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STATE OF CALIFORNIA
CALIFORNIA ENERGY COMMISSION

In the Matter of :

Complaint Against and Request for
Investigation of CalCERTS, Inc.

Docket No. 12-CAI-01

**PREHEARING CONFERENCE STATEMENT
OF
ERIK HOOVER AND PATRICK DAVIS,
COMPLAINANTS**

May 4, 2012

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STATE OF CALIFORNIA
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On April 20, 2012, the Commission issued a Notice of Prehearing Conference and Evidentiary Hearing, directing the parties to serve and file a Prehearing Conference Statement. Pursuant to the Notice, Complainants Erik Hoover and Patrick Davis submit the following information requested by the Notice.

1. A summary of the legal and factual questions presented by the Complaint and Answer.

In December, 2011, Complainants Erik Hoover and Patrick Davis were notified by CalCERTS that their ability to work as HERS raters had been summarily suspended. Several weeks later, they were notified that they had been permanently decertified as HERS raters. Complainants filed a complaint alleging that the suspensions and decertifications were unlawful for two main reasons. First, because CalCERTS failed to comply with the quality assurance procedure outlined in the HERS regulations. Second, because CalCERTS failed to comply with the constitutional demands of due process. The following legal and factual questions will need to be addressed in order to resolve the complaint.

A. Is CalCERTS required to comply with the quality assurance procedure outlined in Title

20 § 1673 (i)(3)? Did it do so?

Title 20 § 1673 (i)(3)(C) states that if a rater's work fails to meet the criteria for truth, accuracy, or completeness, the Provider is required to report the quality assurance failure in the Provider's registry for a period of six months, and conduct additional quality assurance evaluations over a period of 12 months. Title 20 § 1673 (i)(3)(C). That CalCERTS failed to follow the prescribed procedure with Hoover and Davis is not disputed. CalCERTS has not thus far asserted that it is not required to comply with this regulation, and it has not disputed Complainants' assertion that it has not in fact complied. CalCERTS has provided no reasons purporting to justify its failure to comply.

Given that this claim has not been disputed or contradicted by CalCERTS, the Commission may answer this question now, without further fact finding or briefing.

In addition, Title 20 § 1673 (i)(3)(A) specifies that CalCERTS must "annually evaluate the greater of one rating, randomly selected or one percent of the Rater's past 12 month's total number of ratings (rounded up to the nearest whole number) for each measure tested by the Rater." Title 20 § 1673 (i)(3)(A). Has CalCERTS performed the required number of evaluations for Hoover and Davis? Would the timely and regular performance of these "quality assurance" evaluations have contributed to Complainants' ability to perform adequately as HERS raters?

Although CalCERTS has an express responsibility to follow these regulatory procedures, and its failure to do so provides a separate and distinct ground for relief, given that these regulations require that a particular process be applied to HERS raters like Hoover and Davis, CalCERTS failure to follow this process also has implications for constitutional due process requirements (see below). Given that the administration of these regulatory procedures is the responsibility of the Energy Commission, there are also due process concerns if the Energy Commission does not require that the procedures be followed as written.

B. Is CalCERTS Bound by the Constitutional Requirements of Due Process?

Although constitutional due process typically applies only to governmental actors, where sufficient entanglement between government and private persons exists, private persons will also be bound. *See, e.g.,* Adams v. Department of Motor Vehicles, 11 Cal.3d 146 (1974). Are there sufficient entanglements between CalCERTS and the State of California that procedural due process applies to the way CalCERTS disciplines HERS raters?

While strictly speaking this is a factual inquiry, many of the relevant facts come from the nature and structure of the HERS program, and can be determined with reference to the statute and regulations under which the program operates. Can sufficient entanglement be found in the fact that essentially all of CalCERTS' functions are expressly dictated by regulation, including accountability and regular reporting to the Energy Commission? Is CalCERTS' ability as a private company to control the occupancy of new homes a sufficient entanglement with government to justify the imposition of due process requirements? Is it significant that the HERS program is entirely a creation of government?

Apart from the inherent entanglements, are the State of California and CalCERTS otherwise entangled due to the way they interact to operate and implement the program? For example, has the Energy Commission been actively involved in decisions to decertify or otherwise discipline HERS raters? Does CalCERTS make recommendations about discipline to the Energy Commission, with the Energy Commission, or its staff making final decisions? Complainants do have reason to believe that the answer to each of these questions is, or has been, yes. Yet Complainants do not currently have access to information that enables them to readily answer these questions, because the information is in the possession of CalCERTS and Energy Commission employees who oversee the HERS program. Complainants have informally requested some of this information from CalCERTS, but the request was refused.

i. What Quality/Quantity of Process was Due?

Assuming due process applies to CalCERTS, the Commission must decide what quality/quantity of process was owing to Hoover and Davis. The U.S. Supreme Court has explained that

identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

a. What is the private interest?

If CalCERTS is bound by due process due to its entanglement with government, there is still a question as to whether Complainants have a private interest that is entitled to protection.

This involves both the factual question of what rights Hoover and Davis had prior to their suspension and decertification, and the legal question of whether those rights were “vested,” such that due process protects them. *See Bixby v. Pierno*, 481 P. 2d 242, 246 (1971).

Complainants’ contention is that they have vested rights both (i) to the continued use of their professional certification as HERS raters, and (ii) to meaningful quality assurance evaluation that can help them maintain high standards of performance. Both of these rights have been infringed.

Whether these rights exist involves both questions of fact and law. Were Hoover and Davis in fact certified as HERS raters? Does their power to work in their chosen profession and function as HERS raters derive from a contract with CalCERTS, or does it derive from Public Resources Code section 25942, and the regulations that implement the statute? As certified HERS raters, are Hoover and Davis entitled to receive the quantity of quality assurance review specified in Title 20 § 1673 (i)(3)(A)? Was CalCERTS’ failure to perform the quantity of

quality assurance review required by the regulations in some measure responsible for Complainants' alleged performance failures?

A related question is whether the Commission's delegation to CalCERTS of some of its governmental power over the HERS program operates to change the nature of Hoover's and Davis' rights as HERS raters? In other words, we might presume that if the Energy Commission had chosen to administer the HERS program directly, Hoover and Davis would have vested rights. Does the Energy Commission's delegation of administrative functions to Providers like CalCERTS prevent any rights from vesting? This is a question of law.

b. What is the risk of an erroneous deprivation through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards?

Due process can be satisfied by a broad range of procedures, from the very informal, to the very strict. The Commission must decide what procedure was appropriate here.

Accordingly, it must examine the procedures used to suspend and decertify Hoover and Davis, and consider the extent to which such procedures risk the erroneous deprivation of their continued right to work. This requires a determination of the quality of the notice and hearing that was provided to Hoover and Davis.

- Were Hoover and Davis given notice and an opportunity for a hearing prior to the time their ability to work was interfered with?
- If not, was there some urgency that justified interfering with their ability to work prior to the time notice and an opportunity for a hearing was provided?
- Did the notice fairly apprise them of the nature of the allegations made against them, and the consequences that could be imposed upon them?
- Did it provide them with enough information to participate meaningfully in defending themselves?
- Was the hearing provided to Hoover and Davis objective and impartial?
- Was it on the record?

- Did Hoover and Davis have an opportunity to confront witnesses who accuse them?
- Did Hoover and Davis have a meaningful opportunity to challenge the factual conclusions reached by the QA rater?
- Were the decisions made by CalCERTS based upon objective evidence, or upon the subjective opinions of CalCERTS employees?
- Were the decisions based upon extrinsic evidence not made available to Hoover and Davis?
- Did CalCERTS apply objective standards in reaching these decisions?
- If so, what are those standards?
- Did Hoover and Davis have a meaningful opportunity to appeal the decisions before some sort of neutral tribunal?

Hoover and Davis are prepared to testify about *their* experience with the CalCERTS quality assurance process. But Hoover and Davis do not currently have access to information that enables them to readily determine, for example, whether CalCERTS' decisions were based upon objective evidence or subjective opinions, whether CalCERTS applied objective standards, or even whether objective standards exist, etc. For example, CalCERTS has asserted that Hoover's and Davis' alleged failures were "not rectifiable." Complainants Exhibits 6, 7. Hoover and Davis have informally requested that CalCERTS provide facts that support this and other conclusions, but that request has been refused. Complainants Exhibits 14, 15. CalCERTS has published a document entitled "Quality Assurance Program," (see Complainants' Exhibit 5) but it describes only general policies. It does not describe the particular procedures that CalCERTS follows, and it does not describe the standards CalCERTS applies when it decides what discipline is appropriate.

Are the procedures employed by CalCERTS likely to lead to an erroneous deprivation of Complainants' right to work? Or, in the case of CalCERTS' failure to perform the number of quality assurance reviews required under Title 20 § 1673 (i)(3)(A), is CalCERTS' failure to perform regular and meaningful quality assurance review likely to lead to an erroneous

deprivation of Complainants' right to work?

Given that the Energy Commission's regulations specify the process that is required in the event of quality assurance failures, is the Commission's failure to enforce the quality assurance procedure described in Title 20 § 1673 (i)(3)(C) a sufficient departure from due process to entitle Hoover and Davis to relief?

Once the Commission has determined what procedural safeguards were provided – or not provided – to Hoover and Davis, the Commission must also decide what value additional procedural safeguards would provide.

c. What are CalCERTS' and the Government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail?

Ultimately the Energy Commission must decide whether the value of additional procedural safeguards is worth the additional cost. This requires the identification of those costs, including fiscal and administrative burdens. CalCERTS and the Energy Commission are best positioned to describe the fiscal and administrative burdens they would face if additional procedural protections were required. But for Complainants' part, Hoover and Davis aren't asking for much. CalCERTS should actually perform the quality assurance review that the regulations demand so that raters get regular and meaningful feedback and can fix bad practices before they become habits. It should perform quality assurance review according to written standards that everyone can understand. If someone complains about a HERS rater, give the rater a copy of the complaint. If QA evaluation turns up conflicting data, give the HERS raters the data, so they can try to figure out what went wrong. *Before* interfering with a HERS rater's ability to earn a living, give the rater a meaningful opportunity to defend himself (rather than an interrogation). In order to make sure that mistakes aren't made in imposing such severe discipline as this, provide some sort of opportunity to appeal. It wouldn't take much to comply with due process. But CalCERTS did none of these things.

2. *The identity of each witness sponsored by the party; a brief summary of the testimony to be offered by each witness; qualifications of each witness; and the time required to present direct testimony by each witness.*

a. Erik Hoover – Mr. Hoover was a certified HERS rater who was suspended and decertified by CalCERTS. He will testify that he had been a certified HERS rater since 2008, that he performed approximately 2,707 ratings during that period, and that he received zero quality assurance evaluations prior to being notified of four evaluations in December 2011. He will also describe from his perspective the process of his suspension and decertification. Direct examination estimate: 30 minutes.

b. Patrick Davis – Mr. Davis was a certified HERS rater who was suspended and decertified by CalCERTS. He will testify that he had been a certified HERS rater since 2007, that he performed approximately 4,730 ratings during that period, and that he received zero quality assurance evaluations prior to being notified of several evaluations in December 2011. He will also describe from his perspective the process of his suspension and decertification. Direct examination estimate: 30 minutes.

c. John Flores – Mr. Flores is a certified HERS rater, and the owner and manager of JaaR Sales, Inc. which operates under the trade name Valley Duct Testing. Valley Duct Testing is the employer of Complainants Erik Hoover and Patrick Davis. Mr. Flores has evaluated the quality assurance reviews done for Hoover, Davis, and three other Valley Duct Testing employees, and will testify about errors and mistakes made by CalCERTS and by CalCERTS's QA raters in conducting those reviews. He will further testify about practices and procedures followed at Valley Duct Testing. Direct examination estimate: 30 minutes.

d. Other witnesses – As noted, Complainants do not have access to relevant information held by CalCERTS and the Energy Commission. For this reason Complainants reserve the right to thoroughly examine witnesses put forth by CalCERTS and the Energy Commission in order to discover relevant information.

3. *An exhibit list identifying exhibits and declarations that each party intends to offer into evidence, provided in the format attached to this notice. The Hearing Office can provide the parties with a Word version of the exhibit list template.*

Complainants' exhibit list is attached hereto as Attachment 1.

4. *Proposals for post-hearing briefing deadlines.*

Complainants propose that parties be permitted to submit opening briefs within seven (7) days after the conclusion of the evidentiary hearing, and reply briefs within fourteen (14) days after the conclusion of the evidentiary hearing.

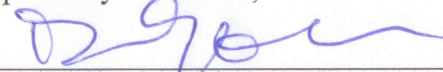
Should the Committee issue a proposed decision, Complainants request the opportunity to provide written and oral submissions as permitted under Section 1236 of the Commission's regulations prior to the Commission's Decision on the matter. Complainants propose that parties be permitted to submit written briefs within fourteen (14) days after the issuance of a proposed decision by the Committee. Respondent proposes that parties be permitted to address the Commission prior to the adoption of a decision by the Commission.

5. *Comments, if any, on the Committee's possible use of informal hearing procedures as described below.*

At this time, Complainants do not object to the use of informal hearing procedures. However, Complainants reserve the right to object and request that the Committee convert any informal hearing into a formal hearing.

Dated: May 3, 2012

Respectfully submitted,



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***IN THE MATTER OF
COMPLAINT AGAINST AND REQUEST
FOR INVESTIGATION OF CALCERTS, INC.***

**Docket No. 12-CAI-01
(EST. 3/23/12)**

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DECLARATION OF SERVICE

I, Kristen Haddock, declare that on May 3, 2012, I served and filed copies of the attached Prehearing Conference Statement of Erik Hoover and Patrick Davis, dated May 3, 2012. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at:
<http://www.energy.ca.gov/HERS/12-cai-01/index.html>.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

(Check all that Apply)

For Service to all other parties:

☐ Served electronically to all e-mail addresses on the Proof of Service list;

☒ Served by delivering on this date, either personally, or for mailing with the U.S. Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "e-mail preferred." Due to the size of this document, CD copies have been delivered to all parties.

AND

For filing with the Docket unit at the Energy Commission:

☐ by sending an electronic copy to the e-mail address below (preferred method); **OR**

☒ by delivering one CD (per the Docket office's request) to

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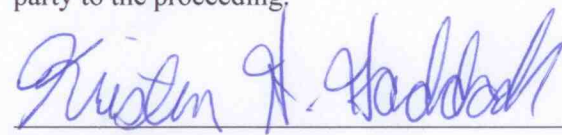
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and Correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.



Kristen H. Haddock

5/3/2012

Date

Attachment 1



Docket Number: 12-CAI-01

Date: _____

Project Name: Complaint Against and Request for Investigation of CalCERTS, Inc.

COMPLAINANTS' TENTATIVE EXHIBIT LIST

Exhibit	Brief Description	Stipulation	Offered	Admitted	Refused	CEC Use Only
Complainants' Exhibits						
1	Complaint Against and Request for Investigation of CalCERTS, Inc.; dated February 13, 2012, and docketed on February 13, 2012; Docket No. 12-CAI-OI					
2	Answer of CalCERTS, Inc. to Complaint and Request for Investigation; dated March 26, 2012.					
3	CalCERTS e-mail to Erik Hoover, dated December 16, 2011					
4	CalCERTS e-mail to Patrick Davis, dated December 16, 2011					
5.	CalCERTS Quality Assurance Program, dated August 22, 2003					
6.	CalCERTS decertification letter to Hoover, dated January 30, 2012					
7.	CalCERTS decertification letter to Davis, dated January 30, 2012					
8.	CalCERTS QA Summary Report, Erik Hoover, undated.					
9.	CalCERTS QA Summary Report, Patrick Davis, undated					
10.	CalCERTS QA Action Report, Erik Hoover, dated January 17, 2012					

