

DOCKETED

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Via CEC Docket 23-HERS-01

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Objections to 23-HERS-01 Rulemaking

On February 10, 2023, the California Energy Commission (Commission) commenced a formal rulemaking to amend Title 20, sections 1670-1675 of the California Code of Regulations. The filing started the official rulemaking process to change Title 20 and included the Proposed Regulatory Language (TN#248707) Initial Statement of Reasons (TN# 248708), Final Staff Report (TN #248709); and an Economic Impact Statement (TN #24812). Collectively, this rulemaking proposes to change what is commonly referred to as the HERS Regulations.

CalCERTS, Inc. (CalCERTS) is certified to operate under the HERS Regulations and is directly impacted as an interested party. All of CalCERTS' clients and HERS Raters are directly impacted by the proposed changes to the HERS Regulations. A conservative estimate, based solely on CalCERTS' data, is that the Title 20 Rulemaking will eliminate 1,896 active HERS Rating companies.

CalCERTS submits the following objections to the 23-HERS-01, Title 20 Rulemaking, and requests the Commission to join this rulemaking with its 22-BSTD-03 Field Verification and Diagnostic Testing prospective rulemaking. By joining the two rulemakings, the Commissions may be able to correct its substantial failure to comply with California's Administrative Procedures Act.¹

¹ The 23-HERS-01 rulemaking, will be referred to in these Objections as the "Title-20 Rulemaking." The 22-BSTD-03, Field Verification and Diagnostic Testing *prospective* rulemaking, will be referred to as the "Title-24 Rulemaking."

Summary of Objections

California’s Administrative Procedures Act (APA) requires agencies repealing or adopting regulations to allow affected parties to be heard on the merits of what is being proposed and enable “meaningful public participation” in the rulemaking process. (*Sims v. Department of Corrections & Rehabilitation*, (2013) 216 CA4th 1059.) An agency fails to comply with the requirements when the requirements are only perfunctorily applied. (*Id.*)

The Commission perfunctorily supports its Title-20 Rulemaking by citing to a possible future rulemaking as the basis for its action. The Commission attempts to address the APA requirements of *necessity* and *clarity* by citing to a proposed future rulemaking. The prospective rulemaking has no stakeholder consensus as to scope, terms, or impacts, and lacks the financial assessments required by law. (See 22-BTSD-03 Docket)

Within the Title-20 Rulemaking the Commission is proposing to remove an entire industry from California’s regulations and defers any assessment of that action to a later time under a separate rulemaking. Within the *Initial Statement of Reasons*, the Commission literally supports the necessity requirement by referencing something the Commission is “proposing” to do in the future and risks the livelihoods of thousands of small businesses in the interim. (See ISOR p.3 TN# 248708)

The Commission is required by the APA to assess the direct impacts of its proposed action on HERS Raters. (Gov. Code §§11346.3 and 11346.4.) The Commission, in this instance, *cannot* meet this requirement without joining the Title-20 Rulemaking with the potential Title-24 Rulemaking, for 22-BTSD-03 Title-24 Field Verification and Diagnostic Testing Rulemaking. (Herein after referred to as the Title-24 Rulemaking.)² It is the Title-24 Rulemaking that contains the information about what may transpire if the Commission moves forward with reworking the HERS Regulations.

Without joining these proceedings, affected parties are precluded from the rights and protections intended by the APA. As proposed within the Title-20 Rulemaking file, the Commission has not met the requirements under the APA, nor has it sought to address the *spirit or intent* of the rulemaking process.³ Quite simply, the Title-20 Rulemaking kills an entire industry without any impact analysis whatsoever. The Commission must correct the substantial failure to comply with the APA requirements.⁴

² Please note that although these objections refer a Title-24 Rulemaking, the process is still only in the information gathering stages.

³ A fair process would be to amend Title-20 subsequent to any changes into Title-24, so that the HERS Program is protected, and stakeholders can understand what has been adopted to protect HERS Raters prior to the program being removed from regulations.

⁴ Commission Staff have informally cited to the implementation date of January 1, 2026, as the basis for the incongruent rulemaking processes proposed for Title-20. The implication is that HERS Rater and HERS Rating

Objection #1: Proposed Action Not Support by Rulemaking File

The Repeal of the FV&DT Proposed Language wholly eliminates the entire HERS Rater Program for HERS Raters performing Title-24 verifications. (“*Proposed Language*” See TN # 248707.) The redlines remove an entire industry from regulations. The industry that is being eliminated has partnered with the Commission and with Building Departments for close to two decades to help enforce California’s Energy Code. The HERS Program for code compliance must not be removed from regulations without the proper process and the analysis required by law. (Gov. Code §11346.2) Proper safeguards must also be adopted to prevent harm to the thousands of small businesses impacted. (See Gov. Code §11346.3, Cal. Admin. Code tit. 1, § 4.)

The *Proposed Language* also removes select reference manuals that are outside the scope of FV&DT program but that are nonetheless redlined from the regulations. The Commission does not address these redlines directly. (See as example, ACM manual on p.4 of *the Proposed Language*, TN #248707)

The *Proposed Language* will be considered *invalid* upon review under the APA, since the rulemaking file is incomplete. (Gov. Code §11349.3; *Sims v. Department of Corrections & Rehabilitation*, (2013) 216 CA4th 1059.) The Commission should address these issues now, rather than wait for the Office of Administrative Law’s review.

Objection #2: ISOR is Not Valid

Within the *Initial Statement of Reasons*, the Commission supports the rulemaking by stating that the changes are needed to provide clarity to the marketplace, and to reduce duplication of inconsistent requirements. (“ISOR” TN# 248708.)

With respect to “clarity,” the Commission has not proven, or even offered proof, that there is confusion in the marketplace regarding the HERS Program. The HERS Program supports two types of rating programs and has done so for years. Hundreds of HERS Rating businesses are successfully operating in the marketplace. These businesses use the name and nomenclature of HERS Raters and offer one or both of the types of rating services. If the Commission is going to premise the necessity of the rulemaking on the need for “clarity”, the Commission is required to

Companies will have plenty of time to adjust to whatever new rules are adopted under the Title-24 rulemaking. This basis is flawed. First, there is **no guarantee** there will be a successful rulemaking under the Title-24 process. Second, there is **no precedent** under the APA for the implementation date of a regulation to remove the procedural requirements and safeguards required when adopting a regulation.

support its premise with evidence and information. (Gov. Code S11346.2(b)(3).)⁵ This basis without support appears to be conjecture.

With respect to reconciling the regulations, the Commission is attempting to cleanup regulations that have not yet been adopted. The Commission is not proposing to cut-and-paste the revoked regulations from Title-20 into Title-24. Rather, the Commission is proposing to rewrite and redesign the entire HERS Program within the Title-24 rulemaking. The Commission has proposed more than forty pages of new regulatory language. The Commission cannot expect the public to understand the implications of removing the HERS Rater Program from Title-20, and comment on this process, without being clear about what will be adopted in its place.

To date, the Commission has proposed changes to the HERS Program that range from renaming the industry, to placing limitations on a Rater's ability to work, to new oversight, training and reporting requirements. (See 22-BSTD-03 TN # 246542.) The scope of the Commission's proposed changes are broad and impact thousands of businesses, *all* California ratepayers, and trigger costs yet to be quantified. Since the proposals are still in development, the Commission cannot use a prospective rulemaking as its basis to meet the standard for necessity under the APA rules for the Title-20 Rulemaking.⁶

Given the deficiencies in the ISOR, the ISOR fails to meet the requirements under the APA. (Gov. Code §11346.4)

Objection #3: Economic Impact Assessment is False

With the *Economic Impact Assessment* of the ISOR, the Commission indicates there will be no economic impacts or impacts to businesses. (See ISOR p.7) This statement is false. This rulemaking eliminates an entire industry from regulations, impacting thousands of businesses, and impacting all ratepayers in California.⁷ A simple calculation of the number of field

⁵ CalCERTS has approximately 1,896 registered HERS Rating companies that are identified as active in its data Registry. This number *excludes* businesses no longer active in the marketplace or that have moved to other HERS Providers. For these companies, there does not appear to be any consumer confusion since they are able to conduct their businesses effectively. The Commission may have other reasons for separating the two types of ratings performed by HERS Raters; however, confusion in the marketplace as a justification is not supported by any evidence in the rulemaking file or by the robustness of the industry.

⁶ The Commission has not documented any administrative difficulties in administering the HERS Program under Title-20. Rather, the Commission has generically identified some concerns relative to reporting and quality assurance that have been addressed in comments to the docket under 22-BSTD-03. These issues could be addressed within Title-20 and the existing HERS Program.

⁷ The Commission is proposing changes to the HERS Program that will significantly diminish inspections of existing homes. Inspections of HVAC changeouts may become nonexistent. As a result, there will be less energy savings under the Energy Code due to the lack of enforcement of the code. The Commission has not quantified these impacts. Given California's issues with grid stability during peak hours when there is a high demand for energy, less energy savings means all California ratepayers will be impacted.

verification and diagnostic testing ratings a year, times the average cost of those ratings, has the impacts well in excess of the fifty-million-dollar threshold of a major rulemaking.

The Commission citing to unadopted and prospective rules to support its conclusion that there is no economic impact is unprecedented, and wrong. The *Economic Impact Assessment* must be rejected as incomplete. (Gov. Code S11346.3(a)(3).)

In comments to the 22-BTSD-03 docket, for the prospective Title-24 rulemaking, there is evidence the economic impacts of proposed changes to the HERS Program will trigger a major regulation assessment. The economic impacts of proposed Title-24 rulemaking are directly relevant to the Title-20 rulemaking.

Given the deficiencies in the *Economic Impact Assessment* of the ISOR, the ISOR fails to meet the requirements of the APA.

Objection #4: Form 399 – Economic and Fiscal Impact Statement is False

All HERS Providers, HERS Raters, HERS Rating Companies, residential builders, HVAC contractors, and residential construction trades will be financially impacted by the rulemaking. There are no Whole House HERS Raters that are not also Field Verification and Diagnostic Testing Raters.

All residential homeowners, and California ratepayers, will also be impacted by the proposed actions.

The Form 399 within the rulemaking file needs to be revised to reflect these economic impacts of the Title-20 Rulemaking.

Objection #5: Unfair Process

If the Commission is allowed to eliminate the Field Verification and Diagnostic Testing (FV&DT) portions of the HERS Program from regulations without first completing the process of reworking the FV&DT Program into Title-24, the rulemaking process is gutted of its meaning and purpose. Industry stakeholders are held hostage because their businesses and livelihoods have already been eliminated within Title-20. For example, within the Commission's proposals for the Title-24 Rulemaking a reasonable alternative identified by Commission staff is "Do Nothing." (See *Draft Staff Report* p. 39 TN. #246827). This alternative cannot be vetted and reviewed if the HERS Program for FV&DT has already been removed from regulations.

Proceeding with the Title-20 Rulemaking out of syncopation with the Title-24 Rulemaking, or subsequent to the Title-24 Rulemaking, is severely prejudicial to the industry being regulated. The existing schedule allows for an unstable and unfair rulemaking process, with the potential of HERS Rating Companies agreeing to anything in the Title-24 Rulemaking to simply save their businesses. In addition, and importantly, the Commission has proposed an accelerated timeline for adoption of the Title-24 Rulemaking that is not proportionate with scope of the new rules being proposed. The proposed process is unfair and prejudicial to all stakeholders and can be easily corrected.

Thank you for your consideration of these objections.

A handwritten signature in black ink, appearing to read "Shelby M. Gatlin", with a long horizontal line extending to the right.

Shelby M. Gatlin
Chief Operating Officer