HERS Rating Companies to do this work through administrative staffers. The Commission needs to clarify how this new rule better protects the ratepayer, or homeowners, since it is prejudicial to small HERS Rating Companies.
6. Regulatory Alignment. The Commission is proposing moving the HERS Program from Title-20 to Title-24 in order to “consolidate the data access and gathering requirements.” (See CEC-400-2022-016-SD). However, the proposed regulations go far beyond the scope of consolidating data access requirements. The Commission is removing all regulatory oversight and operational constructs of field verification and diagnostic testing from Article 8

of Title 20. This proposal goes beyond data requirements, and raises several issues for small businesses.

- a. The changes force an inappropriate rulemaking timeline. Changes to the HERS Program could be adopted and enacted sooner than January 1, 2026 if changes are not tied to the 2025 Building Energy Efficiency Code. The timeline for the rulemaking could be expanded, engaging more stakeholder feedback, if the regulations remain within Title 20. This in turn could lead to enacting more timely consumer protection improvements prior to January 1, 2026.
- b. Code requirements relative to Raters, Data, and Quality Assurance, will be fragmented if adopted only into the 2025 Building Energy Efficiency Code. The 2016 and 2019 Building Energy Efficiency Codes are still in effect for all jurisdiction in California. Even now, the 2008 and 2013 Codes have legacy projects, with substantial AHJ support. The HERS Program and Program oversight should apply to all Building Energy Efficiency Standards equally, for consistency of enforcement, oversight, and to control operation costs for the businesses impacted. By moving the HERS Program to Title-24, the Commission may need to continue to enforce HERS Requirements for the 2016 and 2019 code separately.
- c. The Commission has struggled with continuity of staffing in the Standards Compliance Branch, the office in charge of enforcements of HERS Providers. There has been a multitude of branch/office managers over the past ten years, with several of the managers requiring extended leaves of absence, and periods of vacancies between managers. Consolidation of the HERS Program under Title-24 is premature since there has been inconsistent leadership within the Standards Compliance Branch to understand and oversee the program.

The investment by HERS Providers and HERS Rating Companies to support the Building Energy Efficiency Standards is significant and needs to be better understood before moving the program to a code section that is frequently amended. Removal of the HERS Program from the Title 20, section 1670, et seq. and incorporation into Title-24, puts all stakeholders at risk of operational shifts based on inconsistent staffing changes at the Commission. Changing the building codes on a triennial basis to improve energy efficiency is *very different* than changing the operational rules and requirements for an entire industry that supports enforcement of the building code. Regulations for HERS Providers and HERS Raters should have some assurance of reliability of operational rules given. (Note: The HERS Program is very different than the Acceptance Testing Technician Program relative to investments required by

stakeholders, and constraints on business. This difference should be discussed if the Commission is trying to make HERS match the ATTCP program.)

7. Data Access. The Commission needs access to reliable data. Access to reliable data will help with oversight of the Quality Assurance Program and will help achieve the consumer protection objectives identified in this rulemaking. Access to reliable data will also help with the development of the Building Energy Efficiency Standards. CalCERTS agrees this should be a priority in this rulemaking.
  - a. The Commission should revise the data retrieval regulations and remove the Report Generator from the HERS Program. The Commission introduced the use of the Report Generator as a mechanism to validate and capture data. However, the Commission has never used the Report Generator to retrieve data. With changes under this rulemaking, CalCERTS recommends that HERS Providers be required to validate data against the Commission’s schemas and pseudo code. A requirement on the HERS Providers to match the functionality of the Report Generator could be easily tested and verified by Commission Staff as part of approval and through ongoing oversight of the program. This approval and testing process is already established. This single change, or removing the Report Generator, would significantly reduce costs to the Commission, reduce the workload of the Building Standards Branch, and remove the impediments to the program caused by malfunction of the Report Generator.
  - b. The Commission should build the document repository that would allow the Commission to retrieve and analyze data from the HERS Providers. In the 2022 Code, HERS Providers are required to transmit Compliance Registration Packages to the Commission. (See Joint Appendix JA7 – Data Registry Requirements) The Commission building a mechanism to receive and analyze compliance data will help achieve most of the objectives of this proposed rulemaking. By capturing the data, the Commission can better support development of future Building Energy Efficiency Standards and protect consumers.

8. Data Analysis: The Commission relies on Investigation Report Number 2-06, TN 246535 to support the rulemaking. (The Commission must support rulemakings with reliable studies, reports, and documents. Government Code 11346.2(b)) CalCERTS recommends the Commission bring in more experts from the Building Standards Branch and more Subject Matter Experts to assist with the data analysis. The generalization in Report 2-06 about data may be misguided.

Although the data in the Report Number 2-06 is from the CHEERS Registry, and not CalCERTS, CalCERTS asked a Subject Matter Expert (SME) to review the Commission's findings. Below is a summary of the SME's feedback:

"The Commission findings and the feedback indicated the author of the report may be not fully aware of the ins and outs of HERS rating and is jumping to conclusions that may be a bit out of focus or misdirected.

General Notes:

- There is no indication if these projects were in a sampling group or not. I "assume" that they are not sampled groups because the CF2Rs must first be completed by the installing contractor prior to the CF3Rs, and the non-sampled units would indicate that they are not tested as a part of a group sample. Thus, if the report were to cover sample groups, the vast number of forms investigated would not have "identical measurements" as the report indicates. On the other hand, if group sampling is involved, the measurements would differ from the CF2R and the "tested" CF3R. Thus, the CEC report must surely indicate that only non-sampled dwelling units were investigated.
- For non-sampled dwelling units, the HERS Rater is allowed to test for the CF2Rs, and if so, the expectation would be that the numbers would obviously be identical on the CF3Rs. The crux of the CEC report appears to be suspicious of "identical measurements" when, in fact, this would be a common practice. As a Rater, I always completed the CF2Rs for non-sampled dwelling units as a valuable service to the installer, and a Signature Authorization was on file. I also had the installer present during most verifications so that any failures could be identified and corrections could be made on the spot. The HERS Rater is obviously responsible for the results of the CF3R regardless of who tests the CF2R.

- For non-sampled dwelling units, the CF2R is insignificant in that the CF3R is the document that determines pass or fails. It never made sense to me for the installer to have to do a duct leakage test on a non-sampled unit and then have a HERS Rater duplicate the same test. So even if the CF2R was fraudulent, the CF3R would report the accurate measurements.
- For sample groups, the installer must test and complete the CF2Rs, thus there would not be "identical measurements."
- Section 10-103(a)3C allows the "Authorized Representative" the power to "submit" the Certificate of Installation.
- RA2.5.1 states: HERS Raters or other authorized users of the HERS Provider data registry may provide documentation author support to facilitate the submittal of the Certificate of Installation information to the HERS Provider data registry on behalf of the builder or the builder's subcontractor when such facilitation has been authorized by the builder or subcontractor.

Findings of Fact:

- *"Only 32 registration numbers recorded a different actual duct leakage value between the 2R and 3R."*
  - Not surprising. The CEC Report implies suspicion. However, this is not a surprising find.
- *"A Home Energy Rating System (HERS) rater company advertises CF2R testing services that include inputting data into the CF2R (see Appendix A)."*
  - The CEC report implies that this would be illegal. However, Section 10-103(a)3C and RA2.5.1 allow the "Authorized Representative" the power to "submit" the Certificate of Installation.
- *"Only 42 registration numbers actually measured the system airflow to determine the maximum duct leakage allowed."*
  - Not surprising. This is typical practice. Actual measured airflow could be best used if a "new" system had a high-airflow design, but regardless, the cooling method is most common and easy to comply with. The heating method is used for heating-only systems, or when the cooling system fails and the heating system is oversized in comparison, which is not an unusual design in California. Actual measured airflow is last resort, but when you are measuring it anyway because of a MCH-23, then you could use the measurement if needed-- it is rarely used, especially in alterations.
- *"A particular rater recorded almost half of their duct leakage tests as 1 cubic foot per minute (cfm) below the allowable value (this observation is an*

*instance in the larger analysis showing frequent discrete, whole values being recorded (see Appendix D))."*

- This type of activity is suspicious and should be investigated. This is one example of being able to perform Quality Assurance audits on a project from the desk that could be helpful.”

9. Commission Requirements. CalCERTS recommends with any changes to the HERS Program that the Commission promulgate regulations that improve the Commission’s complaint process relative to the HERS Regulations. Under current rules, complaints brought to the Commission alleging violations of the HERS Regulations must go through the 20 CCR 1230 process. (See 20 CCR 1675.) This process does not work for efficient oversight and enforcement. The Commission must be able to and willing to act against bad actors. Rules should be promulgated to identify the steps the Commission will take to enforce the rules, due process steps for fair investigations, and methods for redress if the Commission fails to act. The Commission used to host the list of decertified Raters on the CEC’s website along with a summary of all disciplinary measures from all Providers. The Commission actively participated in the oversight of the Quality Assurance Program and was engaged in the oversight of Providers, Rater discipline, and decertification. It is unclear why the Commission stopped these practices. The Commission has taken a far less decisive role in oversight of the HERS Program, despite CalCERTS’ requests for clarification and formal complaints issued for violations of 20 CCR 1670 et seq. New regulations under Title-20 and/or Title-24, should make clear the Commission’s process to address complaints to protect all stakeholders, ranging from HERS Providers, to HERS Raters, to homeowners and ratepayers. Without proper Commission oversight, new regulations will only add costs to the program without improving compliance.

Sincerely,

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