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Filer:	Jennifer Brazell
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Via CEC Docket 22-BSTD-01

Mr. Drew Bohan
Executive Director
California Energy Commission
1516 Ninth Street, MS-39
Sacramento, CA 95814
Drew.bohan@energy.ca.gov

RE: CalCERTS Comments on pre-rulemaking draft Express Terms for the 2025 Update

CalCERTS submits this comment as an initial and immediate response to the pre-rulemaking draft Express Terms for the 2025 Update. TN # 252915. We believe there is a mistake in the proposed regulations based on our work with Commission Staff.

The staff proposal for ECC Providers to remedy flawed field verification and diagnostic testing must be removed from the draft language. (See Gov. Code §11346.2).

Proposed section 10-103.3 (d)(5)(D) Remedy for Flawed Field Verification and Diagnostic Tests, was discussed with Commission staff and HERS Providers at the July 12, 2023, meeting. There should be a transcript of this meeting on file in the rulemaking.

Proposed section 10-103.3(d)(5)(D) was included in the redesigned Field Verification and Diagnostic Testing Program, through the recommendation of a single CEC staff engineer. This was discussed in the July 12, 2023, meeting. There was no analysis of this proposal to justify its suggestion or adoption. This was a “we think this could be a good idea” by staff.

Analysis conducted by HERS Providers revealed there is no paradigm for this type of liability and as a result no equivalent insurance coverage. There are no comparable cost projections from similar industries for reference since this proposal is completely novel and unconventional.

Section 10-103.3(d)(5)(D) requires ECC Providers to remedy any flawed field verification and diagnostic testing. This passes the liability of the entire FV&DT program to ECC Providers for all the work of all certified ECC Raters. This cannot be correct.

ECC Raters enter into contracts or service agreements to conduct testing for consumers. Those agreements allow the consumer to get a remedy for flawed testing. There *is* a relationship between the consumer and the ECC Rater or ECC Rater Company, but not the ECC Provider.

There is a remedy available via those contracts for consumers. The consumer is protected. The consumer has a remedy. Imposing an additional remedy to the consumer, and cost to businesses, must be supported through the rulemaking requirement. (Government Code §11346.2(b)(5)) It is not supported. (See 22-BSTD-03 TN#252904.) It will substantially hurt business, increasing operating costs on every test registered.

With this proposed rule, the CEC is creating a wholly new entitlement to the consumer. The ECC Provider did not set the scope of work, the costs, or the specifications between the consumer and the ECC Rater. Yet, the proposed regulations shift the responsibility to the ECC Provider when there is an issue with the testing. This is unusual. It is highly unconventional to impose a third party into correcting the contract of another. However, it is *not* unconventional for a training organization to discipline and oversee its members to protect consumers. This staff suggestion conflates these two ideas.

ECC Providers certify ECC Raters. This is very similar to many other skilled trade organizations that have accredited training and certification programs. For the FV&DT Program, the CEC is accrediting the training and certification administered by the ECC Providers. ECC Providers are responsible for maintaining the credibility of the certification by ensuring ECC Raters are properly trained and provide truthful, accurate, and complete field verification and diagnostic testing.

The proposed regulations would make ECC Providers insurers of every job ever conducted by every Rater throughout the state. ECC Providers are being asked to correct the work of ECC Raters that make mistakes and then to issue corrected work at no cost to the consumer. This is an incredibly high burden being placed on small companies with limited staff and resources. There is no cost analysis to support this novel idea.

There is no paradigm of a training and certifying organization being held responsible for reissuing the work of its members. This would be the equivalent of requiring the California Board of Accountancy to correct tax returns for anyone who received a flawed tax return from a CPA. Or requiring the Contractors State Licensing Board to fix any projects improperly performed by a licensed contractor. This mandate does not mirror any reasonable industry standard for organizations that train and certify skilled workers. This was discussed in the July 12, 2023, workshop meeting. Please see the meeting recording and transcripts.

The proposed regulations attempt to allow ECC Providers to pay for the mandate by allowing an ECC Provider to go after ECC Raters for the costs of reissuing the flawed testing. (See 10-103.3(d)(5)(D)(iv)) As written, it is an impossible mandate. ECC Providers are not set up to be collection agencies. Once an ECC Rater or ECC Company is disciplined the ECC Provider has zero leverage to collect reimbursement. At best, an ECC Provider could require reimbursement via contract but then would need the courts to enforce it.

There is no information in the Staff Report to suggest if this is even feasible. Common sense says it is not. How would an ECC Provider be able to collect costs from an ECC Rater that is likely suspended or decertified from issuing the flawed testing results?

There is no cost assessment or estimate for the risks associated with remedying flawed testing. At a minimum, this would add a cost to every verification and test, increasing program costs in the millions. Commissioner McAllister has provided direct guidance to CEC staff to not substantially increase program costs, especially without a rational basis.

There is also no information in the regulations or Staff Report on how to remedy flawed testing that cannot be duplicated due to changed conditions or impossibility. Most testing is required to be completed in conjunction with other time-sensitive conditions for it to serve its intended purpose. In most instances, the ECC Provider won't be able to match conditions. The CEC will need to arbitrate what is a satisfactory remedy on a case-by-case basis, which in turn will add substantial costs to the program.


Most importantly, the proposed regulation **disincentivizes** ECC Providers from working to find flawed field verification and diagnostic testing to protect the FV&DT program. If the ECC Provider is directly responsible for incurring costs to correct the work of ECC Raters, why would an ECC Provider want to find and identify flawed tests? (There is a reason training and certifying bodies are focused on the competency of their members.) The CEC should empower and incentivize ECC Providers to conduct robust QA. ECC Providers should want to find and mentor ECC Raters who need support. And, ECC Providers should want to decertify ECC Raters working unethically. As written the proposed regulations would encourage ECC Providers to always favor Raters over consumers, which is the opposite of the intentions identified in the Staff Report.


Based on conversations with CEC staff over the course of the last several months on the FV&DT Rulemaking, CalCERTS believes that section 10-103.3(d)(5)(D) was included in the draft express terms by mistake. However, if it was not a mistake, the section must be removed for failure to meet the standards under the California Administrative Procedures Act, for adoption.

Sincerely,




Shelby Gatlin
Chief Operating Officer

 (916) 805-5240

 www.calcerts.com

 shelby@calcerts.com

 31 Natoma, Suite 120
Folsom, CA 95630