BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of:	DOCKET NO. 12-CAI-01
Complaint and Request for Investigation of CalCERTS, Inc.	

CALCERTS, INC.'S POST EVIDENTIARY HEARING BRIEF

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June 5, 2012

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CalCERTS, Inc. ("CalCERTS") submits the following as its response to this Committee's May 18, 2012 Order Directing Parties to Submit Post Hearing Briefs relative to Eric Hoover and Patrick Davis' (collectively, the "Petitioners") Complaint and Request for Investigation.

I. INTRODUCTION

CalCERTS decertified Eric Hoover and Patrick Davis as HERS Raters because they submitted clearly fraudulent rating data. There is absolutely *no* evidence in these proceedings to the contrary. As the Committee may recall, neither Mr. Hoover, nor Mr. Davis offered any testimony to suggest, even circumstantially, that the materially false ratings were the result of "inadvertent mistakes." The one document that spoke to the Petitioners defense, written by their employer against whom a complaint has been filed for similar conduct, was rightfully withdrawn as evidence. Against this backdrop, the Petitioners ask the California Energy Commission ("Commission") to revoke their decertifications on the basis they were not provided with sufficient process. In order for the Commission to accede to this request, and to avoid reversal, it's decision must be justified by substantial evidence. However, in this case there is *no* evidence that justifies such a result. Equally importantly, the relief sought is not justified under the law. In short, CalCERTS is not a state actor. Thus, the Petitioners were not entitled to constitutional due process. And, finally, the decertifications were the result of a fair procedure—one in which neither of the Petitioners ever offered any evidence to suggest that their ratings were anything but fraudulent. The Committee should deny the Petitioners' request for relief.

II. LEGAL ISSUES AND ANALYSIS

A. The Commission's Decision Must be Supported by Substantial Evidence

CalCERTS responds to the specific questions posed by the Committee in the sections that follow. Preliminarily, and for context, CalCERTS notes that in addressing the issues presented in the Petitioners' Complaint, the Commission must state the factual and legal basis for the decision ultimately made. (Cal. Gov. Code. §§ 1425.10(a)(6), 11425.50(a).) Additionally, the Commission's decision must be supported by substantial evidence. (*Mohilef v. Janovic*i, (2nd Dist.1996) 51 Cal. App. 4th 267, 306 ("[T]rial court considers only whether the agency's findings are supported by substantial evidence in light of the whole record.")) "Substantial evidence" is evidence that is of "ponderable legal significance," and it must be "reasonable in nature, credible and of solid value." (*Pennel v. Pond Union School Dist*., (5th Dist.1973) 29 Cal. App. 3d 832, 837.) A decision which is not supported by substantial evidence is an abuse of discretion, subject to review pursuant to California Code of Civil Procedure section 1095.4. And, this standard of review poses a particular problem for the Petitioners because it cannot support a decision by this Commission consistent with the Petitioners' request.

B. CalCERTS is Not a "State Actor"

It is only "in rare circumstances" that a private entity may "be viewed as a 'state actor.'" (*Harvey v. Harvey*, (11th Cir.1992) 949 F. 2d 1127, 1130; *see also Lugar v. Edmondson Oil Co.* (1982) 457 U.S. 922, 936.) In fact, private entities are presumed *not* to be state actors. (*See Sutton v. Providence St. Joseph Med. Ctr.*, (9th Cir. 1999) 192 F. 3d 826, 835 ("When addressing whether a private party acted under color of law, we therefore start with the presumption that private conduct does not constitute governmental action.")) The presumption may be rebutted and the private entity "may become a state actor by conspiring with a state official, or by engaging in joint activity with state officials" or, "by becoming so closely related to the State that the person's actions can be said to be those of the State itself" or the actions are "practically compelled by the State." (*Price v. State of Hawaii* (9th Cir. 1991) 939 F. 2d 702, 708.) [1]

[1] The four tests commonly used to determine whether a private party is a state actor are discussed in greater detail in CalCERTS' Answer to the Complaint, submitted to this Commission on March 26, 2011, for Dkt. No. 12-CAI-01, hereinafter "CalCERTS' Answer." (*See* CalCERTS' Answer at § III(C) (There are four tests commonly used to determine whether a private party is a state actor "(1) public function, (2) joint action, (3) governmental compulsion or coercion, and (4) governmental nexus." (*Sutton*, s*upra*, 192 F.3d. at pp. 835-836.)) CalCERTS' Answer to the Complaint is incorporated by reference in this brief.

CalCERTS is not a government or an instrumentality of government. Rather, it is a private corporation, functioning as a HERS Provider. (*See* Transcript from May 11, 2012 Evidentiary Hearing ("Transcript") at pp. 116–117.) The Petitioners have offered *no* evidence of conspiracy or entanglement between the Commission and CalCERTS to refute the presumption against state action. (*Lugar, supra,* 457 U.S. at 939, ("Action by a private party pursuant to [a] statute, without something more, was not sufficient to justify a characterization of that party as a 'state actor.'") Commission Staff reported that they did *not* compel the decertifications of Mr. Hoover and Mr. Davis. (Transcript at pp. 152 ln. 11–21; p. 155 ln. 1–15; 206–210; 216–221; 221 ln. 20–24.) Commission Staff also did *not* conspire with CalCERTS during the decertification process. (*Id.*) There is no evidence to indicate that CalCERTS' actions are attributable to the state of California and overcome the presumption against state action. (Transcript at pp. 225–227.)[2] Moreover, CalCERTS has produced substantial evidence to prove it is *not* a state actor.

First, the HERS Program was designed so that the role of Providers would be fulfilled by private entities. (Transcript at p. 217–218; *see also* 20 Cal. Code Regs.§1671 ("Provider means an organization that administers a home energy rating system in compliance with these regulations (referred to as a home energy rating service organization in Section 25942 of the Public Resources Code).")) Three organizations have applied for and received certification as Providers under section 1674 of Title 20; CHEERS, CalCERTS and CBPCA. Presently, CalCERTS competes with CBPCA for the training and certification of HERS Raters verifying Title 24 compliance for alterations. (Transcript at p. 155.) Prior to October 2010, CalCERTS competed with CHEERS for the training of certification of HERS Raters verifying Title 24 compliance of new construction.[3] (Transcript at p. 24 ln. 16–21.) There are no impediments to

[2] Question at p. 226 ln. 1 "are those things that are done really at the discretion of the provider without any oversight of the Energy Commission?" Answer from Mr. Holland at p. 226 ln. 13 "we require a rater agreement and a complaint response process to be presented to us... however; we are not – we are not given authority to tell them what's their rater agreement…we have no authority to tell them what's in that agreement." Answer from Mr. Pennington at p.227 ln. 13 "Commission does have expectations that there be a way that the rater agreements can be enforced and we expect in the application process for that to be explained. We don't – we don't really dictate how that's done."

[3] CHEERS has since declined recertification.

other organizations becoming Providers.[4] (Transcript at pp. 221–222; starting at p. 221 ln. 1,Q: "is there anything in the regulations that is preventing another Provider from petitioning for certification to compete with CalCERTS?" A: "No there are not. There are no restrictions on the number of HERS Providers that exist.") Contrary to Petitioners' contention, neither the Commission's certification of CalCERTS as a Provider, nor CHEERS' decision to withdraw as a Provider, can convert CalCERTS into a government actor. (*American Manufacturers Mutual Insurance Company v. Sullivan,* (1999) 526 U.S. 40, 52 ("Action taken by private entities with the mere approval or acquiescence of the State is not state action.") (Transcript at p. 10 ln. 4–12.)

Second, HERS Providers do in fact function as private entities. (Transcript at pp. 153–155; 155 ln. 18–25; 156 ln. 1–15; 225–227; *see also* Exh. 205.) Although reviewed by the Commission, CalCERTS is responsible for drafting its own rater agreements which include agreements that protect CalCERTS' business interests. (Transcript at pp.118–119; 225–227.) CalCERTS determines its own process for decertification. (Transcript at pp. 206–210; 225–227.) CalCERTS does not consult with the Commission regarding certification or decertification of individual raters. (Transcript at p. 119 ln. 16–20; 152 ln. 11–18; 206–210; 216–221.) Although CalCERTS must comply with the regulations governing Providers, the law is clear that compliance with statutes or regulations does not covert a private party into a state actor. (*See, Sutton, supra,* 192 F. 3d at 843; *Sullivan,* supra, 526 U.S. at 52.)

Third, Commission staff and counsel have made it abundantly clear that the Commission does not participate in rater discipline. (Transcript at pp. 206-210; 216-221; *see also* Exh. 205.) And, specific to this Complaint, the Commission played no role in the decertification of Mr. Hoover or Mr. Davis. (Transcript at pp. 152 ln. 11–21; 155 ln.1–15; 221 ln. 20–24.) CalCERTS did not involve the Commission during the decertification process; nor, did the Commission compel the decertifications. (Transcript at pp 152 ln. 11-21; 155 ln.1-15; 209-210; 221 ln. 20–24.) Whether or not CalCERTS could continue to certify Petitioners, warranting their ability to rate homes accurately and truthfully in light of their egregious misrepresentation of fact, was a decision exclusive to CalCERTS. (Transcript at pp. 150 ln. 8–15; 152–153; 161–162; *see also* Exh. 205.)

[4] The decision by CHEERS to stop operating as a HERS Provider, cannot convert CalCERTS into a state actor. The decertification of CHEERS was not addressed during this hearing; but the implications of the limited numbers of Providers have been raised by Petitioners.

In short, there is no evidence in the record to indicate state action on the part of CalCERTS. The HERS Program was specifically designed so that oversight of Raters would be conducted by private entities independent of the Commission. In application, the intent of the program has been realized. If the Commission desires a different structure, one that requires more collaboration between the Commission and Providers, the Commission must address those desires through formal-rulemaking pursuant to Government Code section 11342.60, and *not* through this complaint response process.

C. Petitioners Do Not Have Interests that Were Entitled to Procedural Due Process

The Constitutional protections of due process only apply where there is state action. State action requires two things: (1) the depravation of a right; (2) by a party appropriately characterized as a state actor. (*See American Manufacturers Mutual Insurance Company v. Sullivan* (1999) 526 U.S. 40, 50; *West v. Atkins*, (1988) 487 U.S. 42, 48; *Lugar v. Edmondson Oil Co.* (1982) 457 U.S. 922, 939; *Kirtley v. R*ainey, (9th Cir. 2003) 236 F. 3d 1099, 1092.) As discussed above, since CalCERTS is not a state actor, the constitutional protections associated with state action do not apply to the decertifications of Mr. Hoover and Mr. Davis. However, CalCERTS responds to the Commission's request for additional briefing.

1. Petitioners Rights Are Defined By Contract

CalCERTS is a private corporation with a contractual relationship with Petitioners. This contractual relationship is *undisputed*. (Transcript at pp. 53 –56; 57–59; 59–62; 64–66.) Petitioners admitted there was a valid contract with a decertification provision. (*Id*.) The terms of the agreements required Mr. Hoover and Mr. Davis to enter true and correct rating data. (Transcript at pp. 53–56; 57–59; 59–62; 64–66.) Evidence in the record shows that Mr. Hoover and Mr. Davis breached these agreements by submission of false and inaccurate data. (*See* Exhs. 206, 209, 210, 212, 213, 215, 216, 218, 219, 231–240.) CalCERTS' ability to review in detail each improper rating was constrained by the Hearing Officer. (Pre-hearing Conference Transcript, May 8, 2012, for Dkt. No.12-CAI-01 at pp. 7–12; *see also* Transcript at pp. 73-76.) However, CalCERTS was permitted to discuss a few examples, and the record is replete with supporting evidence regarding all of the failures which CalCERTS respectfully requests the

Commission review in detail. (Transcript at pp. 128–137; Exhs. 206, 209, 210, 212, 213, 215, 216, 218, 219, 231–240.)[5]

There is absolutely no evidence, either documentary or testimonial, offered by Petitioners to suggest that the submission of false rating data was an "innocent mistake." (*See e.g.* Transcript at p. 73 starting at ln. 6 "Q: And you were unable to explain why you placed the Valley Duct Testing …temperature measurement access hole stickers, where there were no holes, correct? A: Correct."; *see also* p. 146 ln.3–5.) The one document, written by Petitioners' employer, which purported to explain their mistakes was never offered into evidence. (Transcript at p.183 ln. 9–11.)[6] What is most significant about Petitioners' errors, is that neither Mr. Hoover nor Mr. Davis have an explanation for why their failures at the Vintage Plaza subdivision are startlingly similar, indicating a pattern or practice of defrauding *all* of the low income residents of this newly built community.[7] (Transcript at pp. 77–78; 128–137, 146 ln. 3–13; 283 ln. 12–25; *see also* Exh. 232, 233, 238, 241, 242, and 243.) These errors have harmed families having the greatest need of the Energy Efficiency Standards set forth in Title 24 and clearly warrant decertification. (Transcript at pp. 210–211; 219 ln. 7–14; 220 ln. 2–10.)

2. <u>There is No Fundamental Right To Work As CalCERTS Certified HERS Raters.</u>

Petitioners will likely argue that despite the clear terms of their agreements, they maintain some type of "fundamental right" to continue working as CalCERTS certified HERS Raters. Petitioners will likely compare CalCERTS' certification to a professional license in order to cite authority regarding professional licensure that is ultimately inapposite. (*See e.g. Interstate Brands v. Unemployment Ins. Appeals Bd*., (1980) 26 Cal. 3d 770, 779.)

A CalCERTS' certification is not a professional license. (*See* CalCERTS' Answer at §§III(E), III(F)(3).) A CalCERTS certification is a warranty that a HERS Rater has completed

[5] CalCERTS implores this Commission to examine this evidence.

[6] Despite Petitioners reluctance to discuss the behavior that got them decertified, if Petitioners prevail in the argument that they have a vested right to work as a CalCERTS' certified HERS Raters, Petitioners must still explain the fraudulent behavior that provides the basis of their decertifications before being reinstated as raters. (*See Flanzer v Board of Dental Examiners*, (4th Dist., 1990) 220 Cal. App. 3d 1392, see also *Housman v. Board of Med. Examiners* (1st Dist., 1948) 84 Cal. App. 2d 308, 315 (in proceeding for restoration of revoked license, burden rests on petitioner "to prove that he has rehabilitated himself and is entitled to have his license restored").)

[7] CalCERTS filed its Complaint and Request for Investigation of Valley Duct Testing, *see* Exhibit 244, with the hope that the Commission will be able to address problems with ratings conducted by Valley Duct Testing's raters and provide some type of recourse for consumers such as the residents of Vintage Plaza.

training, passed testing, and is in compliance with the terms of the CalCERTS Certified Rater Agreement. (Transcript at pp. 117 ln. 2–5; 118 ln. 11–17.) Revocation of the certification is relative only to CalCERTS and does not preclude Petitioners from working as HERS Raters. (Transcript at pp. 43 ln. 7–9; 87–88;153 ln. 13–21.) Revocation of the type of certification offered by CalCERTS has not been recognized by the California courts as holding such significance as to implicate a fundamental right.

Moreover, any argument by Petitioners that CalCERTS' certification can be transformed into a fundamental right confuses several issues. First, as discussed above, whether a right is fundamental or not does not transform a private corporation's actions into state action subject to the due process protection. Second, even if Petitioners had a vested right to continue to work as CalCERTS certified HERS Raters, their fraudulent conduct negates any claim to this right. (*Jaramillo v. State Bd. of Geologists & Geophysicists* (2006) 136 Cal. 4th 880, 891 (no fundamental vested right to continue profession when operating illegally).) And third, whether Petitioners have a fundamental right to work as CalCERTS certified HERS Raters is *separate* from having a right to access and utilize CalCERTS' property, the CalCERTS registry.[8]

C. Petitioners Had Ample Opportunity to Explain Their Ratings But Did Not

Petitioners have never utilized any of the opportunities provided to them to explain their conduct. As explained more thoroughly in CalCERTS' Answer, due process was offered to Petitioners, they simply chose not to participate. (*Ford Dealers Assn. v. Department of Motor Vehicles*, (1982) 32 Cal. 3d 347, 367 (due process is met, as long as there is "reasonable notice" and a "reasonable opportunity to be heard."); *See also* CalCERTS' Answer at § III (E).)

Proper notice is determined under the circumstances and essentially requires notice of the pendency of an action. (*Conservatorship of Moore*, (4th Dist. 1986) 185 Cal. App. 3d 718, 725 (notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") quoting *Mullane v. Central Hanover Bank Tr. Co*. (1950) 339 U.S. 306.) Here, Petitioners were notified by email that they had failed quality assurance reviews at specific residences. (Transcript at pp. 26–27; 30–31; 67, 69 ln. 22–24; 80; 92 ln. 17–23; 94–95; *see also* Exhs. 207, 214.) The Petitioners stated that they understood the notice letters and the possibility of

[8] The terms by which Petitioners may have access to the CalCERTS Registry are outlined in the CalCERTS Subscription Agreement.

decertification. (*Id*.) And, the Petitioners stated that they knew the measures conducted at the residents listed within the letters. (*Id*.) There is no legitimate dispute that the emails sent on December 16, 2011, gave Petitioners notice of their quality assurance failures and of the opportunity to discuss those failures with CalCERTS.

Petitioners have challenged the immediate suspension that accompanied the notice letters. Yet, the record supports the arguments made in CalCERTS' Answer that the temporary suspensions were used in order to protect the public. (*See* CalCERTS' Answer at §III(E)(1).) CalCERTS issued temporary suspensions to Mr. Hoover and Mr. Davis due to the egregious nature of their quality assurance failures and the harm that resulted from those failures. (Transcript at pp.162–163; 200–201; 273 ln. 2–19.) Mr. Hoover and Mr. Davis are prolific raters and their quality assurance reviews showed obvious misrepresentation in their rating data that harmed homeowners. (*Id*.) The temporary suspensions were levied to protect homeowners up and until a time CalCERTS could investigate why there were errors. (*Id*.) This type of post-depravation hearing is permissible and prudent given these conditions. (Transcript at p. 201 ln. 11–14; *see also* Answer at §III(E)(1).)

The record also shows that CalCERTS does not commonly issue suspensions with the notice letters indicating quality assurance failures. (Transcript at pp. 162–163; 200–201.) The failures in this instance warranted a level of protection for the public. (*Id.*) Mr. Davis and Mr. Hoover were not prevented from immediately contacting CalCERTS to address the matter, potentially entitling them to immediate reinstatement as CalCERTS certified HERS Raters. (*Id*.)

Petitioners also received a proper opportunity to be heard. (*See Humphreys v. City and County of San Francisco* (1st Dist. 1928) 92 Cal. App. 69; *Golden Day Schools, Inc. v. State Dept. of Educ.* (2nd Dist. 2000) 83 Cal. App. 4th 695 (due process requirements for a hearing require that persons be afforded an opportunity to be heard and to defend themselves.)) Both Petitioners stated that they brought materials to the meetings and participated in the meetings with CalCERTS. (Transcript at pp. 36 ln. 1–6; 67; 80 ln. 3–19.) Petitioners were shown photos of their quality assurance failures, received documents, and discussed the scale and magnitude of their errors. (Transcript at pp. 70–72; 81 ln. 2–18.) Petitioners stated that they were given the opportunity to address the basis of their decertifications. (Transcript at p. 106 ln. 1–14; *see also* Exhs. 206, 210, 216.) CalCERTS confirmed that Petitioners participated in these meetings and that specific failures were discussed. (Transcript at pp. 143-146; *see also* Exhs. 206, 210, 216.)

This is precisely what is required by due process, the Petitioners were given the chance to explain. (Transcript pp. 159–160.)

Further, Petitioners were given additional opportunities after their meetings with CalCERTS to explain their quality assurance failures. (Transcript at pp. 148–149; 151 ln. 1–22; see also Exhs. 211, 217, 223.) Importantly, any perceived defects in notice were cured by offering additional opportunities to respond since Mr. Hoover and Mr. Davis were fully aware of the details of the quality assurance failures after their meetings with CalCERTS. At no time have Petitioners ever produced any evidence to suggest that their failures were not intentional misrepresentations of rating data. Interestingly, this includes the May 11, 2012 hearing before this Committee. Petitioners' Complaint has been centered around due process, but no amount of process can provide Petitioners with a reasonable explanation for their false ratings if an explanation simply does not exist. (Transcript at pp. 174–176.)

D. Common Law of Fair Procedure Does Not Apply

The common law right of "fair procedure" does not apply under these circumstances. CalCERTS is a private corporation and does not function in a manner than has been recognized by the California courts as requiring fair procedure. Yet, even without this obligation, CalCERTS afforded Mr. Hoover and Mr. Davis a process that far exceeds the common law requirements of fair procedure. And, again, it was Petitioners who chose not to participate in this process. (*See* Exhs. 207, 214.)

Decertification by CalCERTS does not rise to the level of exclusion from a profession that warrants the doctrine of fair procedure. (*Pinsker v. Pacific Coast Society of Orthodontists,* (1974) 12 Cal.3d 541, 551 (Doctrine of fair procedure applies to "limited category of private associations such as labor unions or professional and trade associations." The doctrine applies "[b]ecause of their monopolistic position in a given field of employment."); *See also Dougherty v. Haag,* (4th Dist, 2008) 165 Cal. App. 4th 315, 317 ("'gatekeeper' organizations are labor unions").)

CalCERTS is neither a monopoly nor a gatekeeper to the HERS industry. Up until recently, CHEERS was an active Provider, competing with CalCERTS by offering rater training and certification for field verification and diagnostic testing of new construction. Presently, CBPCA competes with CalCERTS as a Provider offering training and certification for field verification and diagnostic testing of alternations. Petitioners continue to work for the entity that

employed them prior to decertification. (Transcript at pp. 87–88.) Neither Mr. Hoover nor Mr. Davis have sought certification from CBPCA.[9] (*Id*.) These facts are dispositive. The doctrine only applies when an entity possesses "power so substantial" that it significantly impairs an "important, substantial economic interest." *(See Potvin v. Metropolitan Life Ins. Co.*, (2002) 22 Cal. 4th 1060, 1071.) Since CalCERTS as no authority to bar Petitioners from seeking certification elsewhere, application of the doctrine of fair procedure to the facts of this case would be not be justified.

CalCERTS raised the issue of fair procedure in its Answer solely to provide context for the process offered to Petitioner. (*See* CalCERTS' Answer at §III(G).) Even though the doctrine does not apply, CalCERTS offered a process far exceeding the fair procedure standard. Under the doctrine, fair procedure must be "substantively rational and procedurally fair." (*Wilson v. San Luis Obispo County Democratic Cent. Committee* (2009) 175 Cal. App. 4th 489, 502.) The procedure is neither fixed nor judicially prescribed; but should allow for "notice of the charges" and "a reasonable opportunity to respond." (*Id*. at 501 citing to *Rosenblit v. Superior Court* (1991) 231 Cal. App. 3d 1434, 1445.)

It is uncontested that CalCERTS notified Petitioners of their quality assurance failures and that Petitioners met with CalCERTS. Petitioners were given numerous opportunities to explain themselves. (Transcript at pp. 148-149; 151 ln. 1–22; *see also* Exhs. 206, 207, 214, 211, 217, 223 .) CalCERTS was open and receptive to explanations offered by Petitioners. (Transcript at pp. 159–160; 161–163; 190 ln. 15–19; 272-273; 274 ln. 7–25; 82 ln.9–24.)[10] The fact that Petitioners have no explanation in response to the charges against them, does not render CalCERTS' process unfair.

The record clearly indicates that CalCERTS offered Mr. Hoover and Mr. Davis a process that was substantively rational and procedurally fair. This process far exceeds what is required of a private corporation exercising its rights established by contract.

[9] Mr. Hoover was certified by another Provider prior to being certified by CalCERTS. (Transcript at p. 24 ln. 21.)

[10] CalCERTS discussed issues with Petitioners that did not form the basis of their decertifications. For example, Mr. Hoover was asked about his energy efficiency ratio (EER) failures. Based on Mr. Hoover's answers, EER was not used to support decertification. (*See* Record at p. 82 ln. 9–24, Exh. 218.)

III. THE COMMISSION SHOULD AFFIRM THE DECERTIFICATIONS

California Public Resources Code section 25942 empowered the Commission to establish criteria for adopting a statewide home energy rating program for residential dwellings. Those criteria were specifically to include "training and certification procedures for home raters and quality assurance procedures to *promote accurate ratings and protect consumers*." (Pub. Resources Code § 25942(a)(3) (emphasis added).) Without the threat of decertification, the goal of accurate ratings protective of the consumer cannot be met.

HERS Raters are in a competitive business. Petitioners acknowledge that contractors put pressure on HERS Raters to quickly pass homes as Title 24 compliant. (Transcript at p. 96 ln. 6–12.) Petitioners also state that contractors request specific raters. (Transcript at pp. 96 ln. 6–9.) Raters cannot be asked to stand-up to pressures in the field without support from all industry stakeholders. (Transcript at pp. 159 ln. 9–20; 220 ln. 14-19.) Raters must be able to assert the real consequence of decertification when faced with pressure from demanding clientele. The Raters' role of field verification and diagnostic testing can only be conducted in a purposeful manner if the mandate for truthful and accurate ratings is enforced.

As a Provider, CalCERTS has complied with its requirements under the HERS Regulations to ensure truthful and accurate ratings. (20 Cal. Code Regs. §§1672(m), 1673(b); *see also* Exhs. 200, 201, 202, 203.) CalCERTS has also complied with its requirements to respond to and resolve complaints. (20 Cal. Code Regs. §1673(i)(5); *see also* Exh. 206, 244, 245.) CalCERTS has spent hundreds of hours investigating the Complaint against Valley Duct Testing's raters, and has spent even more defending its decision to decertify Mr. Hoover and Mr. Davis. (Transcript at p.160 ln. 7–11; see also Exh. 244 Complaint and Request for Investigation of Valley Duct Testing, Dk. No. 12-CAI-02.) CalCERTS cannot absorb the costs associated with the type of hearing performed before the Committee on May 11, 2012, every time a rater is disciplined. (Transcript at p. 160 ln. 12–17.) In light of the record, CalCERTS should be commended for the thoughtful and deliberative process offered to Mr. Hoover and Mr. Davis,

rather than subjected to further scrutiny. As described more fully in CalCERTS' Answer at §III(H), the Commission must support CalCERTS' decision to decertify Petitioners in order to protect the HERS Program, Providers, Raters, and the public.

Respectfully submitted,

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

Docket No. 12-CAI-01
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DECLARATION OF SERVICE

I, Lois Navarrot, declare that on June 5, 2012, I served and filed copies of the **CalCert Inc.'s Post Evidentiary Hearing Brief**, dated June 5, 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:

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

_X_ 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."

AND

For filing with the Docket Unit at the Energy Commission:

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

___ by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

CALIFORNIA ENERGY COMMISSION – DOCKET UNIT
Attn: Docket No. 12-CAI-01
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.ca.gov

OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

___ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

California Energy Commission
Michael J. Levy, Chief Counsel
1516 Ninth Street MS-14
Sacramento, CA 95814
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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.

Original Signed

Lois Navarrot